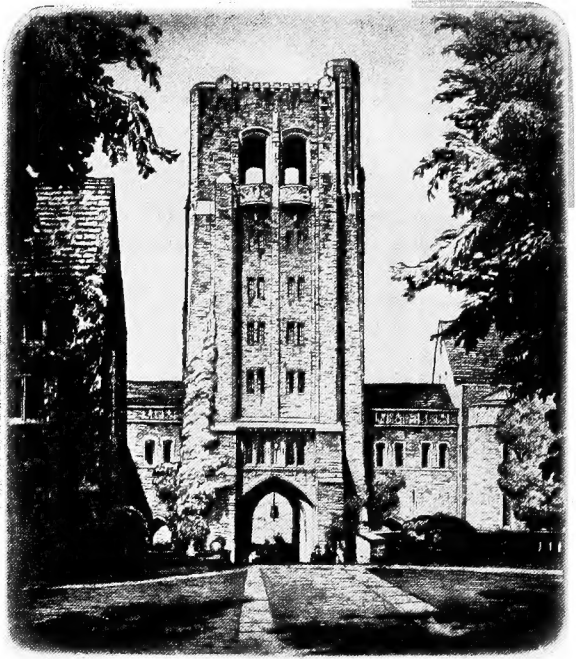


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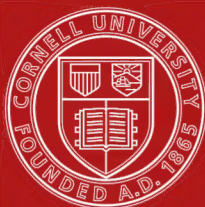
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THE
PRINCIPLES AND FORMS
OF PRACTICE

IN
CIVIL ACTIONS IN COURTS OF RECORD

UNDER
THE CODES OF PROCEDURE.

ADAPTED ALSO
TO COMMON LAW AND EQUITY PRACTICE.

BY AUSTIN ABBOTT,
OF THE NEW YORK BAR.

To observe the forms now used by the most skilled practitioners, the reasons and authorities for each and their relative effect, is to know how to vary them, with advantage and safety in any special case in hand.

VOL. II.

NEW YORK:
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1888.

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AUSTIN ABBOTT,

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PREFACE TO THE SECOND VOLUME.

The reader who notices the bulk of this volume and the unprecedented number of Forms it contains, will understand, I trust, the reason for the delay in its appearance. And if he turns over these pages to notice in some detail the complexity and variety of the remedies now available under the New Procedure, as it has been developed during the quarter of a century that has elapsed since the publication of the original work, he will perhaps share the interest which I have felt as I have surveyed these remedies in their connection and analyzed them to select and arrange the most useful and the best supported, for present use in practice.

The New Procedure, which has introduced immense improvements in simplicity and directness, has successfully adapted all the old remedies to modern requirements, and greatly increased the safeguards of civil justice. It has been my object here to present the resulting practice with sufficient completeness to serve the general practitioner, in all the various proceedings available in Civil actions, and with sufficient fullness to indicate the incidental advantages which may be secured in the settlement of orders and judgments.

The intensity of contest in litigation in the New York courts, where the Code of Procedure was first introduced, and the immense mass of business which continually presses upon those courts, especially in the city of New York, have led to the adoption of somewhat stricter requirements in the recent amendments of the Code of New York than those

existing in many of the States, especially with respect to the essentials of motion papers, and the safeguards required for the protection of the rights of absentees. Hence, forms that are sufficient for New York are also generally quite sufficient for other Code States; and when, as in some cases, they contain matter which is not essential in such other States, they may nevertheless be none the less useful in suggesting to the practitioner the advantage of securing expressly what is often more loosely left to implication. The number of authorities from other States and from the Federal courts, which I have cited, particularly in regard to Provisional Remedies, the Means of Evidence, the Manner of Trial and the Form of Judgment, will indicate the adaptation of the work to assist Practice in all the courts of the country.

It will be seen that I have given special attention to elucidating what is still called Equity Practice. The Codes, while pruning away the redundancies and verbiage of the old chancery forms, have sanctioned them, in substance, to a far greater extent than many young practitioners suppose; and these forms now constitute remedies of singular value and efficiency; although the proper adaptation of them to the modern methods is not easily learned.

The practitioner will find the usefulness of these volumes enhanced if he will notice at the outset the light thrown by systematic analysis and practical arrangement on some proceedings which, as presented in the statutes and in text books, are apt to be perplexing. For instance, the apparent confusion of authorities on proceedings to punish for contempt, nearly disappears when we trace separately the four distinct remedies—by summary commitment, by motion in the cause, by attachment to bring in, or by order to act or show cause, etc. (see p. 583), distinctions which practi-

tioners can appreciate better perhaps than commentators. So the practice as to Abatement and Revival of Actions, and as to Changes of Parties, is hardly to be understood unless we bear in mind the distinctions exhibited in Chapter XI, between the case of a party whose adversary has died or assigned, etc., and who desires to bring the representatives in, and a case where the attorney whose client dies or assigns, etc., desires to know how to bring in his client's representatives; or, again, the case of a party who desires to get out of the cause, or that of a stranger who desires to get into it. So the methods of Discovery of Evidence, and the methods of Taking Evidence, are similarly elucidated by analyses such as are given on pp. 658 and 680. More important still is the light thrown on the various modes of trial and of getting a new trial, when we consider Trial by Jury, with the resulting verdict and judgment, and the means of getting a new trial after verdict, as one connected course of proceeding traced by itself irrespective of the other modes of trial; and when, in a similar way, we consider Trial and Judgment by the Court alone, and the review thereof; Trial and Judgment by the Court with the Aid of a Jury on Special Issues, etc.; Trial by the Court with the aid of a Referee on Special Issues or Questions, etc.; and lastly, Trial by Referee.

It is only when we observe and apply these distinctions that we can intelligently distinguish the various paths, sometimes parallel and sometimes divergent, from which we may in practice choose the course for our client. These paths I have endeavored here to map out, as it were, in a way to suggest and contrast their various advantages and disadvantages. Familiar as we may have been with such distinctions, in practice, the effect of marshalling them in a consistent and harmonious whole seems like a distinct addi-

tion to one's knowledge, and to suggest the paradox that a knowledge of the whole is greater than a knowledge of all its parts.

A collection of reliable forms has an undeniable value for the practitioner even if each is regarded merely as a distinct precedent for an isolated instrument. The practitioner who intends to use these precedents will, I trust, find an added value in observing also that each is a link in a chain of proceedings which is here exhibited in its contrasts with other proceedings, in a manner to aid him to make a judicious choice wherever the law allows a choice between them, and to avoid mistaking his remedy where the law does not allow a choice.

I have in an advanced state of preparation an equally practical treatment of Pleadings, and of Special Proceedings of every kind, which I hope before long to complete.

AUSTIN ABBOTT.

NEW YORK, September, 1888.

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NEW PRACTICE
AND
FORMS.



ABBOTT'S NEW PRACTICE.

COMMON FORMS.

[To save space for a greater variety of forms throughout the volume, I give here the formal parts of orders, and the affidavits, &c., appended to undertakings, both of which are familiar to every practitioner, so that they can hereafter be simply referred to. A more full treatment of these formal parts is to be found in Volume I.]

Form No. 488.

Notice of motion.—¹General form.¹

[*Title of court and cause.*]

Please take notice, that upon [two] affidavits, copies of which are herewith served upon you [*and if the pleadings or other proceedings filed or served are relied on, mention them*], the undersigned will move* this court, at a special term thereof, to be held [at chambers] at the County Court House [or, City Hall], in the of , on the day of , 18 , at the opening of the court [or, at o'clock in the noon], or as soon thereafter as counsel can be heard † [*or if the motion is out of court, will move* § before Hon. J. K., a justice—or, judge—of the court, at in on the day of , 18 , at o'clock in the noon] for an order ‡ [*here state the relief sought, indicating ground therefor, unless other papers or the relief sufficiently disclose it; if irregularity is relied on, specify it*], ¶ or for such other or further relief as may be just [with costs of this motion].

[*Date.*]

[*Signature and office address of*]

Attorney for [*moving party*].

To [*address*],

Attorney for [*adverse party*].

¹ See notes in Volume I, pp. 197- 198, as to general requisites of a notice of motion.

Form No. 489.

Affidavit to obtain an order to show cause as short notice of motion.

[*Title of court and cause.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That [*here insert allegations as to deponent's relation to the cause*].

II. [*State, unless shown by other papers, facts in support of the application, &c.*]*

III. [*State condition of cause, for instance, thus:*¹] That the summons and complaint were served on the defendant Y. Z. on the day of , 18 , and the answer of said defendant was duly served on the day of , 18 , and the cause has not yet been put on the calendar, and the next circuit is appointed for , 18 .

IV. [*State reason for asking an order to show cause, for instance, thus:*²] That an order to show cause is asked for because there is not sufficient time to give the usual notice of motion before the reference [*or other proceeding*] [now moved to be set aside, *or other relief*] is appointed to be held on the day of , 18 .

V. That no previous application has been made for an order to show cause herein for this purpose [*see next Form*].

[*Jurat.*]

[*Signature.*]

Form No. 490.

Affidavit for an ex parte application.

[*Title of cause.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That [*here insert allegations as to deponent's relation to the cause*].

II. [*State, unless shown by other papers, facts in support of the application, &c.*]

III. That no previous application has been made for such an

¹ Required by *N. Y. Gen. Rules*, No. 37, of 1884, second clause, unless the order to show cause is allowed by statute.

² For other examples, see *Volume I*, pp. 201, 202.

order as is now sought [*or name the particular relief sought, and if a prior application has been made, state to what court or judge, and what order or decision was made, and what new facts, if any, are now shown, for instance, thus:*¹] A previous application for an order to show cause herein for the same relief, was made to, and granted by, Hon. _____, a justice of this court, on the _____ day of _____, 18____, but upon the return thereof before the Special Term of this court, on the _____ day of _____, 18____, the relief sought was denied by the court upon the technical and sole ground that the said order to show cause did not specify the irregularity moved against [but such denial was without costs and with leave to renew]. The application is now made for an order to show cause which specifically sets forth the irregularity complained of.

[*Jurat.*]

[*Signature.*]

Form No. 491.

Order to show cause.²—General form.

[*Caption as in Form No. 492 or 493 (below).*]

On reading the affidavit of _____, verified the _____ day of _____, 18____ [*and specifying other papers, if any, relied on; and, if the motion is made by one not a party, add, and on motion of Q. R., attorney for M. N.*]: *

ORDERED, that the _____ herein show cause† at a [special] term of this court, to be held [at chambers] at the _____, in the _____ of _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard [*or, show cause § before me, at _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon*], why an order should not be made‡ [*here state relief sought, and grounds thereof, specifying irregularity, if any*], ¶ and why the _____ should not have such other or further relief as may be just [with costs of this motion].

Service of a copy of this order, and of the papers on which it is granted, made [by mail] on the [attorney for the] _____, on or before the _____ day of _____, 18____, shall be sufficient.

[*If a judge's order, date and signature of judge, with initials of official title.*]

[*Or if a court order, substitute Enter, with signature of judge or presiding justice by initials of name and title.*]

¹ See Volume I, p. 148, paragraph 84. ² See Volume I, pp. 159-163, as to general requisites of an order to show cause.

Form No. 492.

Judge's order.¹—General form.

[Name of court, including, if supreme court, name of county.]

[Names of the plaintiffs]

against

[Names of the defendants].

Upon the annexed [here enumerate all the motion papers, and insert any necessary recitals; see Vol. I, pp. 285-287, for examples] [and, in a case where security is required, may add, and the having given security required in the sum of dollars], and upon motion of A. T., Esq., attorney for the [or, in case of a contested motion, after hearing A. T., Esq., of counsel for the in support of the motion, and Z. T., Esq., of counsel—] or, and on reading and filing proof of due notice of this motion, and no one appearing—for the in opposition; and, after due deliberation: Now, upon motion of A. T., Esq., attorney for the]:

ORDERED [here insert provisions of the order].

[Date.] [Signature of judge and initials of official title.]

Form No. 493.

Court order.—General form.²

At a special term * of the Supreme Court, held in and for the county of , at the County Court House in , in said county, on the day of , 18 .

[Or, in the first district] At a special term * of the Supreme Court, held in and for the city and county of New York [if a chambers order insert here, at chambers], at the County Court House in said city, on the day of , 18 .

¹ See Volume I, pp. 234-330, for requisites and forms of orders in general. See also notes 1 and 2, p. 284, Volume I.

² See Volume I, pp. 234-330, for requisites and forms of orders in general.

[*Or, in a superior city court*] At a special [*or, trial*] term * of the [superior] court [of the city of New York], held at the County Court House in said city on the day of , 18 .
 [*Or, At a general term, &c., as in either paragraph above, from the * but in the Supreme Court, substituting the proper department for the name of the county.*]
 [*Or, At a circuit court, &c.*]
 [*Or, At a stated term, &c.—or, adjourned term of the Circuit Court of the United States for, &c.*]

Present, Hon. [John Duer], *Justice.*

[<i>Names of plaintiffs</i>] against [<i>Names of defendants</i>].

On reading and filing [*here enumerate all the motion papers, and insert any necessary recitals; see Vol. I, pp. 285-287, for examples; if security is required, may add,* and the having given security required in the sum of dollars], and after hearing A. T., Esq., of counsel for the [plaintiff], in support of the motion, and Z. T., Esq., of counsel [*or, and on reading and filing proof of due notice of this motion, and no one appearing*] for [defendant], in opposition; and after due deliberation being had thereon: Now, on motion of A. T., attorney for the [plaintiff]:

ORDERED [*here insert the provisions of the order*].

Enter: [*signature of judge or presiding justice by initials of name and title.*]

Form No. 494.

Verification¹ of a petition.

[*Venue.*]

Y. Z., of , being duly sworn, says that he has read [*or, heard read*] the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein [stated to be²]

¹ See Volume I, pp. 500-512, for the object and requisites of a verification in general.

² The omission of these words deprives the petition of value as proof, though it leaves it sufficient as a petition for most purposes.

alleged on information and belief, and as to those matters he believes it to be true.

[*Jurat.*]

[*Signature.*]

Form No. 495.

Certificate of acknowledgment¹ within the State, by signer known to the officer. (Under N. Y. Statutes.)

STATE OF _____, }
County of _____, } ss.:

On this _____ day of _____, in the year 18____, before me personally came A. B. [C. D. and E. F.], [to me known and] known to me to be the person [or, persons—*or*, one of the persons] described in and who executed the within [or, above—*or*, annexed] instrument, and acknowledged that he [or *if more than one acknowledge*, severally acknowledged that they] executed the same.

[*Signature and official title.*]

Form No. 496.

Affidavit of sufficiency of undertaking; where all are freeholders or all are householders.²

[*Venue.*]

C. D. [and E. F.] above-named, named in and who executed the within [or, foregoing] undertaking [or, bond], being duly [and severally] sworn, says [each for himself], that he is a resident of said State of New York,* and a householder³ [or, freeholder] in said State, and is worth † the sum of [*here insert penalty of bond, or, if it be an undertaking, double the sum specified as the limit of liability*], over and above all the debts and liabilities he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

[*Jurat.*]

[*Signatures.*]

[*Under N. Y. Code Civ. Pro., § 812, this must be subjoined to the bond or undertaking, and thus separate title is unnecessary.*]

¹ See Volume I, pp. 2-13, for requisites of acknowledgments in general. See also *id.*, pp. 14-17, for special forms of acknowledgments.

² See Volume I, pp. 474, 475.

³ See *id.*, p. 467, as to qualifications.

Form No. 497.

Another Form, where one is freeholder and one householder.

[*As in last Form to the *, continuing*] and said C. D. says that he is a householder in said State, and said E. F. says that he is a freeholder in said State; and further each says, for himself, that he is worth [*continue as in last Form, from the †*].

Form No. 498.

Another Form, justifying in different amounts.¹

[*As in Form No. 496 to the *, continuing*] and said C. D. says that he is a householder [*or, freeholder*] in said State, and is worth the sum of dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution; and said E. F. says that he is a householder [*or, freeholder*] in said State, and is worth the sum of dollars, over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

[*Jurat.*]

[*Signatures.*]

[*Under N. Y. Code Civ. Pro., § 813, allowed where penalty is \$5,000 or more, provided each surety justifies in at least \$5,000, and the same person is not counted as making up the sum for more than one of them.*]

Form No. 499.

Approval of bond or undertaking.²

[*If the judge is to fix the sum, and it has not been done by order, begin,* I hereby fix the amount of the within bond or undertaking at the sum of dollars, and] The within bond [*or, undertaking*] * is hereby approved [as to the form and manner of execution and] as to the sufficiency of the sureties [*if fractional justification is allowed, add, and*

¹ See Volume I, p. 475, paragraph 27, as to combining sureties in lesser sums. ² To be indorsed. *N. Y. Code Civ. Pro.*, § 812. See also Volume I, pp. 476-478.

the sum in which they are required to justify is hereby allowed to be made up as in the within justification set forth].

[Date.]

[Signature of judge and initials of title.]

[If by court, prefix to signature the words,
By the court.]

[File undertaking, acknowledged, with affidavit and approval, with clerk of court.]

Form No. 500.

Notice of filing of bond or undertaking.¹

[Title of court and cause, unless indorsed.]

Please take notice, that a bond [or, undertaking] [and order fixing the amount thereof], of which the foregoing [or, within] is a copy, has been duly executed and filed herein, with the clerk of this court.

[Date.]

[Signature and address of],

[Address] To

Attorney for

Attorney for

[Serve a copy of the security, acknowledgment, affidavit, and approval; and this notice therewith, or indorsed thereon.]

Form No. 500a.

Order plaintiff elect between arrest and attachment.

[Caption and recitals, see Form No. 492 or 493, p. 4 of this Vol.]

ORDERED, that the plaintiff elect, within days as to whether he shall hold the attachment or order of arrest herein against defendant, and in default of such election, then that both of said provisional remedies be vacated.

[Authentication, see Form 491, p. 3.]

Form No. 500b.

Notice of election between arrest and attachment.

[Title of court and action.]

Please take notice, that pursuant to an order of this court, entered herein on the day of , 18 , requiring plaintiff to elect within days between the attachment or order of arrest issued herein, the plaintiff herein hereby elects to hold the [attachment] issued herein.

[Date, signature and addresses, as in Form 488, p. 1.]

¹ See Volume I, pp. 479-481.

CHAPTER VIII.

SPECIFIC LIEN AND PROVISIONAL REMEDIES, INCLUDING THE VARIOUS METHODS BY WHICH POSSESSION OR SECURITY MAY BE HAD IN ANTICIPATION OF JUDGMENT.

ART. I.—WHAT ACTIONS ALLOW OF THESE REMEDIES.

II.—*LIS PENDENS*.

III.—INJUNCTION (INCLUDING ORDER TO STAY WASTE, &C.).

IV.—RECEIVER (INCLUDING MANAGER CONTINUING BUSINESS).

V.—DEPOSIT OR DELIVERY OF PERSONAL PROPERTY.

VI.—REPLEVIN (CLAIM AND DELIVERY).

VII.—SEIZURE OF CHATTEL UNDER FORECLOSURE.

VIII.—ATTACHMENT.

IX.—ARREST.

ARTICLE I.

WHAT ACTIONS ALLOW OF THESE REMEDIES.

1. Two classes of cases.
2. Neither remedy necessarily exclusive.

1. *Two classes of cases.*]—If the object of the action is to reach specific property, the principal modes of laying hold of it before judgment are : (1) Filing a *lis pendens*, which fixes a specific lien upon real property ; (2) Proceedings to replevy, which obtain possession of personalty, or security for its forthcoming ; (3) An order for delivery, or deposit in court, of personalty, or for seizure under a lien ; (4) A receivership, which fixes a lien on property of either class, and may secure its possession ; (5) An injunction, which may prevent a change of title or possession of property of either class, whether within or without the jurisdiction.

Beside these aids to actions for specific relief, the remedies available in other actions also, for the purpose merely of holding the property or person of the adversary, to await the issue of a money execution, are : (6) Attachment, which in

certain classes of cases may bind all or any of his property not exempt, unless he will give security for payment of an anticipated judgment; and (7) Arrest, which may hold his person, unless he will give the like security.¹

It will be observed that the first group of these remedies assume the plaintiff's right in the specific thing claimed, while attachment concedes defendant's right, and asks to anticipate execution.

A defendant who makes a case for affirmative relief is entitled to the same remedies in all these respects as if he were proceeding as a plaintiff by a cross action, instead of prosecuting a counterclaim in an action originally brought against him.² All that is here said, therefore, of the remedy of a plaintiff is equally applicable to such a defendant.

2. *Neither remedy necessarily exclusive.*—Neither of these remedies are necessarily exclusive of any others in the same case. The court have power, if a sufficiently clear case is made out, to allow any of these remedies which may be reasonably necessary to secure the plaintiff's right³ (if the nature of the

¹ The New York Code of Civil Procedure (c. vii) classes only Arrest, Attachment, Injunction, Receivership, and Delivery or deposit ordered upon an admission, as Provisional remedies. Proceedings to replevy a chattel, which in the original Code were well classed with these, under the name of claim and delivery, have been in the recent revision unwisely treated separately under the old name of "replevin," in a way to sanction the revival of the tradition that such proceedings can only be taken in an action of a common law nature (*id.*, c. 14, t. 2). Those proceedings are however expressly declared to be within the rule that from the time of granting a provisional remedy the court is deemed to have jurisdiction (*id.*, § 1693).

² See *N. Y. Code Civ. Pro.*, § 720.

³ Arrest and attachment may both be allowed in the discretion of the court as concurrent remedies. *Rockford, &c., R. R. Co. v. Boody*, 56 *N. Y.*, 456. So also of injunction with them or either of them. See *N. Y. Code Civ. Pro.*, § 719.

Injunction and attachment may be allowed in the same action. *Mitchell v. Bettman*, 25 *Barb.*, 408, 413.

Notice of *lis pendens* filed, if not clearly sufficient protection, is no objection to granting an injunction. *Cornell v. King*, 13 *Weekly Dig.*, 327.

So proceedings of claim and delivery (replevin) do not necessarily preclude injunction. *Hunt v. Mootry*, 10 *How. Pr.*, 478, where the opinion is well expressed that equitable relief may be had in replevin, by injunction, if not inconsistent with the statutory proceedings. *s. p.*, *Furniss v. Brown*, 8 *How. Pr.*, 59.

But claim and delivery may preclude actual arrest, and *vice versa*. *N. Y. Code Civ. Pro.*, § 1714.

Injunction, and order to stay waste or damage to real property, are not inconsistent. See *N. Y. Code Civ. Pro.*, § 1681.

case be within the statute as to each), so far as it can be done without oppression to the defendant.¹

And where the violation of a right admits of a civil and also a criminal prosecution, one is not merged in the other.²

So an offer of judgment and its acceptance does not extinguish a right to arrest upon the cause of action.³

So power to grant an injunction often involves or implies the power to appoint a receiver, otherwise the plaintiff might be left with no remedy but to try to punish for contempt.

¹ *It seems* that both an order of arrest and an attachment may be simultaneously pursued so far as to secure a probable satisfaction of the plaintiff's demands, but that the arrest of defendant, and seizure of his property to the full amount of the claim, will not both be allowed. *People v. Tweed*, 5 *Hun*, 382.

A party asking arrest, injunction and attachment, or any two of them, may, unless they are necessary for his security, be required to elect between them. *N. Y. Code Civ. Pro.*, § 719.

² *N. Y. Code Civ. Pro.*, § 1899. re-enacting *Code Pro.*, § 7.

³ *Collins v. Harris* (Sept., 1886), 5 *N. Y. State Rep.*, 162

ARTICLE II.

LIS PENDENS.

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| 1. The judicial doctrine of <i>lis pendens</i> . | 13. Filing <i>nunc pro tunc</i> . |
| 2. What constitutes commencement of <i>lis</i> . | 14. Service of summons. |
| 3. Origin and effect of <i>lis pendens</i> statutes. | 15. Effect of judgment. |
| 4. In what actions the statutory notice must be filed. | 16. Cancelling. |
| 5. Defendant's notice. | 17. Superseding. |
| 6. What classes of claimants affected. | 18. Fraud. |
| 7. — persons claiming under plaintiff. | 19. No personal liability |
| 8. Description of premises. | |
| 9. Time of filing. | |
| 10. Place of filing. | |
| 11. Omission to index. | |
| 12. Amending. | |

FORMS.

- (501.) Notice of pendency of action (statutory notice *lis pendens*).
 (502.) Direction to index notice of pendency.
 (503.) Order cancelling notice of pendency.

1. *The judicial doctrine of lis pendens.*—At common law,¹ as well as in equity, and independent of statute, one who acquires an interest in, or lien upon specific property² (other than negotiable paper, &c.) pending a suit, the object of which is to reach that specific property,³ takes subject to the result of the action, if his interest be acquired from a party thereto,⁴ and the property be described in the complaint sufficiently to identify it, even if he be a purchaser in good faith and for value, without notice of the suit.

The rule applies equally to purchasers from one of several

¹ Sorrell v. Carpenter, 2 P. Wms., 483 (saying that the equity practice was in imitation of the common-law rule).

² Or any part of the property in litigation. Chapman v. West, 17 N. Y., 125.

³ An action to establish a lien (in this case for attorney's fees) on real property is an action affecting the title within the doctrine of *lis pendens*. Wilson v. Wright, 72 Ga., 848 (attorney's lien); Sanders v. Warner, 2 Weekly Dig., 507 (charge on married woman's separate estate, under former statutes).

⁴ The rule affects only voluntary alienations, and not third persons asserting adverse rights obtained prior to the commencement of the suit. Becker v. Howard, 4 Hun, 359, so held and so laid down in aff'g judgment while rev'g 47 How. Pr., 423; aff'd, 66 N. Y., 5. It does not affect one who takes a tax title from the Comptroller of the State prior to an action to foreclose a mortgage on the same property. *Id.*

In Randall v. Snyder, 64 Tex., 350, it was held, reversing judgment below, that although a purchaser *pendente lite* is bound by the judgment, yet, after judgment in favor of his vendor, he is not bound by a judgment rendered in a subsequent suit based on the same cause of action, but to which he was not a party.

co-plaintiffs or co-defendants, when there is a controversy in the action between him and his co-party.¹

The sole object of the rule is that the power of the court over specific property to affect which an action is pending, shall not be impaired by a party to the action transferring the property pending the action, even to a *bona fide* purchaser without notice.² Hence it has been held that after issue joined the judicial rule charges such a purchaser with notice of the claims in the pleadings only.³

The rule, however, is enforced by other courts as well as the one whose judgment it is the object to protect. Courts of law hold those bound who purchase pending an equity suit, and courts of equity hold those bound who purchase pending a suit at law.⁴

2. *What constitutes commencement of lis.*—No little injustice resulted from uncertainty as to what was the precise stage of the commencement of a suit when it should be deemed to be "pending" within the meaning of this rule. It was finally settled that both the filing of the pleading and service of process, if not also of the pleading, must have taken place;⁵ and if there were several defendants, interested, but not jointly, in the property, service on one was only enough to bind purchasers from that one.⁶

Service of the summons without complaint is enough, if

¹ See *Craig v. Ward*, 1 *Abb. Ct. App. Dec.*, 454; s. c., 3 *Abb. Pr.*, N. S., 235, aff'g 36 *Barb.*, 377.

² See the leading cases of *Murray v. Ballou*, 1 *Johns. Ch.*, 566; *Newman v. Chapman*, 2 *Rand.*, 93; s. p., *Tilton v. Coffield*, 93 *U. S.*, 163; *County of Warren v. Marcy*, 97 *id.*, 96, 105 (*dictum*); *Buser v. Shepard*, 107 *Ind.*, 417, 424; s. c., 8 *Northeastern Rep.*, 282 (*dictum*); citing also *Smith v. Hodsdon*, 78 *Me.*, 180; s. c., 3 *Atl. Rep.*, 276.

Purchasers of real estate *pendente lite* are bound by the decree, even though the purchaser be a corporation organized under the laws of another State. *Whiteside v. Haselton*, 110 *U. S.*, 296.

³ *Weiler v. Dreyfus*, 26 *Fed. Rep.*, 824.

⁴ *Bennett v. Williams*, 5 *Ohio*, 461; *Inloe v. Harvey*, 11 *Md.*, 519 (holding at law, that a purchaser *pendente lite* of the subject of a bill in chancery was bound at law, by the decree in chancery).

Smith v. Coker, 65 *Geo.*, 461 (purchaser pending suit at law held, in subsequent suit in chancery to enforce the judgment at law, bound by that judgment).

⁵ *Murray v. Ballou*, 1 *Johns. Ch.*, 566.

⁶ *Myrick v. Selden*, 36 *Barb.*, 15, 22.

its contents put the defendant served on inquiry as to the object of the suit.¹

It is not essential that service be personal. Legal service, though constructive, is enough.²

Thereafter the world must take notice that the controversy as to the property is before the court, and cannot be entangled by a transfer. Hence it was common to say that the filing and service were constructive notice. *

3. *Origin and effect of lis pendens statutes.*]—To make this constructive notice still more explicit, in respect to real property, and thus limit the judicial rule within narrower bounds, the *lis pendens* statutes were adopted, the usual purport being to provide that a plaintiff in an action affecting real property may file a notice, describing the property, and the action, and naming the parties; that all such notices shall be indexed under the defendants' names; and that the pendency of no action as to real property shall bind purchasers, &c., unless such a notice of the action be filed. The primary object of these statutes is, by requiring, or at least allowing a definite record, to abolish the somewhat indefinite judicial rule of *lis pendens*, as to all cases within the scope of the statute.³

Under these statutes, one who holds an unrecorded deed or mortgage, and does not put it on record until after notice of the

¹ *Albert v. Back*, 52 *Super. Ct. (J. & S.)*, 550. Under the N. Y. *Lis Pendens* Statute, service of complaint is not required to give effect to the lien.

² *Hayden v. Bucklin*, 9 *Paige*, 512; and see *Green v. Slayter*, 4 *Johns. Ch.*, 88.

Under the N. Y. Code of Civil Procedure, when constructive service of process is required with the statutory notice of *lis pendens*, it must usually, if not always, be under an order for publication. But I am not aware that it has ever been held that service by leaving at residence under the other form of substituted service allowed for absentees, &c. (see Volume I, of this work, p. 636), is not sufficient to require the application of the judicial rule of *lis pendens*.

³ *De Camp v. Carnahan*, 26 *W. Va.*, 839 (land sold under a decree in an attachment suit. No *lis pendens* filed as required by *W. Va. Code*, ch. 139, § 14. Held (reversing decree to the contrary), that a purchaser from the debtor *pendente lite* could hold as against the purchaser under the decree).

Where a statute provides for filing notice of *lis pendens* (as in Colorado statute), no purchaser is bound unless notice is filed, or he has actual notice. *Richardson v. White*, 18 *Cal.*, 108.

Only those who are not parties to the action should be allowed to take advantage of omitting to file a notice. *White v. Coulter*, 1 *Hun*, 357; s. c., 8 *Supm. Ct. (T. & C.)*, 608, modified on other points in 59 *N. Y.*, 629.

pendency of an action has been filed, comes in as a purchaser or incumbrancer *pendente lite*,¹ unless the party claiming to charge him so had actual notice of the deed or mortgage.² This enables one commencing such an action to be sure of joining all necessary parties by searching the records of deeds and incumbrances up to the moment of filing his complaint and notice of *lis pendens*.

But the judicial rule of *lis pendens* remains in force as to those having actual notice of the pendency of the action, although a statutory notice was required, but was not duly given.³

4. *In what actions the statutory notice must be filed.*—Under the New York statute⁴ a notice of *lis pendens* should be filed in any “action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of real property.”⁵

¹ *Freem. on Judg.*, § 201; *Ayrault v. Murphy*, 54 *N. Y.*, 203 (such a mortgage held barred). *Kindberg v. Freeman*, 39 *Hun*, 466 (holding that the grantee in such a deed need not be brought in as a party). *Norton v. Birge*, 35 *Conn.*, 250; *Hoyt v. Jones*, 31 *Wisc.*, 389, 397, 403; *McCutchen v. Miller*, 31 *Miss.*, 65, 83. *Contra*, *Hammond v. Paxton*, 58 *Mich.*, 393 (unsound).

² *Lamont v. Cheshire*, 65 *N. Y.*, 30; *Patterson v. Brown*, 32 *N. Y.*, 81; *S. P.*, *Brown v. Goodwin*, 1 *Abb. N. C.*, 452.

³ *Patterson v. Brown*, 32 *N. Y.*, 81.

Whether a State statute allowing and requiring a notice of *lis pendens* to be filed applies in cases at law in the United States courts, so as to allow of such notice there, see *Majors v. Cowell*, 51 *Cal.*, 478 (holding that such a State statute has no application in the Federal courts).

⁴ *N. Y. Code Civ. Pro.*, § 1670.

⁵ By *N. Y. Code Civ. Pro.*, § 3343, subd. 6, “the words ‘real property’ are co-extensive with lands, tenements and hereditaments.”

In *Wilmont v. Meserole*, 41 *Super. Ct. (J. & S.)*, 274, it was held that “real property” is not necessarily synonymous with “real estate” as used in the Revised Statutes; but it includes all estates in land, estates for life, for years, at will, and by sufferance, as well as estates of inheritance. So laid down in holding that a *lis pendens* was properly filed in an action “for the purpose of procuring the avoidance and cancellation of record of an assignment of lease [for 13 years] executed by plaintiff to defendant,” and hence the motion to cancel the *lis pendens* was properly denied.

The actions may be enumerated as follows:

Action to compel determination of a claim to real property. *N. Y. Code Civ. Pro.*, §§ 1670, 1645 and 1646.

—to establish title or recover possession, whether by establishing, reforming or cancelling a deed, will, or other written instrument, or by fastening a trust upon the property, or reaching it for creditors, or in any other way declaring or defining the existence of an alienable title or interest, provided the judgment sought would by its terms have such an effect.

Dower. *N. Y. Code Civ. Pro.*, §§ 1670, 1619 and 1685.

But an action merely to recover damages, though upon grounds that would equally serve to impeach the title to the property itself, is not within the rule.¹

In a case within the statute, the right to file the notice is absolute,² not dependent on leave of court. In any case not within the statute a notice filed is a nullity,³ except that the seeing of such a notice on the files may be actual notice, in which case the purchaser would be bound, not by the statutory notice, but by the judicial rule.

The statutes in other States where such statutes exist, are closely analogous.⁴

Ejectment. *N. Y. Code Civ. Pro.*, §§ 1670, 1524, 1526 and 1685.

Foreclosure of mortgage upon real property. *Lis pendens* must be filed at least twenty days before final judgment. *N. Y. Code Civ. Pro.*, § 1631.

Foreclosure of lien. See "*Lien*" (below), and "*Mechanic's Lien*."

Lien. Action to establish lien on specific real property. *Mills v. Bliss*, 55 *N. Y.*, 139 (vendor's lien). *Sanders v. Warner*, 2 *Week. Dig.*, 507; *Brainerd v. White*, 12 *Abb. N. C.*, 407; s. c., 48 *Super. Ct. (J. & S.)*, 399 (married woman's charge).

Mechanic's lien. *Lis pendens* (if the action is in a court of record) must be filed within one year after the lien to render the lien binding for a period longer than one year. *N. Y. L.*, 1885, ch. 342, § 6. For liens under other special statutes, see them.

Partition of real property. *N. Y. Code Civ. Pro.*, §§ 1670 and 1557, subd. 2. Including partition and sale for distribution of proceeds. *Kunz v. Bachman*, 1 *Civ. Pro. R.*, 281; s. c., 61 *How. Pr.*, 519.

Specific performance of contract for sale of land (against vendor). *N. Y. Code Civ. Pro.*, § 1670; *Chapman v. West*, 17 *N. Y.*, 125 (holding that filing *lis pendens* would be available against a defendant vendor, but not against prior mortgagees who need not and should not be made parties). But compare, on last point, *Metropolitan Trust Co. v. Tonawanda, &c., R. R. Co.*, 18 *Abb. N. C.*, 368; *Ruck v. Lange*, 10 *Hun.*, 303 (specific performance of a contract for sale of a leasehold interest in this case lease having twenty years to run).

Replevin. *Lis pendens* cannot be filed, but the judicial doctrine of *lis pendens* applies, and purchasers *pendente lite* are bound by the judgment. *President, &c., of D. & H. Co. v. Harris*, 15 *Week. Dig.*, 36 (holding that the complaint must be served and filed as well as the summons served, to create a *lis pendens* binding upon third persons). *Carr v. Lewis Coal Co.*, 15 *Mo. App.*, 551.

¹ *Zoeller v. Riley*, 100 *N. Y.*, 102, 109. In this case (the property being personal) the decision was put in part on the ground that the complaint had not been filed at the time of the purchase; but either ground is sufficient to sustain the conclusion.

² *Mills v. Bliss*, 55 *N. Y.*, 139 (so held in an action to establish vendor's lien for amount of securities he was induced by fraud to take in part payment).

³ *Dictum* in same case.

⁴ In *Alabama* and *Arkansas* there are no statutory provisions as to filing a notice of *lis pendens*.

In *California* the statute is, "in an action affecting the title or right of possession of real property." *Code Civ. Pro.* (1885), § 409.

In *Colorado* and *Connecticut* there are no statutory provisions

5. *Defendant's notice.*—A defendant who by his answer or by a cross-bill demands affirmative relief affecting real property,

In *Dakota* the statute is, "in an action affecting the title to real property." *Dak. Code Civ. Pro.*, § 101.

In *Delaware, Florida* and *Georgia* there are no express statutory provisions. [The Civil Code of *Georgia* (1882), § 3092, contains a provision that "a bona fide purchaser for value and without notice will not be interfered with by a court of equity."]

In *Illinois* there is no statute.

The *Indiana* statute is, a suit "to enforce any lien upon, right to, or interest in any real estate upon any claim not founded" on certain recorded instruments. *R. S. Ind.* (1881), § 325.

The *Iowa* statute (*Revised Code*, 1880, § 2628) says, "where a petition has been filed affecting real estate."

The *Kansas* statute provides that "when the petition has been filed the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title," &c. *Compiled Laws* 1885, § 3880.

In *Kentucky, Louisiana* and *Maine* there are no statutory provisions.

In *Massachusetts* the statute is, "no writ of entry, petition for partition, or other proceeding either at law or in equity affecting the title to real estate," &c. *R. S.* (1882), ch. 126, § 13.

In *Michigan* the statute relates to suits in chancery and purchasers of real estate. *How. Stat.* (1882), § 6619.

In *Minnesota* the statute is, actions "in which the title to, or any lien upon or interest in real property shall be affected, involved or brought in question by either party." *Gen. Stats.* (1878), c. 75, § 34.

In *Mississippi* there is no express statutory provision.

In *Missouri* the statute is, "in any civil action based on any equitable right, claim or lien affecting or designed to affect real estate." *Mo. R. S.* (1879), § 3217.

In *Montana* the statute is, "in an action affecting the title or the right of possession of real property." *Mont. R. S.* (1879), p. 52, § 70.

The *Nebraska* statute provides that "when the summons has been served or publication made, the action is pending so as to charge third parties with notice of its pendency, and while pending no interest can be acquired by third parties in the subject-matter thereof as against the plaintiff's title." *Compiled Stats.* (1885), p. 639, § 85.

In *Nevada* the statute relates to "actions for partition of real property." *Gen. Stats.* (1885), § 3291.

In *New Hampshire* there is no statutory provision.

The *New Jersey* statute is, "in any suit relating to, or affecting the possession of, or title to lands or real estate." *N. J. Laws*, 1880, ch. 29, § 1.

The statute in *New Jersey* seems not to apply to bills to foreclose duly recorded mortgages.

The *New Mexico* statute is, "in all actions in the district courts of this Territory affecting the title to real estate in this Territory." *Comp. L.* (1884), § 1853.

In *New York* the statute is, "in an action brought to recover a judgment affecting the title to, or possession, use or enjoyment of real property." *Code Civ. Pro.*, § 1670. See notes on pp. 15, 16 (*above*).

In *North Carolina* the statute is, "in an action affecting the title to real property," and also in case of a defendant demanding "substantive relief" in his answer, "if the same be intended to affect real estate." *Clarke's Code Civ. Pro.* (1884), § 229.

The *Ohio* statute provides (*R. S.*, 1880, § 5055) that "when the summons has been served, or publication made, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can

has the same right as a plaintiff to file such a notice. This is expressly provided by statute in some States,¹ and where it is not, the court may properly recognize the right under the new practice, for an answer claiming affirmative relief in a proper case is equivalent, on general principles, to a cross-action.²

be acquired by third persons in the subject-matter thereof as against the plaintiff's title."

In *Oregon* there is no express provision, but it is enacted that an action to recover possession of real property shall not be prejudiced by alienation thereof by the person in possession either before or after the commencement of the action; but if such alienation be made after the commencement of the action, and the defendant does not satisfy the judgment recovered for damages, such damages may be recovered of the purchaser. *Gen. L.* (1882), ch. 4, § 322.

The *Pennsylvania* statute relates to "any ejectment or action to recover real estate or to compel a conveyance thereof." *Brightly's Purdon's Dig.* (1700-1883), p. 641, § 24.

In *Rhode Island* there is no statute.

In *South Carolina* the statute is, "in an action affecting the title to real property." *S. Car. Code Civ. Pro.*, § 153.

In *Tennessee*, *Texas* and *Vermont* there are no statutes.

In *Utah* there is a provision for filing a notice of *lis pendens* in an action for partition of real estate. *Comp. L. Utah* (1876), p. 480, § 267.

The *Virginia* statute provides that "no *lis pendens* or attachment against the estate of a non-resident shall bind or affect a purchaser of real estate without actual notice thereof, unless and until a memorandum" [&c.] "shall be left with the clerk of the court of the county or corporation in which the land is situate," &c. *Code of Va.* (1873), tit. 53, § 5.

The *West Virginia* statute is "an action, suit, attachment or proceedings to subject real estate to the payment of any debt or liability upon which a previous lien shall not have been acquired in some one or more of the methods prescribed by law." *W. Va. Amended Code* (1884), ch. 139, § 13.

In *Washington Territory* there is no express provision as to filing *lis pendens*, but there are statutes providing that an action for the recovery of the possession of real property cannot be prejudiced by any alienation made by the party in possession, either before or after the commencement of the action, and that the judgment therein shall be conclusive as to the estate in such property and the right to the provision thereof upon the party against whom judgment is given and against all persons claiming from him after the commencement of the action.

In *Wisconsin* the statute is, "in an action affecting the title to real property." § 3187.

¹ *N. Y. Code Civ. Pro.*, § 1673. Applied in *Niebuhr v. Schreyer*, 10 *Civ. Pro. R.*, 72.

A similar provision exists in *Dakota* (*Code*, § 101); *Montana* (*R. S.*, 1879, p. 52, § 70); and *North Carolina* (*Clark's Code Civ. Pro.*, § 229).

The statutes of *Massachusetts*, *Virginia* and *West Virginia* require the notice to be filed without saying by which party.

² 2 *Pomeroy's Eq. Jur.*, § 634.

Moreover, independent of statute, the *lis pendens* is notice of all that is involved in a cross-bill which is inseparable from the original bill. *The S. C. Hall Lumber Co. v. Gustin*, 54 *Mich.*, 624.

In *Brundage v. Biggs*, 25 *Ohio St.*, 652, it was held that a purchaser from the plaintiff and his wife (she having been brought in as a party by the cross-bill of the defendant) was charged with notice of the pendency of the cross-

6. *What classes of claimants affected.*—The New York statute¹ is expressed as making the notice filed constructive notice “to a purchaser or incumbrancer of the property affected thereby from or against a defendant with respect to whom the notice is directed to be indexed,” and it is declared that “a person whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action.”²

It has already been explained that one purchasing, before suit, a paramount title from a person not a party is not bound, and it is also held that a *bona fide* purchaser who is not affected by a *lis pendens* can convey and give the same title to one who has notice.³

A creditor by judgment is an incumbrancer within this rule.⁴

If any mode of acquiring an interest, lien or other right from or under a party be not within the equity of the statute, it remains governed by the judicial rule, and this is a reason, in case of doubt, for prompt service of summons and complaint on all the defendants having any interest which could pass to another.

7. — *persons claiming under plaintiff.*—A transfer by plaintiff pending his action, though more rare than a transfer by defendant, is equally within the judicial rule of *lis pendens*.⁵

bill. The present Ohio statute makes the pendency of an action itself notice to third parties without filing notice. *R. S. (Ohio)*, 1880, § 5055.

¹ *N. Y. Code Civ. Pro.*, § 1671.

² It has recently been held upon an extended review of the authorities, that, in the absence of a statute, one who contracted to purchase before the suit was commenced is not bound by reason of taking a conveyance in fulfillment of the contract after suit brought, especially if he paid the consideration before suit brought. *Walker v. Goldsmith (Oreg., 1886)*, 12 *Pacif. Rep.*, 537.

³ *Snowden v. Tyler (Nebr., 1887)*, 31 *Northwestern Rep.*, 661, and *cas. cit.*

⁴ *Fuller v. Scribner*, 76 *N. Y.*, 190, *aff'g* 16 *Hun*, 130, and explaining *Rodgers v. Bonner*, 45 *N. Y.*, 379, *aff'g* 55 *Barb.*, 9, apparently to the contrary, as turning on the fact not appearing in the report, that the judgment there was docketed before the notice of *lis pendens* was filed.

⁵ *Garth v. Ward*, 2 *Atk.*, 174 (holding that on a bill to establish a will, since the heir at law defendant is at liberty to impeach the will, the rule of *lis pendens* applies in favor of the defendant, and against a purchaser from the plaintiff. Also *dictum* that on a bill to redeem from a mortgage, if there was

But when the *lis pendens* statutes were adopted this class of cases was not noticed, and provision was made only against transfers, &c., by a defendant, by allowing a notice to be filed by a plaintiff, and by a defendant who is in effect a plaintiff in a counter-claim. The result is, that as the *lis pendens* statute does not create the lien, but restricts it merely, providing that no purchasers, &c., under a defendant shall be bound except he become such by record after the time of due filing, the omission of the case of a purchaser from the plaintiff leaves such a purchaser under the judicial rule, and he is bound by the mere pendency of the suit.¹

a final decree against the mortgagor-plaintiff, a purchase from him *pendente lite* would be barred).

Baird v. Corwin, 17 Penn. St. (Harris), 462. In this case (ejectment) it appeared that after the institution of an action of partition the plaintiff conveyed his interest in the land to persons who were not parties to the proceedings. *Held*, that such conveyance imposed no obligation on the parties to the action to notify the purchasers of the subsequent proceedings in the action of partition. *Lis pendens* was of itself notice. The sale of the land under the proceedings in partition was a conclusive defense to the claim of the grantees of the plaintiffs *pendente lite*, who now brought the ejectment. *Per curiam*: "The purchase by the plaintiffs in this action of the interest claimed by Parkes Baird pending the writ of partition in which the latter was plaintiff, did not create any obligation to serve them with notice of the subsequent proceedings. *Lis pendens* is of itself notice, and the principle is applicable to writs of partition as well as to other actions. * * * The sale of the land under the decree in the proceedings in partition is a conclusive defense to the claim founded upon the title derived from Parkes Baird *pendente lite*."

In *Hurd v. Case*, 32 Ill., 45, the holder of a mortgage upon land, containing a power of sale, filed his bill to foreclose and made a junior mortgagee a party defendant. *Pending the suit*, the prior mortgagee sold the premises under the said power of sale to a third person. The junior mortgagee answered the bill and filed his cross-bill, making such purchaser a defendant, and prayed that said sale be set aside, that he be allowed to redeem, and that the prior mortgage be assigned to him upon paying amount due. *Held* (reversing a decree which had sustained a demurrer to the cross-bill), that he was entitled to the relief prayed for. *Per curiam*: "The pendency of that suit was notice to Otis the purchaser, so as to subordinate the rights he acquired by the purchase to any decree which might be made in that suit." * * * "By his purchase *pendente lite* he became an indispensable party to the cross-bill in view of the relief which was sought. If this necessity does not often exist * * * we find it may exist, when necessarily the practice must be admitted."

¹ This has nowhere been squarely held, but in my opinion it is clear. There is a *dictum* to the contrary in the opinion of Judge Rhodes, *Corwin v. Bensley*, 43 Cal., 253, 260, and note, but he does not notice the fact that the statute is not an affirmative, but a negative one. A similar impression contrary to the statement in the text is expressed in 24 Alb. L. J., 539.

See, further, the following cases: Pending suit as to title to land, one of the defendants delivered to another defendant a deed executed by the plaintiff, conveying such and (in suit) to such defendant. Three days afterwards decree was entered declaring that the plaintiff was then the owner of the land

8. *Description of premises, &c.*—The description should be such as is usual in a well-drawn deed. A general reference to all the real property of the defendant in the county, is futile. The designation must be sufficiently specific to guide third persons.¹ It is not vitiated by the addition of further and erroneous particulars which do not mislead as to property adequately described.²

Surplusage, though erroneous, may be rejected where that which remains is a substantial compliance with the statute.³ A description of property not to be affected by the action may be struck out on motion.⁴

In foreclosure, the date of the mortgage, the names of the parties thereto, and the time and place of record should be stated.⁵

9. *Time of filing.*—The party must file his notice when he files his pleading, or thereafter, and before final judgment.⁶

Filing the notice before filing the pleading which states the claim is futile,⁷ but the filing of the pleading at a time

in suit. *Held*, that all parties to the decree were bound by it, and that the rights of the party holding the deed were cut off by the decree. *McGregor v. McGregor*, 21 *Iowa*, 441.

Drennen's Adm. v. Walker, 21 *Ark.*, 539, a purchase *pendente lite* by defendant of the interest of some of plaintiffs in the property in dispute will not be disturbed by this court where there is no appeal by such complainants from the decree.

In *Smith v. Brittenham*, 109 *Ill.*, 540, 549, it is held that where, after bringing suit, a plaintiff sells all his interest in the real estate in suit, no decree can be rendered until his grantee is made a party to the suit.

¹ *Miller v. Sherry*, 2 *Wall.*, 237.

² *Watson v. Wilcox*, 39 *Wisc.*, 643.

³ *Drew v. Dequindre*, 2 *Dougl. (Mich.)*, 93.

⁴ *Fitzgerald v. Blake*, 42 *Barb.*, 513; s. c., 28 *How. Pr.*, 110; and see *Rodgers v. Kavanaugh*, 24 *Ill.*, 583; *Nelson v. Wade*, 21 *Iowa*, 49; *Sanger v. Craigie*, 10 *Vt.*, 555.

It may perhaps sometimes serve a useful purpose to include notice that fixtures or movables connected with the realty are also claimed. See *Gardner v. Peckham*, 13 *R. I.*, 102; s. c., 21 *Am. Law Reg., N. S.*, 264, where the removal of timber, it was intimated, would not have been protected against, because the timber was not mentioned in the bill but the case was really decided on another point. It can hardly be maintained that a person chargeable by *lis pendens* as to land could escape being bound as to fixtures, parcel of the realty, &c., because they were not specifically mentioned.

⁵ Required by *N. Y. Code Civ. Pro.*, § 1631.

⁶ *N. Y. Code Civ. Pro.*, § 1670; *Wisc. R. S.*, § 3187.

⁷ *Burroughs v. Reiger*, 3 *Abb. Pr.*, 393, note; s. c., 12 *How. Pr.*, 171; *President, &c., Del. & H. Co. v. Harris*, 15 *Weekly Dig.*, 36.

subsequent to the notice gives the notice a valid inception from that time.¹

An order that the complaint be filed *nunc pro tunc*, as of the time of filing the notice, cannot cut off rights acquired by an intermediate purchaser or incumbrancer who was not a party with opportunity to be heard when the order was made.²

If the notice is before service of summons, personal service of the summons must be made upon a defendant within sixty days after the filing, or else within the same limit publication must be commenced, or service without the State made, pursuant to order therefor.³

To give effect to the judicial rule of *lis pendens* in a case not within the statute, the complaint must be served,⁴ unless the process is such as to put the defendant on inquiry.⁵

10. *Place of filing.*—The notice must be filed in each county in which is situated any real estate affected.⁶ If property in several counties is affected, the better practice is, on filing the original complaint in the county chosen for the place of trial, with a notice describing the property in that county, to take a certified copy of the complaint (or, if preferred for speed, to verify the complaint in duplicate), and file the copy (or duplicate) in the county where the other real estate is situated, with a notice describing the property in that county.⁷

11. *Omission to index.*—Upon principles well settled under the recording acts,⁸ it is the filing, with a proper request to

¹ *Benson v. Sayre*, 7 *Abb. Pr.*, 472, note; *Tate v. Jordan*, 3 *id.*, 392; *Flood v. Isaac*, 34 *Wisc.*, 423; *S. P.*, *Olson v. Paul*, 56 *id.*, 30.

² *Weeks v. Tomes*, 16 *Hun.*, 349; *aff'd* without opinion in 76 *N. Y.*, 601.

³ *N. Y. Code Civ. Pro.*, § 1670.

⁴ *President Del. & H. Can. Co. v. Harris*, 15 *Week. Dig.*, 36.

⁵ *Albert v. Peck*, 52 *Super. Ct. (J. & S.)*, 550.

⁶ There are specific statutory provisions in some States as to filing a notice, judgment, &c., to affect real estate situated in counties other than the one in which suit is brought. See, for instance, *N. Y. Code Civ. Pro.*, § 1670.

⁷ In an action against a railroad company whose road extends through several counties, a notice of *lis pendens* filed in each county would be inoperative without the filing of a complaint also in each county. *Cornell v. Utica, I. & C. Ry. Co.*, 61 *How. Pr.*, 184.

⁸ *Mutual Life Ins. Co. v. Dake*, 1 *Abb. N. C.*, 381, and note in 14 *Abb. N. C.*, 453, and 17 *id.* 123.

index, that constitutes the constructive notice under the New York statute;¹ but it is safer for the practitioner to see that the notice is correctly indexed.²

12. *Amending.*—If, after filing, new defendants are added, or other property is claimed in the suit, an amended notice should be filed.³

An amended notice filed without leave, with or after the filing of an authorized amended summons and complaint, is valid.⁴ If amendment is desired independent of an amendment of the complaint, leave may be asked by motion on notice to the intermediate purchaser or incumbrancer.⁵ In my opinion a fair construction of the statute allows an amended notice to be filed of course, to supply any defect in the original; but an amended notice so filed cannot have relation back.

13. *Filing nunc pro tunc.*—Filing the notice of *lis pendens nunc pro tunc*, or the complaint which ought to have been filed with it, cannot operate to cut off the rights of intermediate purchasers or incumbrancers,⁶ but if the proof of filing is defective the court may allow that to be amended so as to show due filing.⁷

If a third person purchase or acquire a right or lien from a party *pendente lite* before notice of *lis pendens* was operative, he may be brought in as a party, and the question whether he has acquired a paramount right, tested by moving, that the

¹ *N. Y. Code Civ. Pro.*, §§ 1670, 1671.

² In *Patterson v. Brown*, 32 *N. Y.*, 81, an omission to file in the right place an index in the right book was held fatal by the court of first instance; but the judgment reversed by the Court of Appeals without passing on the point, because the purchaser had actual notice.

³ *Clark v. Havens, Clarke*, 561. And such is said to be the safer practice where parties are stricken out. *Curtis v. Hitchcock*, 10 *Paige*, 399.

⁴ *Daly v. Burchell*, 13 *Abb. Pr., N. S.*, 764.

⁵ *Vanderheyden v. Gary*, 38 *How. Pr.*, 367, granting motion to amend notice of *lis pendens* in attachment case, to include omitted property; on notice to an intermediate assignee for benefit of creditors; excuse of the mistake being shown.

⁶ See paragraph 9.

⁷ *White v. Coulter*, 1 *Hun*, 357 (*dictum*); s. p., Volume I of this work, pp. 627, 652, and see Article on FILING, p. 35 of Vol. I.

notice, or complaint, as may be necessary, be filed *nunc pro tunc*.¹

14. *Service of summons, &c.*—If notice is filed before service of summons, follow it up within sixty days by service on same defendant, or by getting an order for publication (see Volume I, page 636) and commencing publication, or making service without the State.

15. *Effect of judgment.*—It is often said that judgment terminates *lis pendens*, but this means only that one who claims under a judgment may rely on the judgment (at least after time to appeal has expired), and is not bound to investigate claims or equities determined by it. But it has been held that if the litigation be continued after judgment, its pendency or the statutory notice thereof is notice to third persons who deal with a party to the litigation in respect to the subject of the action as truly as if judgment had not been reached.²

On the other hand, it is held that the party successful in the judgment may rely on it, and that no notice is necessary to charge persons who deal after judgment with those whose rights are bound by the judgment.³

16. *Cancelling.*—The filing of a notice of *lis pendens* under the statute is regarded in New York as a statutory right, and being independent of any leave of court, it has been held

¹ See *Weeks v. Tones*, 16 *Hun*, 349, *aff'd* on opinion below, 76 *N. Y.*, 601; and see *Vanderheyden v. Gary*, 38 *How. Pr.*, 367.

² *Weyh v. Boylan*, 63 *How. Pr.*, 72, *aff'g* 62 *id.*, 397. In this case an action for foreclosure of a real property mortgage was brought against B., the owner of the land, and *lis pendens* filed. B. answered, and the complaint was dismissed at the trial. Pending appeal B. conveyed, and died. The action was revived against B.'s grantee as his administrator. The judgment was affirmed, but subsequently reversed in the Court of Appeals, and a new trial ordered, on which new trial plaintiff recovered. *Held*, that the proceedings were regular, and B.'s grantee was cut off by the judgment, though he was not made a party individually. *Weyh v. Boylan*, 62 *How. Pr.*, 397; *aff'd*, 63 *How. Pr.*, 72. So held granting motion to compel purchaser at foreclosure sale to take title. *s. p.*, *Parks v. Murray*, 2 *N. Y. State Rep.*, 135 (holding that pending time to appeal the court could not cancel the notice, even after a decision in favor of defendant on the merits); *Willis v. Bellamy*, 53 *Super. Ct. (J. & S.)*, 94.

³ No notice is necessary after judgment. *Sheridan v. Andrews*, 49 *N. Y.*, 478, *aff'g* 3 *Lans.*, 129. See *N. Y. Code Civ. Pro.*, §§ 1323, 1479, 1674.

that if filed in a case within the statute, the court have no power to cancel it except for a cause for which the statute permits cancellation.¹ This, however, is an exception to the general principle that the court have control over their records, even in respect to papers filed, pursuant to a statute not requiring leave of court, and it should not be extended in cases where the filing is required by the statute to be with the clerk of the court in which the action is pending.

The only causes allowed by the New York statute are that the action has been "settled, discontinued or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action."²

Not until the action has been terminated so that malicious prosecution will lie for bringing it, can an action be brought for damages caused by the malicious filing of *lis pendens*,³ unless the filing was itself irregular and wholly unauthorized by the statute.

If a suit is unconscionably delayed,⁴ or is abandoned,⁵ the court will equitably refuse to apply the judicial rule of *lis pendens*, at least against a *bona fide* purchaser; and the same laches are sufficient to move it to cancel a statutory notice.

¹ *Mills v. Bliss*, 55 *N. Y.*, 139; *Niebuhr v. Schreyer*, 10 *Civ. Pro. R.*, 72; *S. P.*, next paragraph.

² *N. Y. Code Civ. Pro.*, § 1674.

³ *Smith v. Smith*, 26 *Hun.*, 573, modifying on re-argument, 20 *id.*, 555, which aff'd 56 *How. Pr.*, 316.

⁴ *Myrick v. Selden*, 36 *Barb.*, 15 (in this case eight years).

Mann v. Roberts, 11 *Lea (Tenn.)*, 57 (in this case three years, the case being thereafter prosecuted to a conclusion). The court say: "To have the benefit of it * * * there should be a close and continuous prosecution of the suit from its commencement to its close, taking into consideration the character of the case, the obstacles thrown in the way by the opposing litigant, and the usual law's delay. [*Hayden v. Bucklin*, 9 *Paige*, 512.] The lien will not perhaps be impaired by ordinary negligence, and will only be lost by unusual and unreasonable delay. The delay may be explained, but if not explained, the question becomes one of culpable laches to the injury of an innocent third person. And what constitutes unreasonable want of diligence or undue delay must be determined by the particular circumstances of each case."

⁵ *Hammond v. Paxton*, 58 *Mich.*, 393 (in this case plaintiff brought a fresh suit in lieu of the old one).

Durand v. Lord, 115 *Ill.*, 610 (in this case plaintiff delayed, and made representations justifying belief that the suit was abandoned).

Dismissal having ended the cause, a motion to re-instate without notice to the defendant does not revive the judicial rule of *lis pendens*.¹ In the case of the statutory notice an order to cancel is required on dismissal.

17. *Superseding.*—Upon the conversion of real property by a judicial sale, or upon any other substitution of a fund deposited in court in lieu of real property thereby discharged, there is no longer any necessity of filing the statutory notice;² but a statutory notice duly filed, which bound the real property, will follow the fund and bind that instead.

18. *Fraud.*—The constructive notice which strangers have, whether by the judicial doctrine of *lis pendens* or the statutory notice, never makes a purchase for value a fraud. Therefore if such a transfer to a known person is apprehended, it is well to give him express notice, which is best done by serving a copy of the summons and complaint, with notice of filing and service.³

19. *No personal liability.*—Neither the judicial doctrine of *lis pendens* nor the statutory notice⁴ extends further than

¹ Davis v. McClelland (*Mo.*, 1887), 8 *Western Rep.*, 225. The court here say: "The dismissal of the suit put the parties out of the court, and the entry of the clerk was sufficient evidence of that fact. The *lis pendens* created by filing an abstract of the attachment in Jasper county ended with the dismissal of the cause. We do not see how the mere filing of a motion to re-instate with the clerk in vacation, and no notice thereof given to the defendants, could operate as constructive notice to Mr. Clark. The defendants were not in court until they subsequently appeared to the motion. We see no reason for disturbing the judgment in this case, and it is therefore affirmed."

² So held in a mechanic's lien case. Ward v. Kilpatrick, 85 *N. Y.*, 413, 418.

³ In Albert v. Back, 52 *Super. Ct. (J. & S.)*, 550 (aff'd without opinion in 101 *N. Y.*, 656), the service of a summons without the complaint, upon an assignee for benefit of creditors in which the assignor is named as a co-defendant—held, to constitute notice to the assignee of the pendency of an action to set aside the assignment, so as to disentitle him to credit for the amount of a preference under the assignment thereafter paid by him. [Citing Williamson v. Brown, 15 *N. Y.*, 354.]

⁴ Jacobs v. Smith, 89 *Mo.*, 673; s. c., 2 *Southwestern Rep.*, 13.

In general tax sales purchasers are deemed to take by title paramount. But in Brown v. Goodwin, 1 *Abb. N. C.*, 452 (aff'd in 75 *N. Y.*, 409), it was held that if, pending a creditor's action to reach the equitable interest of a judgment-debtor in land, *lis pendens* having been filed, the land is sold for non-payment of the taxes of the legal owner, but at the sale public notice of the judgment and the pendency of the suit is given in the hearing of all present, the purchaser takes subject to the lien of the judgment obtained in the creditor's action.

the purpose of holding the *res* within the power of the court and actually retaining it against claims of intermediate purchasers or incumbrancers. If the litigant seeks not to retain the *res*, but to charge an intermediate transferee with personal liability for rents or profits—as for instance by a suit for damages for cutting and carrying away timber from the land in litigation—the constructive notice afforded by the general doctrine of *lis pendens*, or by the statutory notice, is not enough. To make the result of litigation as to the title to property binding upon a stranger for the purpose of rendering him liable in damages for interference with it, actual notice must be shown.

Form No. 501.

Notice of pendency of action (statutory notice of *lis pendens*).¹

[*Title of court and cause, naming all the parties.*]

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this court, upon a complaint of the above-named plaintiff against the above-named defendants [*in Foreclosure, say*] for the foreclosure of a mortgage, bearing date the day of , one thousand eight hundred and , executed by [*names of mortgagors*], of , to [*names of mortgagees*], of [and which has been duly assigned to the above-named plaintiff], to secure [*here state the condition of the mortgage*], which mortgage was recorded in the office of the clerk [*or, register*] of the [city and] county of , on the day of , one thousand eight hundred and , at o'clock in the noon, in Liber of Mortgages, at page .

[*Or, in Partition, say, for the purpose of obtaining a partition of the premises therein described, among the owners thereof, or for a sale thereof under the direction of this court, and for a division of the proceeds thereof among such owners, according to their respective rights.*]

[*Or, in Specific Performance, for instance thus: upon a written contract made by and between said A. B. and Y. Z.,*

¹ Names of parties, date, and place and date of record must be stated. *N. Y. Code Civ. Pro.*, § 1631.

which contract was recorded in the office of the clerk [*or*, register] of the [city and] county of _____, in Liber _____ of [Mortgages], at page _____, on the _____ day of _____, one thousand eight hundred and _____, and at _____ o'clock in the _____ noon, whereby the said Y. Z., among other things, agreed to give to said A. B. satisfactory security for _____ dollars, borrowed by him from said A. B., in which action plaintiff demands judgment, that said Y. Z. specifically perform the said agreement, and execute a mortgage upon the following described real estate and property, for the repayment of said sum of _____ dollars, with interest by installments, as specified in said contract.¹]

[*Or, in action to clear title and cancel deeds, for instance, thus:*] And that the object of such action is that the said Y. Z., and all persons holding or claiming to hold by or under him, may be forever barred from all claim to any state of inheritance or freehold in the premises hereafter described; that the title to said premises be adjudged to be in the said A. B. [as receiver of, &c.]; that the said Y. Z. surrender possession thereof to the plaintiff; that the cloud upon plaintiff's title thereto may be removed, and that said Y. Z. execute and deliver to the plaintiff a release of all claim, right or interest of, in or to said premises, and that various deeds mentioned in the complaint filed herewith by the provisions of which the said Y. Z. claims to hold title to said premises be cancelled and set aside, and that a note of such cancellation be made upon the record of such deeds in the office of the Register of the city and county of _____

[*Or, in an action to establish a charge or lien, &c.*] for the purpose of having it adjudged that the plaintiff do recover of the defendants the sum of _____ dollars, with interest thereon from the _____ day of _____, 18____, besides the costs of this action, and that the hereinafter described real estate of the said defendant Y. Z. be charged with the payment thereof, and that the same is a lien thereon, for the payment of which said property should be sold by the judgment of the court in this action.

[*In any case after such statement proceed thus:*] And that the [mortgaged] premises in said county of _____, affected by [*or*, the premises in said county of _____, of which partition or sale is sought—*or*, dower wherein is claimed—in] the said _____

¹ Under such a notice as this of a demand for the execution of a mortgage, it was held that a judgment for sale could not be sustained against

subsequent purchasers having no other notice than the notice of *lis pendens*.

action, were at the time of the commencement of this action, and at the time of the filing of this notice, situate in the town of [or, the ward of the city of], in said last-mentioned county in the State of New York, and are described [in the said mortgage] as follows, to wit [*description as in a well-drawn deed*].

[*Date.*]

[*Signature and office address of*],
Plaintiff's attorney.

[*File with the complaint.*]

[*Within sixty days after filing, the service of the summons must be made, or publication thereof begun.*¹]

Form No. 502.

Direction to index notice of pendency.

To the county clerk of county :

You will please index the above notice to the name of each of the following defendants :

[*Names.*]

[*Date.*]

[*Signature and office address of*],
Plaintiff's attorney.

Form No. 503.

Order cancelling notice of pendency.²

At a Special Term [*&c., as in Form No. 493 (above)*].

[*Title of action.*]

On reading and filing the affidavit of Y. Z., verified the day of , 18 [and upon the summons and complaint and answer, *specifying any papers on which the motion is made*], and [after due notice approved by the court, given to A. B., and on filing proof thereof by the affidavit of M. N., and after hearing T. Z., of counsel for [the defendant] in support of the motion, and A. T., of counsel for plaintiff [*or, and no one appearing*], in opposition, and after due deliberation had : Now, on motion of T. Z., attorney for [the defendant],

¹ *N. Y. Code Civ. Pro.*, § 1670.

² The motion may be made by any person aggrieved. *N. Y. Code Civ. Pro.*, § 1674; s. P., independent of statute, Volume I of this work, page 105.

ORDERED, that the notice of the pendency of this action filed by the plaintiff herein, be cancelled of record, and that the clerk of the county of is hereby directed upon the entry of this order to enter in the margin of the record of the same a note of the cancellation [*and if filed in any other county*, that the clerk of county, upon the filing in his office of a certified copy of this order, enter upon the margin of the record of such notice filed in said office a note of the cancellation of the same referring to this order]; and that said [defendant] have dollars costs of this motion to be paid by plaintiff to defendant's attorney.

Enter: [*signature of judge by initials of name and title.*]

ARTICLE III.

INJUNCTIONS (INCLUDING ORDER TO STAY WASTE, &c.).

SECTION I.—OBTAINING AN INJUNCTION.

II.—THE SECURITY TO BE GIVEN.

III.—SERVING AND ENFORCING AN INJUNCTION.

IV.—GETTING RID OF AN INJUNCTION.

V.—REMEDY ON THE SECURITY.

SECTION I.

OBTAINING AN INJUNCTION.

- | | |
|--|--|
| 1. The practice. | (512.) Affidavit by co-plaintiffs in support of motion for injunction. |
| 2. Applying on affidavits alone. | (513.) Notice of motion before court or judge, for injunction. |
| 3. Using the complaint as an affidavit. | (514.) The same, in action of interpleader. |
| 4. Relative functions of complaint and affidavits. | (515.) Notice of motion at general term for injunction to restrain State officer or board, or employee thereof, in statutory duty. |
| 5. Prudential rules for drawing injunction papers—the complaint. | |
| 6. — the affidavits. | |
| 7. — the injunction. | |
| 8. Who to be addressed. | |
| 9. Mandatory injunctions. | |
| 10. Order to stay waste. | |
| 11. Staying legal proceedings. | |

FORMS.

I. MOVING PAPERS.

- (504.) Complaint in action in which the right to a temporary injunction depends on the nature of the action.
- (505.) Affidavit to truth of allegations in complaint.
- (506.) Affidavit in corroboration, by attorney.
- (507.) Affidavit to truth of allegations in complaint; another Form.
- (508.) The same; another Form.
- (509.) Another Form; affidavit to obtain injunction against delivery of pledge wrongfully sold.
- (510.) Oath to reason for not presenting complaint.
- (511.) Oath denying collusion; to annex to a bill of interpleader.

II. INJUNCTIONS.

- (516.) Injunction, *ex parte*, by court or judge, where the right depends on the nature of the action—general Form with or without order to show cause why it should not be continued.
- (517.) Injunction, *ex parte*, by court or judge, against wrongful delivery of stock pledged (absolute).
- (518.) Injunction against disposal of negotiable bonds, with order to show cause.
- (519.) Injunction against taking letters from post office, with order to show cause.
- (520.) Injunction against municipal corporation, forbidding them to authorize the construction of a city railroad.

- (521.) Injunction in aid of attachment, with order to show cause.
- (522.) Injunction against summary proceedings to dispossess; with order to show cause.
- (523.) Injunction in action of interpleader, with order to show cause.
- (524.) Injunction *ex parte*, by judge or court, where the right depends on extrinsic facts;—General Form, with or without order to show cause why it should not be continued.
- (525.) Another Form; injunction against disposing of property to defraud plaintiff (in divorce).
- (526.) Another Form; against sheriff's interference with receiver.
- (527.) Condition as to further security, and speeding appeal.
- (528.) Injunction, after contested motion, on notice or order to show cause.
- (529.) Leave reserved, in denial, to apply again, or in a partial injunction to apply for more stringent injunction, on further evidence.
- (530.) Leave to defendant to move to modify or dissolve.
- (531.) Order denying motion without prejudice.
- (547.) — undermining plaintiff's land.
- (548.) — obstructing streams, &c.
- (549.) — obstructing tow-path or navigation.
- (550.) — stopping a way.
- (551.) — diverting a water-course.
- (552.) — erection, and to compel removal of buildings.
- (553.) — authorizing the laying of a railroad in a city street.
- (554.) — laying a railroad in a city street.
- (555, 556.) — building in violation of covenant.
- (557.) — change in use of premises.
- (558.) — contractor interfering with work after forfeiting his contract.
- (559.) — underletting.
- (560.) — carrying on business forbidden by lease.
- (561.) — preventing lessee of theatre from using it.

2. *As to personal property.*

- (562.) Against transferring negotiable paper.
- (563.) — transfer of stock.
- (564.) — transferring assets.
- (565.) — assigning, &c., patents.
- (566.) — removing chattels.
- (567.) — receiving moneys from the sheriff.

3. *As to productions of mind or art.*

- (568.) Against publishing book.
- (569.) — imitating plaintiff's publications.
- (570.) — sale or disposition, but not against use of plates, &c., for publication.
- (571.) — representation of drama.
- (572.) — publishing private letter.
- (573.) — utilizing patents.
- (574.) — resuming practice, after having sold business.
- (575.) — disclosure of secrets by clerk.
- (576.) — use of a secret in trade, by one who acquired it in violation of contract.
- (577.) — infringing patent.
- (578-581.) — infringement of trademark.
- (582.) — infringement of name, and taking letters from post office.
- (583, 584.) — infringement of sign, &c.

4. *Parties in peculiar relations.*

- (585.) In creditor's actions.

III. STATEMENTS OF ACTS ENJOINED, TO BE INSERTED IN THE FOREGOING FORMS FOR INJUNCTIONS.

1. *As to real property.*

- (532.) Against trespass to real property.
- (533.) — waste or alienation.
- (534.) — waste by cutting timber.
- (535.) — contractor using lands except for his work.
- (536.) — working a mine.
- (537.) — tenant of a mine.
- (538.) — taking possession of lands without payment.
- (539.) — taking rents and profits.
- (540.) — tax or assessment sale, &c.
- (541.) — removing fixtures.
- (542.) — nuisance—burning brick.
- (543.) — — continuance of slaughter-house.
- (544.) — noisy bells.
- (545.) — obstructing lights.
- (546.) — removing plaintiff's obstructions to defendant's lights.

- (586.) Against carrying out void assignments.
- (587.) — receiving proceeds of action.
- (588.) — husband's interference with wife's property.
- (589.) — entering confession of judgment.
- (590.) — disposing of partnership assets.
- (591.) Another Form; where dissolution is not sought.
- (592.) Against interference with fund to be reached.
- (593.) — assignee for benefit of creditors making payments.
- (594.) — bank paying over deposit made by agent.
- (595.) — the reorganization of a corporation.
- (596.) — preventing use of records.
- (597.) — creating or filling vacancies.
- (598.) — holding corporate election.
- (599.) — voting on stock.
- (600.) — giving proxy.
- (601.) — inspectors receiving votes.
- (602.) — issue or transfer of stock, &c., to an officer.
- (603.) — mortgaging railroad.
- (604.) — issuing corporate bonds.
- (605.) — paying interest on bonds.
- (606.) — officers of a corporation executing a contract.
- (607, 608.) — violation of agreement respecting corporate business.
- (609.) Mandatory injunction against refusal to pay over funds pursuant to a continuing contract.
- (610.) Against railroad company interfering with construction of cross-road.
- (611.) — usurping office and taking the fees.
- (612.) — police interference.
- (613.) — interference with health board.
- 5. *Restraint of legal proceedings.*
- (614.) Injunction and stay of proceedings against plaintiff in cross-action and all others similarly situated, against suing, pending litigation on a precedent question.
- (615.) Against proceedings at law; ejectment.
- (616.) The same; action for damages, &c.
- (617.) The same; with leave to proceed to judgment.
- (618, 619.) The same; in a case of interpleader.
- (620.) Another Form; action affecting specific property.
- (621.) Against prosecuting divorce in another State.
- (622.) — sale on execution.
- (623.) — sheriff executing writ of assistance.
- (624–627.) — proceedings for dispossession.
- IV. AFFIDAVIT AND ORDER TO STAY WASTE.
- (628.) Affidavit and order to stay waste.
- (629.) Order to stay waste.

1. *The practice.*—The practice is either (1) to take an order to show cause why an injunction should not be granted, with injunction until the hearing and decision of the motion; or, (2) an injunction until the further order of the court or judge, with an order to show cause why it should not be continued pending the action; or, (3) an absolute injunction pending the action, or until the further order of the court, leaving it for the plaintiff to move to vacate; or, (4) to move on notice, or on order to show cause as a short notice of motion, for an injunction, but without restraint in the meantime.

The first two methods are substantially the same.

From an order to show cause with restraint in the meantime, no appeal lies until after the hearing or an order made on

motion to vacate or modify, as it is only temporary in character.¹ And the same principle appears applicable to the second mode of application.

Under either the first² or second³ mode of application security should alike be required in ordinary cases; for such temporary restraint is one form of relief by injunction which the Code provides for, and which the provisions for security contemplate.

The first three methods, obtaining immediate restraint, *ex parte*, are allowable even without security when the injunction is to stay waste or other damages in an action affecting real property, and is granted by the court or a judge thereof (not by a county judge), either before or after answer, being sustained by the statute as to orders to stay waste.⁴

They are also allowable even without security where the injunction is sought for the protection of a receiver or other officer of the court in the discharge of his duties, if the order be made by the court.

In other cases they are allowable before or after answer, upon security. Security is not dispensed with by asking a receiver.

In other cases than those above stated the third method is not allowable except before answer.

The fourth method is rarely resorted to except where the danger of immediate injury is slight, and it is preferred to argue the question of right before giving security.

2. *Applying on affidavits alone.*—As a naked question of power, the better opinion is that an injunction may be granted on affidavits alone, with the summons, if the affidavits show that the complaint will present a proper case; such an injunction will be sustained if the complaint in due time does present such a case.⁵

¹ *Bloodgood v. Erie R. R. Co.*, 51 *Barb.*, 273; *Watt v. Watt*, 2 *Robt.*, 685. As to the inherent power of the court, see RECEIVERS.

² *Methodist Churches v. Barker*, 18 *N. Y.*, 463.

³ *Sheldon v. Allerton*, 1 *Sandf.*, 700; s. c., 1 *Code Rep.*, 93.

⁴ See Forms No. 624 and No. 625.

⁵ See *Stull v. Westfall*, 25 *Hun.*, 1 (*dictum*); *Mattice v. Gifford*, 16 *Abb. Pr.*, 246; *Morgan v. Quackenbush*, 22 *Barb.*, 72. An affidavit for this purpose should be made by the plaintiff, or disclose excuse for its being made by another person. See *Spalding v. Keely*, 7 *Sim.*, 377.

If the facts on which the injunction is sought are extrinsic to the cause of action, an application may be made upon affidavit alone,¹ with the summons.

The contrary, however, has been held, on the ground that the statute says it may be granted "where it appears from the complaint," &c.²

But even on this theory, an injunction dependent on the nature of the action, if granted on affidavit alone, though irregular, is not void.³

3. *Using the complaint as an affidavit.*—By the New York statute⁴ a verified complaint is to be deemed an affidavit, and so it should upon sound general principles⁵ without the aid of such a statute, unless the verification is such that the allegations are not positively sworn to.⁶ But it is the better practice to apply on affidavit in support of the complaint, because the court ought rarely to grant an injunction solely on the oath of the plaintiff or his attorney.⁷ Moreover, under the New York rule of court there must be, on an *ex parte* application, an affidavit that no previous application has been made, or, if any, stating what.⁸

It is usually most convenient to move upon the complaint;

¹ *Continental Store Service Co. v. Clark*, 1 *How. Pr., N. S.*, 497 (injunction on facts extrinsic to the cause of action).

² *N. Y. Code Civ. Pro.*, § 603; *Roosevelt v. Edson*, 51 *Super. Ct. (J. & S.)*, 227, 233; s. c., 1 *How. Pr., N. S.*, 205. In my opinion, however, the other authorities are more in consonance with sound principles.

³ *Roosevelt v. Edson*, 51 *Super. Ct. (J. & S.)*, 238 (rev'd on another ground in 1 *How. Pr., N. S.*, 482).

⁴ *N. Y. Code Civ. Pro.*, § 3343, subd. 11.

⁵ Where the complaint states all the facts necessary to lay the foundation for an injunction, and the plaintiff swears to them by verification positively, the complaint may be used for the purpose of obtaining an injunction. *Minor v. Terry*, 6 *How. Pr.*, 208; s. c., 1 *Code R., N. S.*, 384; s. p., *Woodruff v. Fisher*, 17 *Barb.*, 224 (where the injunction was dissolved on other grounds); *Levy v. Ley*, 6 *Abb. Pr.*, 89; *Freshwater v. Pittsburgh R. R. Co.*, 6 *W. Va.*, 503.

⁶ *Southern Plank Road Co. v. Hixon*, 5 *Ind.*, 165 (bill only verified in old form, in alternative); s. p., *City of Atchison v. Bartholow*, 4 *Kans.*, 124; *Hone v. Moody*, 59 *Ga.*, 731; *Chesapeake R. R. Co. v. Huse*, 5 *W. Va.*, 579.

See Table at the end of this chapter, and Article on VERIFICATION in Volume I, p. 500.

⁷ *Chatterton v. Kreidler*, 2 *Abb. N. C.*, 453, Lawrence, J. The complaint here was verified by only one of two plaintiffs, and the verification was not sufficient.

⁸ Volume I, page 149

and where it is so drawn and verified as to aver all the material facts upon the personal knowledge of the party who verifies it, the question whether the complaint will be sufficient as to those facts without any other affidavit, will depend on whether the oath of the party is sufficient proof.¹

4. *Relative functions of complaint and affidavits.*]—It is not the function of the complaint as a pleading to state evidence. So far as it does state facts with such a verification as makes it evidence of them, it is available. It is the function of the affidavits to supply evidence not afforded by the complaint, to corroborate by other witness evidence that is afforded by the complaint, and to state the condition of the cause.

Where the right to a temporary injunction depends on the nature of the action, all the essential grounds for asking the injunction should be alleged in the complaint. A general allegation of irreparable injury apprehended, not supported by facts or circumstances tending to justify it, is wholly insufficient.²

The affidavits may support these allegations with evidence, and may corroborate them with collateral facts,³ but it is unavailing to introduce into the affidavit a substantial ground of relief as to which the complaint does not contain any allegations; for the affidavits to such facts are considered only as evidence of the allegations of the complaint.⁴

5. *Prudential rules for drawing injunction papers—the complaint.*]—See that the verification, if not positive and unqualified,⁵ is not in the old form, qualified by saying, “except as to the matters therein *stated on information*,” &c., but by saying, “except as to the matters therein *stated to be alleged on*

¹ That it may be sufficient, see *Fowler v. Burns*, 7 *Bosw.*, 637; *Woodruff v. Fisher*, 17 *Barb.*, 224; *Levy v. Ley*, 6 *Abb. Pr.*, 89; *Scott v. Doneghy*, 17 *B. Monr. (Ky.)*, 321, 324; *Franklin Savings Institution v. M. M. Bank of Wheeling*, 1 *Met. (Ky.)*, 156.

² *McHenry v. Jewett*, 90 *N. Y.*, 58, holding it error to grant an injunction where neither complaint nor affidavit stated such circumstances.

³ *Brooks v. Bicknell*, 3 *McLean*, 250.

⁴ *Stull v. Westfall*, 25 *Hun*, 1 (allegation in complaint that defendant agreed not to divert custom of business sold to plaintiff, not to be enlarged by allegation in affidavit that he promised not to sell to the same customers).

⁵ See Volume I, p. 501.

information," &c. If it be qualified in the old form, it will not avail as proof, but full proof must be presented in the affidavits, in addition to the complaint.¹

If the injunction is sought by reason of the nature of the action, let the grounds appear broadly in the complaint, for they may be proved, but not enlarged by the affidavits; and let the prayer for relief mention an injunction pending the action, especially if the motion is before answer.²

6. — *the affidavits.*—Let the evidence come from those having, as far as practicable, personal cognizance of the facts sworn to, and let the affidavit show this. Reasonable exceptions, however, are allowed in applying this requirement. Thus, a creditor's bill may state the judgment, execution, &c., upon information of the attorney.³

If a third person's oath is substituted for that of the plaintiff as to facts which might be presumed to be within the plaintiff's cognizance, state in the affidavit the reason why it is not made by plaintiff.

If statements are made on information and belief, state the sources of the information, and disclose the reason why positive affidavits are not produced.

If documents are relied on as evidence, or as sources of information, annex copies of them. There is an exception to this rule in the case of stating the results of the examination of voluminous documents, such as books of account, in which case the general rule of evidence⁴ will sanction a general statement of the result; but the competency of the affiant, and

¹ See Article on VERIFICATION, Volume I, p. 500, and see Table at the end of this Chapter.

² It appears to me that under the present system the omission of this prayer ought never to be alone regarded as sufficient ground for denying a contested motion. The only existing justification for now applying this rule is in a case where by reason of the omission of the prayer defendant may have postponed answering, and thus subjected himself to an *ex parte* injunction, but as even after answer the court may grant an *ex parte ad interim* injunction on a notice of motion, the distinction is not very substantial, and the defect of prayer, if it be one, should be allowed to be immediately supplied by amendment if the complaint be otherwise sufficient.

In substance there is no more reason why the complaint should pray for a temporary injunction than for any other provisional remedy desired.

³ *Hamersley v. Wyckoff*, 8 *Paige*, 72.

⁴ *Abb. Tr. Brief*, page 75.

his thorough examination of the documents, should be shown, and any specific fact, such as the state of a particular account, should usually be evidenced by embodying or annexing a copy of it.

7. — *the injunction.*—The language of an injunction should be so clear and explicit that an unlearned man can understand it without employing counsel to advise him what he has a right to do.¹ It should in itself contain sufficient to apprise the reader² what he is restrained from doing, without the necessity of his resorting to the bill or complaint on file to ascertain what is meant.³

Hence to enjoin, for instance, an infringement of trademark, it is better to embody in the injunction a copy of the label to be protected, or to annex it and refer to it as such; for if it be, as is very common practice, identified only by reference to the complaint, it will be usually necessary to serve the complaint with the injunction on any agent or servant whom it is desired to put in contempt in case of violation; and even then it may be difficult to charge him in contempt.

In construing an injunction it will not be treated as by implication restraining acts that would not be injurious to

¹ *Laurie v. Laurie*, 9 *Paige*, 234; *Clark v. Clark*, 25 *Barb.*, 76.

² The rules in the text were approved and applied in *Lyon v. Botchford*, 25 *Hun*, 57, refusing to punish violation of injunction against removing bark from the premises "until the same shall have been ranked as usually done by tanners in 1871" [nine years before the suit], and "from doing any act or thing upon or about said premises not permitted or allowed by the contract mentioned in such complaint." So an injunction forbidding defendant to interfere with "any of the said partnership property, or from collecting the partnership debts or other moneys," but containing no reference whatever to any particular firm or copartnership business, is not sufficiently definite to put the defendant in contempt. *Moat v. Holbein*, 2 *Edw.*, 188; *S. P.*, *Cother v. Midland Railway*, 2 *Phillips*, 469; *s. c.*, 5 *Railw. C.*, 187, holding that an injunction should be so expressed as to inform the defendant of the precise limits of his right, and not expose him, in the exercise of such right, to the consequence of violating a vague injunction. Compare, however, *Parker v. First Avenue Hotel Co.* (*Eng. Ct. of App.*, 1883), 49 *Law Times R.*, *N. S.*, 318, holding that a general form is proper, unless the case is ripe for decision, and the right can be defined. In this case the injunction was against obstructing lights as they had been previously enjoyed, and it was held that only in special circumstances should the court define the permissible structure in detail; otherwise plaintiff was entitled to an injunction in general terms.

³ But actual knowledge may be enough to put him in contempt. *Sullivan v. Judah*, 4 *Paige*, 444; *Byam v. Stevens*, 4 *Edw.*, 119.

plaintiff;¹ therefore it should be explicit as to doubtful matters; but it is better to make it so by a concise general statement than by too minute an enumeration of particulars which may raise an implication that particulars not enumerated are excluded.

In an action to enjoin for breach of covenant, the injunction will only be extended to breaches as to which the plaintiffs show that they require protection. General words prohibiting any act in breach of the covenants should not be inserted if no general danger is shown; for the court does not, without necessity, presume there will be a violation of the covenants.²

8. *Who to be addressed.*—An injunction should not, in general, be directed to persons who are not defendants.³

It is, however, usual and proper to express that the agents, attorneys and servants of the defendant are enjoined;⁴ and whether they are named or not, they are bound by it, if they have notice of it.⁵ But in an action to restrain legal proceedings at law, it is improper to join as a defendant the attorney employed in those proceedings, unless something more is alleged against him than the prosecution of his client's rights.⁶

9. *Mandatory injunctions.*—A temporary injunction of a mandatory character should rarely be granted (save on an

¹ *Wilkinson v. First Nat. Ins. Co.*, 72 *N. Y.*, 499, aff'g 9 *Hun*, 522 (holding that an injunction against receiving a fund did not necessarily forbid suing to judgment for it).

So an injunction against disposing of partnership moneys without forbidding collecting does not necessarily render it a contempt to receive and indorse over a check of which plaintiff had no legal interest in preventing the transfer. *MS.*

So prosecuting a suit at law against the heirs, is not a violation of an injunction against suing the executors for the debt. *Dale v. Rosevelt*, 1 *Paige*, 35.

² *Earl of Mexborough v. Bower*, 7 *Beav.* (29 *Eng. Ch.*), 127.

³ *Fellows v. Fellows*, 4 *Johns. Ch.*, 25; *Chase v. Chase*, 1 *Paige*, 198; *Watson v. Fuller*, 9 *How. Pr.*, 425; *People v. N. Y. Common Pleas*, 3 *Abb. Pr.*, 181; *Bloomfield v. Snowden*, 2 *Paige*, 355; *Sage v. Quay*, *Clarke*, 347; *Edmonston v. McLoud*, 19 *Barb.*, 356. For some exceptions to this rule, see *Hoffm. Prov. R.*, 363.

⁴ That the agent may be made a defendant and enjoined when his principal cannot be reached, see *Osborn v. Bank of U. S.*, 9 *Wheat.*, 738.

⁵ *Mayor, &c., of N. Y. v. Conover*, 5 *Abb. Pr.*, 252.

⁶ Compare *Lord Wellesley v. Earl of Mornington*, 11 *Beav.*, 181; *Davis v. Mayor, &c., of N. Y.*, 1 *Duer*, 451; *Armitage v. Hoyle*, 2 *How. Pr.*, *N. S.*, 488.

admission by defendant) except in those cases where it is necessary to preserve the *statu quo*; that is to say, to forbid defendant to cease doing that which he has been doing, and plaintiff claims he is bound to continue doing.¹ In such a case it may be granted if necessary to protect plaintiff's right; and the power to grant such an injunction even in other cases doubtless exists,² though rarely exercised.

Thus a temporary injunction against a completed act,³ such as a completed structure, is rarely granted, for it would be mandatory of removal.

10. *Order to stay waste.*—The order to stay waste here included was originally a remedy conferred by statute on courts of common law, to supply their want of power to grant injunctions; and it is preserved under the new Code and extended to all actions, legal or equitable, affecting the title to, or the possession, use, or enjoyment of, real property, and to staying damages of any kind to the property, and this without

¹ See the subject discussed and cases collected in *Hall v. Chesapeake, &c.*, R. R. Co., 23 *Am. L. Reg., N. S.*, 126. Compare *Lawrence v. Saratoga Lake R. Co.*, 36 *Hun*, 467.

² See *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 33 *Hun*, 539, quoted on p. 80 of this Vol.; *Broome v. N. Y. & N. J. Tel. Co.*, 5 *Centr. R.*, 814.

Contra, *Ward v. Kelsey*, 14 *Abb. Pr.*, 106; and see *Akrill v. Selden*, 1 *Barb.*, 316.

The forms of injunctions given in this chapter, which embrace this feature, are all from actual precedents; and in most of them the mandatory clause was allowed by the court against distinct objection.

Of late this objection to mandatory injunctions is less regarded than formerly. See *Lond. Law T.*, July 31, 1880, page 242; *Virg. Coupon Cas.*, 25 *Fed. Rep.*, 654, 664, where the court explain *Marye v. Parsons*, 114 *U. S.*, 325, as not questioning the validity of a mandatory injunction, and say: "The mandatory injunction is as old as the high court of chancery of England, and will be used as long as the English-speaking race shall maintain a system of chancery judicature. It belongs to the inherent prerogatives of the chancery courts, and to abolish it would be to paralyze their entire jurisdiction."

Against mandatory injunctions see *Harris v. Pounds*, 64 *Geo.*, 121, 124.

For the distinction between remedy by mandatory injunction and by mandamus, see *Glossop v. Heston, L. R.*, 12 *Ch. Div.*, 102; s. c., 28 *Weekly Rep.*, 111.

In *People ex rel. Peck v. Conley*, 42 *Hun*, 98, the court issued a mandamus to the officers of a religious corporation, in view of the recent statute giving courts of equity jurisdiction to preserve the temporalities from diversion, a power which has usually been exercised by injunction.

³ *Fox v. Fitzsimons*, 29 *Hun*, 574.

prejudice to the right to an injunction also in any proper case.¹ The remedy is in its nature an injunction, and the court or a judge thereof doubtless may in a single order exercise the power involved in both remedies.

11. *Staying legal proceedings.*—A temporary injunction should not usually be granted in an action to restrain legal proceedings if the proceedings sought to be restrained are such that the plaintiff who sues to enjoin them must have notice and adequate opportunity to be heard on those proceedings, in support of the objections which his action seeks to present.²

An injunction from a court of one State may forbid actions in other States,³ but that of a State court cannot restrain the process of Federal courts.⁴ Nor can a Federal court enjoin a party from proceeding in an action already pending in a State court, save in exceptional cases.⁵

The regulations of the statute restricting the mode of granting injunctions generally, are not applicable to orders of *the court* restraining actions by or against its officers, such as receivers.⁶

Enjoining the party to an action from prosecuting it does not enjoin the court.⁷ If it be desired to enjoin the court, take a writ of prohibition.⁸

¹ *N. Y. Code Civ. Pro.*, § 1681.

² See on this subject Volume I, pages 434, 813, 818.

For instances see *Jewett v. Swan*, 19 *Weekly Dig.*, 144 (stockholder's action to enjoin proceedings for voluntary dissolution of corporation); *Fullan v. Hooper*, 19 *Weekly Dig.*, 93 (action to enjoin enforcement of judgment obtained by fraud, brought after sufficient time had elapsed to prevent issue of execution except by leave of court).

³ *Dinsmore v. Neresheimer*, 32 *Hun*, 204; *Cunningham v. Butler*, 104 *Mass.*, 47; s. c., 23 *Cent. L. J.*, 274, and note, but the power is sparingly exercised.

⁴ 76 *Am. Dec.*, 217, 224; and see *Embry v. Palmer*, 107 *U. S.*, 3, 10.

⁵ *Fisk v. Union Pacific R. R. Co.*, 10 *Blatchf.*, 518; *State Lottery Co. v. Fitzpatrick*, 3 *Woods*, 222; s. p., *Live Stock Association v. Crescent City Co.*, 1 *Abb. U. S.*, 388.

See Volume I, page 813.

⁶ See note 2, page 60, and Article on RECEIVERS.

⁷ *Tyler v. Hamersley*, 44 *Conn.*, 419, and see Volume I of this work, page 814.

⁸ See Volume I, page 818.

I. MOVING PAPERS.

Form No. 504.

Complaint in action in which the right to a temporary injunction depends on the nature of the action.

[Allege all the facts relied on as grounds for the injunction (as distinguished from the evidence proving those facts¹), and insert, besides the prayer for judgment, a prayer for a temporary injunction,² for instance, thus:]

And plaintiff prays for an order that during the pendency of this action the defendants be enjoined and restrained from all the acts aforesaid *[or specify the acts desired to enjoin]*.

Form No. 505.

Affidavit to truth of allegations in complaint to move for injunction.

[Title of court and action.]

[Venue.]

A. B., being duly sworn, says:

I. That he is [one of the plaintiffs above named, and the same person who verified the complaint herein].

[Corroborate allegations of complaint, for instance, thus:]

II. That the facts therein stated in respect to the recovery of the judgments by deponent's firm, and by C. D., are true, as deponent is informed by an official search made by the clerk of the county of _____, at the request of the deponent's attorneys, which deponent verily believes to be true.

III. That the facts recited in said complaint in respect to the issuance and return of the executions as therein mentioned are true, as deponent is informed by his attorneys herein, as the result of inquiries made by them at the office of the sheriff of the [city and] county of _____, and of his deputy in charge of such executions, and which deponent verily believes to be true.

[And so on.]

IV. That the defendant W. X. is about to *[stating what is threatened]* in violation of the plaintiffs' rights respecting the

¹ See paragraphs 3 and 4 (*above*).

² This is to be done for greater caution, on account of the old practice in

chancery, but the omission is not, in my opinion, a defect under the present procedure. See parag. 5, note 2.

subject of this action, and tending to render judgment herein ineffectual, and which will produce injury to the plaintiffs, as deponent is informed, as the result of such inquiries made by his attorneys herein, and verily believes to be true.

[*Jurat.*]

[*Signature.*]

Form No. 506.

Affidavit in corroboration, by attorney.

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says :

I. That he is one of the firm of B., S. & H., the attorneys for the plaintiffs in this action, and who are the attorneys referred to in the annexed affidavit of the plaintiff.

II. That the statements contained in said affidavit as to inquiries having been made by said attorneys, and as to information having been thereby ascertained, as stated in said affidavit, are true.

III. That no previous application for an injunction in this action has been made [except, &c. See Form 490, p 3, of this Vol.].

[*If absolute ex parte injunction is asked for*] IV. That the defendant has not answered herein, the complaint not having been yet served [or, having been served on the day of last].

[*Jurat.*]

[*Signature.*]

Form No. 507.

Affidavit to truth of allegations in complaint; another Form.

[*Title of court and action.*]

[*Venue.*]

L. M., of , being duly sworn, says : *

That he is familiar with all the matters which in the complaint in this action are stated on the information and belief of the plaintiff, and has actual knowledge thereof, and knows that the matters therein stated are true. [*Also state means of knowledge, &c.—e. g., thus :*] That deponent, until within a few days last past, was in the employ of said defendant as book-keeper, and had free access to the books of said copartnership and of said defendant, and had and has personal knowledge of the financial and other business matters of the said concern, and of said defendant.

[*Jurat.*]

[*Signature.*]

Form No. 508.

The same; another Form.

[*As in last Form to the *, continuing*] I. That A. B., above named, the plaintiff in this action, is now, as this deponent verily believes, absent from the city of New York, viz, on a voyage to, or now in, the kingdom of Great Britain, he having left the city of New York for Liverpool, in that kingdom, on or about the day of last past.

II. That this deponent is the attorney in fact of said A. B., for the purpose of suing for and recovering the sum of money mentioned in the complaint, by virtue of a power of attorney under seal, duly executed and delivered, a copy of which is hereto annexed,

III. That this deponent has read such complaint, and knows the contents thereof; and that this deponent was personally conversant with the transactions with defendant alleged in the complaint, and acted therein as agent of the plaintiff; and he has full information as to all other matters stated therein [*indicating its sources and annexing copies of any documents mentioned*], and from such knowledge and information believes all such matters to be therein truly stated, and such complaint to be true.

[*Jurat.*][*Signature.*]

Form No. 509.

Another Form; affidavit to obtain injunction against delivery of pledge wrongfully sold.¹

[*Title of court and action.*][*Venue.*]

W. H., being duly sworn, says :

I. I am the plaintiff in the above entitled action.

II. On or about the day of , 18 , at , I borrowed dollars of the defendant R. W. S., and then and there gave him my promissory note [a copy of which is hereto annexed], dated that day, promising to pay to his order days after date, the said sum of dollars, and interest at six per cent. per annum, and at the same time pledged to

¹ The dissolution of an injunction which had been granted on substantially this affidavit was held error in *Hamilton v. Schaack*, 16 *Weekly Dig.*, 423.

him, as collateral to said note, all of my interest in the stock, assets and property of the defendants, the N. R. Company, the same being an undivided part, or thereabouts, of the whole capital thereof.

III. My said interest pledged as aforesaid is of great value, and is worth at least the sum of dollars, but said stock and property is not listed, and has not a market value.

IV. On the day when said note became due, the time for payment thereof was, by agreement between myself and said S., extended to the day of , 18 .

Subsequently, and on the day of , 18 , I had an interview with said S., at which I endeavored to obtain an extension of time for the payment of said note, which he would not grant, but promised me that before the said collateral should be sold I should have ample time and sufficient notice of said sale in order that I might redeem my said pledge. I, on my part, promised that if I should have such notice I would raise the money and redeem said collateral.

V. On Monday, the day of . 18 , at about half after ten o'clock in the forenoon, I received the annexed notice of sale, which, as appears from the post-mark on the envelope which contained the same, a copy of which is hereto annexed, was mailed to me on Saturday previous, the day of , 18 , at 6.30 o'clock in the afternoon; said notice was addressed to me at my office, No. street, in the city of , and the same was mailed long after daily business hours, which was well known to said S. or the person who sent said notice.

There is no delivery of mail on Sunday, which also was well known to said S. or the person who sent said notice, who also well knew that I would not receive said notice until the next business day, which would be Monday, the , the day previous to said contemplated sale.

VI. After said notice was received, I made diligent effort to obtain the money with which to redeem said pledge, and I am satisfied that I should have been able to do so in time if I had had reasonable notice of said sale. My attorney, A. T., of , attended at the time and place of said sale, and before any bids were made notified all parties present of the facts of said notice and of its insufficiency, and that any purchaser would buy subject to this defect, but notwithstanding, as I am informed and believe, the collateral was sold to the defendant S. for dollars.

VII. On Friday, the day of , inst., about

o'clock, I duly tendered said S. in money the sum of dollars, being the amount of my said debt to him, and legal interest in full thereon to date of the tender, but he refused to accept the same.

VIII. Said notice before mentioned was unreasonably short and insufficient to allow me to obtain the necessary amount of money with which to redeem said pledge, and unless said sale of my interest can be rescinded and the same redeemed and retransferred to me, and the officers of the defendant corporation can be meanwhile and during the pendency of this action restrained from issuing or delivering shares of stock or securities or evidences representing my interest in said corporations, or allowing access to their books, so that transfers of the same might be made by others, and said S. enjoined from negotiating, selling, transferring, or in any way disposing of my said interest, or any part thereof, to third parties, or any party other than the plaintiff, I shall suffer irreparable loss and injury thereby, and the judgment of this court will be rendered ineffectual.

[*Jurat.*]

[*Signature.*]

Form No. 510.

Oath to reason for not presenting complaint.¹

This action has been commenced by the issue of the annexed summons, and the complaint will demand judgment for [*indicating relief*] upon the facts stated in the affidavits hereto annexed, and the reason that said complaint is not herewith presented is that [it has been impossible for deponent in the exigency requiring an immediate application for injunction herein, to complete it in time].

Form No. 511.

Oath denying collusion; to annex to a bill of interpleader.²

That he does not bring this action by the consent, knowledge, privity, or combination of any or either of the defendants in this action, but only of his own free will, for relief in this court.

¹ See paragraph 2, p. 84.

² This allegation is often inserted in the complaint, instead of in an affidavit.

Form No. 512.

Affidavit by co-plaintiffs in support of motion for injunction.

[*Title of court and action.*]

C. D., E. F., G. H. [*&c.*], being duly severally sworn, each for himself says: That he is and for some time past has been the owner of the shares of the capital stock of the defendant corporation, the N. Y. C. C., L., set opposite to his name in the exhibit annexed to this affidavit; and that he favors the commencement and prosecution of this action, and is in full accord with the proceedings taken herein by the plaintiff. And that the allegations of the complaint in paragraphs numbered and are true to deponent's knowledge.

[*Jurat.*]

[*Signatures.*]

Form No. 513.

Notice of motion before court or judge, for injunction.¹

[*As in Form 488, p. 1, of this Volume, inserting between the ¶ and the ¶:] of injunction to restrain the defendant, his agents, attorneys and servants [if a corporation, add, and officers; if a public officer, and deputies] from [here state concisely for what the injunction is required, as, for example, in Forms Nos. (below)].*

Form No. 514.

The same, in action of interpleader.

[*As in Form 488, p. 1, of this Volume, inserting in place of the italic clause between the ¶ and the ¶:] that the plaintiff may be at liberty within [ten] days to pay into this court, in trust in this cause, the sum of dollars, in the complaint herein mentioned [and to deposit in such manner as the court shall direct the two promissory notes therein mentioned, for the sums of and dollars respectively]; and*

¹ For orders to show cause as a short notice, see Forms 516, 522.

As to necessity of notice in actions against corporations and joint-stock associations. see *N. Y. Code Civ. Pro.*, §§ 1787, 1802-9. and *People ex rel. Roosevelt v. Edson*, 51 *Super. Ct. (J.*

& S.), 238; s. c., 1 *How. Pr., N. S.*, 231; 7 *Civ. Pro. R.*, 5 (holding the statute not applicable to municipal corporations); rev'd on another ground in 1 *How. Pr., N. S.*, 482. If receiver is asked for, move *the court*. See also RECEIVERS.

that upon his so doing an injunction may be awarded to restrain the said defendant Y. Z. from [*here state acts to be restrained; see Forms 517-625*].

[*If in action to dissolve corporation or distribute assets, address to and serve on attorney-general. N. Y. L., 1833, c. 378.*]

Form No. 515.

Notice of motion at general term for injunction to restrain State officer or board, or employee thereof, in statutory duty.¹

[*Title of court and action.*]

Please take notice, that upon the annexed complaint [*or, the complaint filed herein*] and the [*two*] annexed affidavits the undersigned will move this court, at a general term to be held at the County Court House [*or, City Hall*], in the of
[*designating a term in the department in which the officer or board to be enjoined is located, or the duty required to be performed*] for an order that [*here state acts to be enjoined; see Forms 517-625*], or for such other or further relief as may be just.

[*Signature and office address of*],
Attorney for plaintiff.

[*Date, and address to the officer, board, or other person to be restrained.*]

[*Notice of motion in other cases,² as in Form 488, p. 1, and 513, p. 47, of this Volume.*]

¹ Under *N. Y. Code Civ. Pro.*, Y. City Board of Health, eight days notice is required. *N. Y. City Cons. Act of 1882*, § 1091.

§ 6.

² For an injunction against the N.

II. INJUNCTIONS.

Form No. 516.

Injunction, *ex parte*,¹ by court or judge,² where the right depends on the nature of the action.—General Form, with or without order to show cause why it should not be continued.³

[*Title of*] Court [*or if a court order*]

At a special term [*&c., as in Form No. 491, on p. 3, of this Volume*].

[*Or if it is sought to enjoin a State officer*]

At a general term [*&c., as in Form No. 491, p. 3*].

[*Title of action.*]

It appearing to my satisfaction [*or, to the satisfaction of the court*] by the complaint herein verified the day of , 18 , supported by the affidavit of A. B., verified the of , 18 , that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission of the acts hereinafter enjoined [*briefly indicating*

¹ *Before answer* this may be granted *ex parte* (unless it suspend the ordinary business of a corporation or joint-stock association, or restrains the acts of a director, &c.).

² Under *N. Y. Code Civ. Pro.*, § 606, unless otherwise specially prescribed by law, as in some cases of injunctions against corporations, this order must be made by the court in which the action is brought, or by a judge thereof, or any-county judge. See page 131 of Volume I, as to the reason why it cannot be made by a judge of another court except the county judge. See also *People ex rel. Roosevelt v. Edson*, 1 *Hov. Pr.*, *N. S.*, 482, holding that a common pleas judge is not a county judge within the meaning of the statute; and compare *People v. Donohue*, 15 *Hun*, 446, holding the contrary as to an order of arrest.

But the restriction of the power of a county judge to grant ordinary *ex parte* orders to a judge of a county where the action is triable, or the attorney resides, is not applicable. See Volume I, pp. 130-133.

An injunction granted by a judge or a county judge since it is provided by *Code Civ. Pro.*, § 606, that where

"it is granted by a judge it may be enforced as the order of the court," is deemed a mandate of the court, and disobedience may be punished by proceedings in contempt.

On this question, in the case of *People ex rel. Negus v. Dwyer*, where an injunction in a supreme court cause was granted by the county judge, and it was objected that such an injunction could not be thus enforced, Gilbert, J., at special term, says: "A simple reading of §§ 606, 607-609 and 610, in connection with subd. 3 of § 3343 of the Code of Civil Procedure, will show very clearly that the order made by Judge Moore was a mandate of the court, and not an act merely of the county judge done independently of the court." This ruling was approved at general term, and also by the Court of Appeals. 90 *N. Y.*, 410. Citing *Erie Ry. Co. v. Ramsey*, 45 *N. Y.*, 646.

³ The order may be absolute till the further order of the court, leaving defendant to move against it, which form is rarely granted; or it may be, as usually it is, with a clause requiring defendant to show cause why it should not be continued.

ground,¹ for instance, as a violation of the contract mentioned in the complaint], and that the commission or continuance of the said acts during the pendency of the action would produce injury to the plaintiff [*may add, if extrinsic facts are also relied on*], and it appearing by said complaint and affidavit, that the defendant during the pendency of the action is doing or procuring or suffering to be done, and threatens, or is about to do or to procure or suffer to be done the acts above enjoined, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, by [*here briefly indicate ground; ¹ see Forms below*]. * And the plaintiff having duly given an undertaking as required by law :

Now, on motion of A. T., attorney for the plaintiff,

ORDERED, that the defendants W. X. and Y. Z., and each of them, and their agents, attorneys and servants [*if corporation, add, and officers; if a public officer, and deputies*], each of them, are hereby enjoined and restrained until the further order of the court, from [*here state acts forbidden; see Forms 516-526, and 531-627*].

[*It is usual to add an order to show cause why the injunction should not be continued, thus:*] † And let the defendants or their attorneys show cause before [me, or one of the justices of] this court [at a special term thereof, to be held] [at chambers] at the County Court House, in the city of , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, why this injunction should not be made permanent, of which motion service of this order on or before the day of shall be sufficient notice.

[*If leave to serve additional papers is desired, add:*] And plaintiff has leave to serve such further and additional affidavits and other papers in support of his motion for an injunction in this action as he may be advised, on or before the day of , inst.

[*Authentication as in Form 491, p. 3, of this Volume.*]

[*If a court order, take certified copies for service.*]

¹ The omission to comply with the requirement of *N. Y. Code Civ. Pro.*, § 610, that the injunction shall briefly indicate the ground on which it is granted, may be disregarded by the court if no substantial right has been

violated, for it is not jurisdictional. *Atlantic & Pac. Tel. Co. v. Baltimore & O. R. R. Co.*, 46 *Super. Ct. (J. & S.)*, 377; but it is always better to state it, for the omission may materially aid a motion to vacate.

Form No. 517.

Injunction, ex parte, by court or judge, against wrongful delivery of stock pledged (absolute).¹

[*Name of*] Court [*or if a court order*]

At a special term [*&c., as in Form 491, p. 3, of this Volume*].

[*Names of parties.*]

It appearing satisfactorily to me [*or, to the court*], by the affidavit of the plaintiff W. H., that sufficient grounds for an order of injunction exist, to wit, that the plaintiff being indebted to the defendant R. W. S., in the sum of dollars, and interest thereon from the day of , 18 , and having given to the said S. the property hereinafter mentioned as a pledge and collateral security for said debt, the said S. did, on the day of , 18 , cause said property to be sold at public sale, without having first given to the plaintiff reasonable and sufficient notice of said sale; that all persons present at said sale were notified of the insufficiency of said notice, and that the purchase at said sale was made by said S. himself, subject to said notice, and that on inst. the plaintiff tendered to said S. the amount of his said debt and legal interest thereon to the date of the tender, and that there is reason to believe that the defendant corporations may issue and deliver to said S. or others, shares of stock or securities for, or evidences representing the plaintiff's interest in the stock, assets and property of said defendant corporations, or one of them, in whole or in part, or allow access to their books, so that transfers of the same might be made by others than the officers of the corporations, and that said S. may negotiate, sell, transfer or dispose of the said interest in whole or in part to persons or parties other than the plaintiff, to the damage of the plaintiff in the premises. And the plaintiff having given the undertaking required by law, now, on motion of A. T., attorney for plaintiff:

ORDERED, that the defendants, The Newfoundland Railway Company and The Newfoundland Railway Construction Company, their officers, agents, employees and attorneys, refrain from issuing or delivering to R. W. S., or any person or party whatsoever, any shares of stock or securities, or any evidences whatsoever representing in whole or in part the right, title and

¹ As to who may make this order, see last Form, note 2. Sustained in *Hamilton v. Schaack*, 16 *Weekly Dig.*, 423, on the ground that the pledgee was not authorized to buy in himself.

interest of the plaintiff in and to the stock, assets or property, or any thereof, of the defendants, The Newfoundland Railway Company and The Newfoundland Railway Construction Company, or either of them, or allowing access to their books, or any of them, to any person or party, so that transfers of said right, title and interest, or some thereof, might be made by others than the officers of said corporations, and that the defendant R. W. S., his agents, employees and attorneys, refrain from negotiating, transferring or in any way disposing of the plaintiff's said right, title and interest, or any part thereof, to third parties, or any party or person other than the plaintiff, during the pendency of this action, or until the further order of this court; and in case of disobedience to this order you will be liable to the punishment therefor prescribed by law.

[Authentication as in Form 491, p. 3, of this Volume.]

[If a court order, take certified copies for service.]

Form No. 518.

Injunction against disposal of negotiable bonds, with order to show cause.

[Title as in last Form.]

It appearing satisfactorily to me [*or, to this court*], by the verified complaint in the above entitled action and the affidavit of E. M., verified , 18 [*here briefly state facts, for instance, thus*], that plaintiff is entitled to the ownership and immediate possession of the bonds hereinafter named which are in the hands of defendants, who hold them for her account, and that defendants threaten and are about to sell and dispose of said bonds, although forbidden so to do by plaintiff, to the great damage and injury of plaintiff, and that by such sale plaintiff will sustain damages over and above the value of said bonds, and plaintiff having given the undertaking required by law; now, on reading said complaint and affidavits, and on motion of W. D. H., attorney for the plaintiff, it is

ORDERED, that until the further order of this court, the defendants and each of them and their servants, agents or attorneys be and they are hereby enjoined and restrained from selling, delivering, parting with or disposing of the six hundred and fifteen (615) second mortgage income bonds of and issued by the Carolina Central Railroad Company, on or about

, 18 , of the par value of one thousand dollars each, numbered 1 to 615, and mentioned in the complaint herein.

And on the service of this order and of copies of the papers above mentioned on the defendants, three days before the return day below named, that the defendants, or their attorneys, show cause before me [*or*, this court at a special term, to be held] at , in , on the of 18 , at o'clock in the noon on that day, or as soon thereafter as counsel can be heard, why the foregoing order, or some order to be made, of like purport and effect as the same or some part thereof, should not be continued until the final judgment in this action, or why such other or further order or relief should not be granted as may seem just; and until this order is modified, let the same be in full force and effect.

[*Authentication as in Form 491, p. 3, of this Volume.*]

[*If a court order, take certified copies for service.*]

Form No. 519.

Injunction against taking letters from post-office,¹ with order to show cause.²

[*Title of*] Court [*or if a court order*]

At a special term [*&c.*, as in Form 493, p. 4, of this Volume].

[*Names of parties.*]

On reading and filing the complaint herein, verified the day of , 18 , and the affidavits of M. N. and O. P., verified [the same day],* by which it appears that [*here state concisely the grounds of the injunction,³ for instance, to enjoin taking letters from post-office, thus*] the defendants have conspired to defraud and have defrauded the plaintiff of a large sum of money, viz., \$16,600 or thereabouts, which has been forwarded by certain of the defendants to the others; that the letters containing the money or part thereof so fraudulently obtained, are still under the control of the postal authorities of the United States; that the defendants are irresponsible, and that if said letters are delivered to defendants or either of them, plaintiff will have no adequate remedy

¹ This injunction was sustained in *Zellenkoff v. Collins*, 23 *Hun*, 156. For another form, see Form No. 581.

² As to who may make this order, see note 2 to Form 516.

³ For other grounds, see Nos. 531, &c.

at law, it is, on motion of C. B., plaintiff's attorneys, the undertaking required by law having been filed,

ORDERED, that the defendants [*names*] be, and they and each of them, their agents, servants, attorneys and assignees, and each of them, are enjoined and prohibited [*state forbidden act, for instance, thus (for other Forms, see pp. 531-627)*] from asking, demanding, receiving or accepting from the postal authorities of the United States any registered letters addressed to said defendants or either of them; and more especially certain letters mailed between the day of , 18 , and the day of , 18 , both inclusive, addressed to [*names*] and purporting to come from [*name*] at Antwerp, Belgium, until the further order of the court.

And let the defendants, or their attorneys, show cause before [me, or one of the Justices of] this court [at a Special Term thereof, to be held] [at Chambers], at the County Court House, in the city of [Brooklyn], on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, why this injunction should not be made permanent [of which motion service of this order on or before the day of , shall be sufficient notice].

[*Authentication as in Form 491, p. 3, of this Volume.*]

[*If a court order take certified copy for service.*]

Form No. 520.

Injunction against municipal corporation forbidding them to authorize the construction of a city railroad.¹

[*Title of court and action.*]

[*Or may be a court order.*]

[*Recitals, &c., according to the case.*]

ORDERED, that the above-named defendants show cause before one of the Justices of the Supreme Court, at a Special Term thereof, to be held at the Court House, in the city of Brooklyn, on the day of , 18 , at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue in said action as prayed for

¹ From the case of *People ex rel.* disobedience of this injunction was punished. *Negus v. Dwyer*, 90 *N. Y.*, 402, where

in the complaint herein, and why said injunction should not be made perpetual.

And it is further ordered, that in the meantime and until the hearing and decision of said motion, the aforesaid defendants, The City of Brooklyn and the Common Council of the City of Brooklyn, and each and every member thereof, be and they are hereby enjoined and restrained, them and each of them, from voting, acting upon or considering in any form or manner or passing any resolution, ordinance, rule or regulation, altering or changing the route of the defendant, the Brooklyn Elevated Railway Company, in the city of Brooklyn, from the route designated in the charter of said company or its successors or any persons in interest, or giving or granting any privileges or franchise to said defendant railway company over, along, upon or through or across any of the streets, avenues, or places, or any portion thereof named in the resolution set forth in the plaintiff's complaint hereto annexed, or from voting or doing any act to override, or pass any resolution or rule to reconsider the veto or disapproval of the mayor of the city of Brooklyn, of the resolution aforesaid.

And it is further ordered, that said defendant, the City of Brooklyn and the Common Council thereof, and each and every member thereof, be and they are hereby restrained from giving, granting, or in any way or manner conferring on the said B. E. R. C., their counselors, attorneys, servants and agents, or the defendants, J. R. L. or S. M. S., as receivers of said B. E. R. C., or their associates, successors or assigns, their counselors, attorneys, agents, servants, or any person or persons whomsoever, the right, liberty, privilege or franchise of constructing or maintaining an elevated railway or any railway in any of the streets or avenues thereof mentioned in the aforesaid resolution.

And it is further ordered, that the said defendant, the B. E. R. C. and J. R. L. and S. M. S., its receivers, are and each of them is hereby enjoined and restrained from entering into or upon any of the streets or avenues named in the aforesaid resolution, for the purpose of constructing an elevated railway or any railway therein, and from digging up or subverting the soil, or doing any act in the streets or avenues aforesaid tending to encumber them or any part thereof, or to prevent the free and common use thereof, as the same have been heretofore enjoyed, until the further order of this court.

[Authentication as in Form 491, p. 3, of this Volume.]

[If a court order take certified copies for service.]

Form No. 521.

Injunction in aid of attachment, with order to show cause.

[*Title and recitals according to the case ; see Form 516, p. 49.*]

ORDERED, that the defendant Y. Z., his agents, attorneys and servants, be and each of them hereby are enjoined and restrained from receiving, and the sheriff of the [city and] county of _____, is enjoined and restrained from paying to them or any of them any of the proceeds of the sales of the property of said Y. Z., in satisfaction in whole or in part of the executions issued upon the judgments in favor of said [naming them], and let the said [names] show cause before [one of the Justices of] this court [at a Special Term to be held] [at Chambers] in _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why said injunction should not be continued, and why the proceeds aforesaid, otherwise applicable to the payment of said executions, should not be held by said sheriff until the final determination of this action. [Let service of this order to show cause on or before the _____ day of _____, be sufficient notice.]

[*Authentication as in Form 491, p. 3, of this Volume.*]

[*If a court order take certified copies for service.*]

Form No. 522.

Injunction against summary proceedings to dispossess; with order to show cause.

[*As in Form 516 to the *, continuing :*] and the plaintiff having given the undertaking required by law ; now, on motion of A. T. for plaintiff,

ORDERED, that the defendants, and each of them, and their and each of their agents, attorneys, solicitors, and deputies, and each and every other person or persons, on their behalf, or on behalf of any of such defendants, are hereby enjoined, restrained and forbidden from in anywise interfering with the peaceable use and enjoyment of the store, cellar and first loft of the dwelling and premises known by the street number as No. _____ street, in _____, and from dispossessing or evicting him therefrom

[not to exceed twenty days from date¹], and until the further order of this court in the premises; this preliminary injunction is granted and obtained on the ground that the District Court in the city of New York, for the Third Judicial District [of which the defendant G. W. P. is justice²], had no jurisdiction, nor had said [defendant] G. W. P., as justice or otherwise, jurisdiction [&c., &c., or other sufficient ground³].

And let the defendants or their attorneys show cause before me [or, this court] on the day of , 18 , at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, why this injunction should not be made absolute and permanent and continued during the pendency of this action, and why plaintiff should not have such other and further relief as may be just; and let service of this order and the papers on which it is granted, on [this day], be sufficient.

[*Authentication as in Form 491, p. 3, of this Volume.*]

[*If a court order take certified copies for service.*]

Form No. 523.

Injunction in action of interpleader, with order to show cause.*

[*Name of*] Court [*or if a court order*]

At a special term [dec., as in Form
No. 493, p. 4, of this Volume].

[*Title of action.*]

It appearing satisfactorily to me [or, to this court], by the verified complaint of A. B., verified , 18 , and the affidavits of M. N. and O. P., verified [the same day], that the plaintiff is in possession of certain personal property to which

¹ See Stay of Proceedings, Vol. I, p. 437.

² See, as to impropriety of enjoining the court, Vol. I, pp. 814, 218; and Tyler v. Hamersley, 44 Conn., 419.

³ Compare Sherman v. Wright, 49 N. Y., 227. N. Y. Code Civ. Pro., § 2265; Jessurun v. Mackie, 24 Hun, 624; Knox v. McDonald, 25 id., 268; and Abb. An. Dig. tit. Injunction; Matter of White, 12 Abb. N. C., 348; London v. Board of Supervisors, 24 Hun, 75; Armstrong v. Cummings,

20 id., 313. As to avoiding the objections by bringing an action for the determination of conflicting claims when the case is within the statute (N. Y. Code Civ. Pro., § 1638), see Stamm v. Bostwick, 30 Hun, 70.

In a doubtful case the rights of the defendant may be protected by ordering rents to be paid into court or deposited with a trust company, as a condition of granting the injunction. *Id.* See PAYMENT INTO COURT.

⁴ As to who may make this order, see notes 1 and 2 to Form 516, p. 49.

he makes no claim and in which he has no interest, and that said property is claimed by both of the defendants, and that the plaintiff does not know to whom to deliver it, and has no means of ascertaining, and it appearing that the defendant W. X. threatens to bring a replevin suit against the plaintiff; * and the plaintiff having given an undertaking as prescribed by law: Now, on motion of D. P. H., attorney for the plaintiff,

ORDERED, that the defendants and their and each of their assigns, agents, attorneys and servants be and each of them is enjoined and restrained from taking any proceedings against said plaintiff in relation to the property referred to in said complaint.

And, upon service of this order and copies of the papers hereinbefore mentioned on said defendants [three] days before the return day below mentioned, let said defendants show cause before [me—or, one of the judges—of] this court, at a Special Term thereof [at Chambers], at the Court House in the city of _____, on the _____ day of _____, 18____, at _____ o'clock A. M. of said day, or as soon thereafter as counsel can be heard, why the foregoing order or some order to be made of like purport and effect should not be continued until the final judgment in this action, upon plaintiff's delivering said property as the court shall direct; and until this order is modified let the same be in full force and effect.

[*Authentication as in Form 491, p. 3, of this Volume.*]

[*If a court order take certified copies for service.*]

Form No. 524.

Injunction ex parte, by judge or court, where the right depends on extrinsic facts:—General Form; with or without order to show cause why it should not be continued.¹

[*Title of*] Court [*or if a court order*]

At a special term [*&c., as in Form No. 493, p. 4, of this Volume.*]

[*Or if to enjoin a State officer*]

At a general term [*&c., as in Form No. 493, p. 5.*]

[*Title of action.*]

It appearing satisfactorily to me [*or, to the court*], by the

¹ As to who may make the order, see Notes 1, 2, to Form 516, p. 49.

[complaint herein verified the day of , 18 , and the] affidavit of A. B. and C. D. verified the day of , 18 , that the defendants during the pendency of this action are procuring or suffering to be done, acts in violation of the plaintiff's rights respecting the subject of this action and tending to render the judgment herein ineffectual, [*specify particulars briefly, for instance, thus* and that the plaintiff establishes an apparent right to or interest in the property of the partnership as set forth in the complaint which is in the possession of the defendants to this action, and that there is danger that a portion of the same will be removed beyond the jurisdiction of the court, or lost *[or substitute or add, that the defendant during the pendency of the action threatens or is about to remove or to dispose of his property with intent to defraud the plaintiff]*.

[*Continue as in Form 516, from the *, on p. 50.*]

Form No. 525.

Another Form ; Injunction against disposing of property to defraud plaintiff¹ (in divorce).

[*Name of*] Court [*or if a court order*]

At a special term [*&c., as in Form No. 493, p. 4, of this Volume*].

[*Title of action.*]

It appearing satisfactorily to me [*or, to this court*], by the [complaint herein verified the day of , 18 , and the] affidavit of A. B., verified the day of , 18 , that sufficient ground exists, to wit, briefly stated; that defendant has been conveying, and is about to convey away, lease, or otherwise dispose of his property in fraud of the rights and full claims and demands of the plaintiff, and in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment she may obtain herein ineffectual; and the defendant is about to dispose of his property with intent to defraud plaintiff; and that it appears from the complaint that the defendant has done, and committed, and is

¹ According to *Reubens v. Joel*, 13 N. Y., 488, such an injunction might be had in an action by a simple contract creditor, against a threatened *future* fraudulent disposal of property by the debtor.

The same facts are also a ground for arrest and for attachment in certain actions.

As to who may make the order, see Notes 1, 2, to Form 516, p. 49.

about to commit and continue his acts in relation to disposing of his property [leaving and separating from this plaintiff, his wife, without adequately providing for her support and that of his adopted child], during the pendency of this action, and thereafter, to the injury of this plaintiff: Now, on motion of A. T., attorney for plaintiff,

ORDERED, that the defendant, J. G., his agents, attorneys, and servants, refrain from, and he and they are hereby enjoined and restrained from conveying, transferring, and encumbering, or otherwise disposing of any of his or any real or personal property standing in his name or owned by him, wheresoever situated¹ [and he is likewise hereby restrained from interfering with this plaintiff in her peaceably occupying the house and premises No. , street, where she now resides, and of keeping and using as her own the furniture therein; and is enjoined against removing the same, or any portion therefrom; and is further ordered to refrain from abusing or maltreating this plaintiff], until the further order of this court, and in case of disobedience to this order, you will be liable to the punishment therefor so prescribed by law.

[*Authentication as in Form 491, p. 3, of this Volume.*]

[*If a court order take certified copies for service.*]

Form No. 526.

Another Form—against sheriff's interference with receiver.²

[*Name of*] Court [*or if a court order*]

At a special term [*&c., as in Form No. 493, p. 4, of this Volume.*]

[*Title of action.*]

A petition having been filed in this court by J. F. A., the

¹ In *Rossman v. Rossman* (*Mich.*, 1886), 29 *Northwestern Rep.*, 33, Morse, J., in a dissenting opinion, says: "It is intimated by Mr. Justice Sherwood, in his opinion in *Froman v. Froman*, 53 *Mich.*, 584; s. c., 19 *N. W. Rep.*, 193, that the injunction in a case like this does not stand in the way of the defendant's raising money by mortgage, if it is for the purpose of paying alimony. I cannot agree with him in such opinion."

The injunction in that case had been modified so as to enable defendant to sell for the purpose of raising money to pay plaintiff's alimony.

² As an injunction, this may be made by a judge or by the court. See note 2 to Form 516. But such an order as this is not subject to the statutory restrictions on injunctions generally. See *Woerishoeffer v. North River Constr. Co.*, 99 *N. Y.*, 398.

receiver in this action, asking for an order therein, restraining the sheriff of [the city and county of] , his agents, &c., from making any sale of certain property, viz.: being 602 boxes of electrotpe and stereotype plates upon which he claimed to have levied by virtue of an execution in favor of J. J. L. & Co., against one J. M., and also for an order that J. J. L. and W. J. D., copartners in business under the firm name of J. J. L. & Co., deliver up to the petitioner the stereotype and electrotpe plates so levied on, &c.; and an order to show cause having been made by me on the day of , 18 (in the above entitled action), and returnable on the day of , 18 , at a Special Term held at the Chambers of this court, and the same having been adjourned to this day, by consent, and the same coming on this day to be heard: Now, on reading and filing said petition, and the affidavits of J. R. M. and J. J. L., and on hearing T. D. R. on behalf of J. F. A., the receiver, and J. R. M. on behalf of J. J. L. & Co., and E. J. C., Esq., on behalf of the sheriff of the [city and] county of , no sufficient cause to the contrary being shown, ORDERED, that the said sheriff of the county of , and his agents and servants, be enjoined and restrained from making any and all sales of the property, viz., 602 boxes of electrotpe and stereotype plates which were formerly the property of J. M., and any and all property levied upon by him as alleged upon an execution in favor of J. J. L. and W. J. D. against J. M., and also from in any way interfering therewith, and that the sheriff deliver up possession forthwith of such property aforesaid as may be in his possession and control to said receiver.

And it is further ordered, that the said sheriff withdraw all levy from any property passing to the receiver.

[Authentication as in Form 491, p. 3, of this Vol.]

[If a court order take certified copies for service.]

Form No. 527.

Condition as to further security,¹ and speeding appeal.

This order is granted on condition (1) That the plaintiff execute and file, at the time of entering this order, an undertaking in the sum of dollars, with one or more sureties, to the

¹ See p. 258, of Volume I, and *Newton v. Russell*, 87 N. Y., 527, modifying 24 Hun, 40.

effect that the plaintiff will pay to the defendants so enjoined such damages, not exceeding the said sum of dollars, as they may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto, such undertaking to be without prejudice to an application on the part of the defendants to increase the said security still further in the event that the court of affirm the decree of the surrogate of the county of , made on the day of , 18 , as in the matter of the estate of A. H., deceased, and an appeal is taken from said order of affirmance to the Court of Appeals.

(2) That the plaintiff shall be prepared on his part to argue any appeal from this order at the next General Term of this court.

If the undertaking above required be not given, approved and filed within days, the said motion is hereby thereupon denied, and said temporary injunction shall thereupon cease and fall.

Form No. 528.

Injunction, after contested motion, on notice or order to show cause.

[*Name of*] Court [*or if a court order*]

At a special term [*dec., as in Form No. 493, p. 4, of this Volume*].

[*Title of action.*]

A motion having been heretofore made herein on behalf of the plaintiff for an order of injunction during the pendency of this action [*or, until the further order of the court*]; now, on reading [the complaint herein verified—and filed—the day of , 18], and the affidavits of M. N. and O. P., verified the day of , from which it satisfactorily appears to me [*or, to this court—recite ground of injunction, see Forms 516 and 524*]; and after hearing A. S., of counsel for plaintiff, for the motion, and T. G. S., of counsel for defendant, in opposition [*if the undertaking has already been given, add, and the plaintiff having given an undertaking as required by law in the sum of dollars¹*]: Now, on motion of W. I. W., attorney for plaintiff,

¹ If security not yet given is required, and it is desired to enter the order before giving it, omit this clause

and insert at the end of the above order a condition. See last Form.

ORDERED, that during the pendency of this action the defendants [*names*] and each of them and their agents, attorneys, and servants [and officers—*or*, deputies], be and hereby are enjoined and prohibited from [*continuing as in other Forms*]. And that the defendants [*names*] pay to the plaintiff's attorneys dollars costs of this motion.

[*Authentication as in Form 491, p. 3, of this Vol.*]

[*If a court order take certified copies for service.*]

Form No. 529.

Leave reserved, in denial, to apply again, or in a partial injunction to apply for more stringent injunction, on further evidence.¹

This order is without prejudice to any further application the plaintiff may be advised to make in respect to [*designating subject*] after [having access to and inspection of the books and papers of said].

Form No. 530.

Leave to defendant to move to modify or dissolve.²

Defendant has leave to move to vacate or modify this injunction on the same papers or on papers presented on his behalf, or both.

Form No. 531.

Order denying motion without prejudice.

[*Title of court and cause.*]

Upon reading [the complaint in this action, and affidavit of M. N.], and on hearing O. P. for the plaintiff,

ORDERED, that the plaintiff's motion for an injunction be denied, without prejudice to its renewal upon the same or other papers.

¹ See Vol. I, p. 191.

² See *N. Y. Code Civ. Pro.*, § 627.

III. STATEMENTS OF ACTS ENJOINED, TO BE INSERTED IN FOREGOING FORMS.

1. AS TO REAL PROPERTY.

532. *Against trespass to real property.*¹—From taking, or attempting to take or hold possession of the beach lands of the plaintiff at _____, county of _____, State of _____ (and which are hereinafter more particularly described), or any portion thereof; and from doing, or causing or permitting to be done, any act or thing whereby the rights of the plaintiff to the possession of the said lands may in any manner be impaired. [*Description.*]

533. *Against waste or alienation.*—From pulling down or otherwise injuring the buildings standing on the premises hereinafter described, or any part thereof, or from committing any waste, spoil, destruction or damages upon the said premises, and from executing or procuring to be executed any conveyance of the said premises, to any person or persons other than to the plaintiff, or as he shall direct.

The said premises are known as _____, and are bounded and described as follows [*description*].

534. *Against waste by cutting timber.*—From cutting down, felling, barking, or otherwise wasting or impairing any timber-trees, or underwood standing and growing on the premises hereinafter described, and from removing any such timber or wood, and from committing any further or other waste, spoil, destruction or damages in or upon premises below described, to wit [*description*].

535. *Against contractor using lands except for his work.*—From letting or attempting to let the lands hereinafter described, and from giving any license to enter upon such lands, or to erect any structures, or to place any materials, or to conduct any business thereon, or to interfere therewith, and from himself erecting any structures or conducting any business thereon, or interfering therewith otherwise than in fulfillment of his contract with plaintiff,² bearing date the _____ day of _____, 18 _____. But nothing herein contained shall prevent his use of the stable upon said lands in connection with and for the purpose of said contract, or the removal by him of said stable from said lands upon the completion of his said contract, or sooner if he so desires.³

536. *Against working a mine.*⁴—From working the veins or seams of coal, iron, stone, and other minerals lying in, upon, or under the [*designate lands*], and from digging, getting and carrying away, or selling, or disposing of the coal, culm and iron, stone, and other minerals produced therefrom.

537. *Against tenant of a mine.*—From carrying the brick-clay, or bricks, or tiles made thereof, off the land [*designating it*]; from working away sufficient barriers in the seam in the parts adjoining; from making a communication into adjoining collieries, and from draining any other mines, or permitting the same to be drained, by means of the demised colliery; and from permitting the communication complained of to continue open, and from permitting any water to flow through the same into the demised colliery; and from raising, by means of the shafts on the demised premises, any coal of any other proprietor; and from carrying the same over the demised premises.⁵

¹ From *Mulry v. Norton*, 100 *N. Y.*, 424.

² Compare note 2 on p. 38.

³ See also *Wheelock v. Noonan*, 53 *Super. Ct. (J. & S.)*, 286.

⁴ See *West Point Iron Co. v. Rey-*

mert, 45 *N. Y.*, 703; *Norton v. Snyder*, 2 *Hun.*, 82; *Howe v. Rochester Iron Mfg. Co.*, 66 *Barb.*, 592; *Thomas Iron Co. v. Allentown M. Co.*, 28 *N. J. Eq.*, 77.

⁵ This Form is sustained by *Earl* of

538. *Against taking possession of lands without payment.*¹—From entering upon any part of the lands hereinafter described, until the said defendants shall have paid the plaintiff dollars; and that if the said defendants shall not pay the said sum or dollars, being the residue of the purchase-money of said lands, by the said day of , then, and in such case the said defendants are hereby restrained from in any wise proceeding with the works of their railroad, in, upon, or over any part of the said lands.

The said premises are known as , and bounded and described as follows [*description*].

539. *Against taking rents and profits.*—From collecting, receiving, or intermeddling with the rents and profits of the premises known as , at , and described as follows [*description*].

540. *Against tax or assessment sale, &c.*²—From granting a declaration or declarations of sale of the real estate of said plaintiffs respectively below described, or of any part thereof, or doing any act or thing to enforce the payment or collection of those portions or any part thereof, of an assessment for dollars assessed upon the said real estate of said plaintiffs respectively, on or about the day of , 18 .

541. *Against removing fixtures.*—From removing or causing to be removed any [bricks, timber, building materials, copper pans, or fixtures] from the premises known as , at , and described as follows [*description*].

542. *Against nuisance—burning brick.*³—From burning or manufacturing, or causing to be burnt or manufactured, bricks on a piece of land or premises in the defendant's possession, situate in the town of , in the county of [*describe the premises by name or abutments, or otherwise; for instance, by abutments, thus: abutting on the east, south and west on the lands and premises of the plaintiff*], and so as to occasion damage or annoyance to the plaintiff as owner, or to his tenants respectively as occupiers, of a dwelling-house of the plaintiff [*describe the plaintiff's premises*], situate in aforesaid.

543. *The same—continuance of slaughter-house.*⁴—From occupying a building erected by the defendant Y. Z. on the north side of street, between the - and avenues, in the city of , as a slaughter-house, and from slaughtering any animals in such building, and from permitting the building to be used as a slaughter-house.

544. *Against noisy bells.*—From tolling or ringing the chapel-bell and the church-bells in the church or chapel at , or any of such bells, and from permitting the said bell or bells, or any of them, to be tolled or rung so as to cause or occasion any nuisance, disturbance or annoyance to the plaintiff and his family residing in his dwelling house at [*designating residence*].⁵

Mexborough v. Bower, 7 *Beav.* (29 *Eng. Ch.*), 127.

¹ See *Falker v. N. Y., West Shore, &c., Ry. Co.*, 17 *Abb. N. C.*, 279.

² See *Hurlburt v. Banks*, 1 *Abb. N. C.*, 157; s. c., 52 *How. Pr.*, 196; 67 *N. Y.*, 568; *Hassen v. City of Rochester*, 65 *N. Y.*, 516; rev'g 6 *Lans.*, 185; *Scott v. Onderdonk*, 14 *N. Y.*, 9; *Western R. R. Co. v. Nolan*, 48 *N. Y.*, 513; *Rome, Watertown, &c., R. R. Co. v. Smith*, 39 *Hun*, 332.

³ See *Campbell v. Seaman*, 63 *N. Y.*, 568; aff'g 2 *Supm. Ct. (T. & C.)*, 231; *Mulligan v. Elias*, 12 *Abb. Pr.*, *N. S.*, 259.

⁴ See *Dubois v. Budlong*, 15 *Abb. Pr.*, 445; s. c., 10 *Bosw.*, 700.

As to livery stable, see *Flint v. Russell*, 5 *Dill.*, 151; s. c., 8 *Cent. L. J.*, 68; 7 *Reporter*, 265.

⁵ This Form is from *Soltau v. De Held*, 2 *Sim., N. S.*, (42 *Eng. Ch.*), 133. See *Baltimore, &c., R. R. Co. v.*

551. *Against diverting a water-course.*—From diverting the water-course and water therein, on the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 29, township 77, range 36, in Cass county, Iowa, from its natural course, running in a south and southeast direction across said land, and from turning the water from said land through any artificial channel, or otherwise, on to the land of plaintiff, and from interfering with plaintiff in his lawful and proper efforts to return said water to the natural channel and course through said land of defendant and off plaintiff's land, and in confining said water to the original channel, on and over defendant's lands; and defendant is hereby enjoined from obstructing said original channel, and from keeping the same obstructed, and from so plowing or ditching his land as to cause the said water to leave the said original channel and flow on to or across said lands of plaintiff.¹

552. *Against erection, and to compel removal of buildings.*—From continuing the projected buildings, or commencing any other buildings whatever, on the garden or plot of ground described as follows [*description*], or any part thereof; and also from permitting such part of the said buildings as have been already erected on the said garden or plot of ground from remaining thereon.²

553. *Against authorizing the laying of a railroad in a city street.*—That an injunction-order may be issued by this court, directed to the said defendants, the mayor, aldermen, and commonalty of the city of _____, their counselors, attorneys, solicitors and agents, restraining and enjoining them, and each and every of them, and all others acting in aid or assistance of them, from granting or in any way or manner authorizing J. S. and others, the persons named in a resolution, a copy of which is hereto annexed, or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double or any track for a railway in Broadway, in the city of _____, between the South Ferry and _____ street, or any railway whatsoever in said Broadway, or of breaking or removing the pavement, or in any other manner to obstruct the said street, preparatory to or for the purpose of laying or establishing any railway therein.³

554. *Against laying a railroad in a city street.*—From entering into, or upon _____ street for the purpose of laying or establishing a railroad thereon, and from digging up or subverting the soil, or doing any other act in said street tending to incumber it, or to prevent the free and common use thereof, as the same has been heretofore enjoyed [until compensation shall have been made therefor, pursuant to law].

555. *Against building in violation of covenant.*—From erecting on the piece or parcel of land hereinafter described the double tenement, apartment or flat house now in process of construction partly thereon; and which said piece or parcel of _____ and is described as follows, to wit [*description*].⁴

¹ From *Benson v. Connors*, 63 Iowa, 670; s. c., 19 *Northwestern Rep.*, 812. In this case it was held that this language established the fact that a natural water-course existed, and did not refer merely to surface water. The court further say: "The injunction was not merely negative and prohibitory in its character, it was also affirmative and mandatory. It was the defendant's duty thereunder to cease the obstruction of the original channel of the water-course. This he could only accomplish by opening the original channel and causing the water to flow there-

in instead of flowing over and across plaintiff's land."

² This Form is from *Rankin v. Huskisson*, 4 *Sim.* (6 *Eng. Ch.*), 13.

³ This Form is sustained by *People v. Sturtevant*, 9 *N. Y.*, 263.

⁴ See note 1, p. 68.

See *Trustees of Columbia College v. Lynch*, 70 *N. Y.*, 441; rev'g 39 *Super. Ct. (J. & S.)*, 372. But compare a further decision in *Trustees of Columbia College v. Thacher*, 87 *N. Y.*, 311; s. c., 41 *Am. R.*, 365; 10 *Abb. N. C.*, 235; rev'g 46 *Super. Ct. (J. & S.)*, 305, and qualifying 70 *N. Y.*, 440.

556. *Another Form.*—From erecting upon [*here designate the land*] any brewery, or other building, except one private house or ornamental cottage, to be erected on [*designating what part*].¹

557. *Against change in use of premises.*—From using or occupying, or permitting to be used or occupied, the two buildings, or either of them, fronting on _____ avenue in said city, and situated on the easterly side of said avenue next north of _____ street, for any purpose or business other than as dwelling-houses; except that defendant is permitted, until the determination of this action, to use the same in the condition and arrangement, externally, as they were during the season of 18 __, and in the business then pursued therein.

Also from erecting, completing or maintaining upon said defendant's two buildings, or either of them, any structure or addition which shall materially change the exterior condition thereof, with the purpose of appropriating the same or any part thereof to the use to which said buildings were applied during the season of 18 __.

558. *Against contractor interfering with work after forfeiting his contract.*—From retaining possession of, or entering upon, or interfering with, the main line of the plaintiff's railway from H. to C., and the branch line of railway from the main line to the intended junction with the M. and L. Railway at T., and the works connected with the main and branch lines respectively; and from proceeding in any manner to construct, complete, or repair the works, by the contract of the _____ day of _____, 18 __, agreed to be constructed, completed, or repaired, or any of such works; and from removing, or causing, or permitting to be removed, the materials of any description being on or about the said lines of railway and works, or any part thereof respectively, or any of such materials; and from in any manner interfering with or disturbing the possession or use or enjoyment by the company, their officers, contractors, agents, servants, or workmen, of the said lines of railway and works, or any part of the same respectively; and from in any manner obstructing or preventing the company, their officers, contractors, agents, servants, or workmen, from constructing, completing, or repairing the said works by the contract agreed to be constructed, completed, or repaired, or any of such works; and from in any manner interfering with or preventing the company, their officers, contractors, agents, servants, or workmen, in the use or employment of the said materials in constructing, completing, or repairing the works, or any of them.²

559. *Against underletting.*—From granting or making, or contracting to grant or make, any leases, underleases, or assignments of any part of the premises [*designating them*], demised by A. B. to C. D. by a lease dated on, &c.³

560. *Against carrying on business forbidden by lease.*—From carrying on the auction business, or selling goods at public auction, in the store No. _____ street, in the city of _____; and from conducting therein any business other than the regular dry goods jobbing business.⁴

¹ See *Phenix Ins. Co. v. Continental Ins. Co.*, 14 *Abb. Pr.*, N. S., 266; 87 *N. Y.*, 400; *Wright v. Evans*, 2 *Abb. Pr.*, N. S., 308.

This Form is from *Maun v. Stephens*, 15 *Sim.* (38 *Eng. Ch.*), 377, in which case the words, "which shall be ornamental, rather than otherwise, to the surrounding property," were struck out as being too indefinite.

² This Form is from *East Lancashire R. R. Co. v. Hattersley*, 8 *Hare* (32 *Eng. Ch.*), 72.

³ As to apartment houses, see *Barrington Ap. Asso. v. Watson*, 38 *Hun.*, 545.

⁴ See *Howard v. Ellis*, 4 *Sandf.*, 369; *Dodge v. Lambert*, 2 *Bosw.*, 570; *Ambler v. Skinner*, 7 *Robt.*, 561; *Gillilan v. Norton*, 6 *id.*, 547. Compare

561. *Against preventing lessee of theatre from using it.*—That the defendants herein, their lessees, servants, agents, attorneys, and each of them, be and they hereby are restrained and enjoined from furnishing to any person or persons, firm or firms, corporation or corporations, and from causing, aiding in, consenting to, or allowing and abetting, at or within the building known as the “_____,” in the city of _____, the exhibition of any interlude, tragedy, comedy, opera, ballet, play or minstrelsy, other than that given by the plaintiff’s combination, known as The _____ Company, during the week commencing _____, 18____, and that they be also enjoined and restrained from interfering in any manner with the rights of the plaintiff and his said [name of troupe] to take possession of and play said company in said _____ during said week.¹

2. AS TO PERSONAL PROPERTY.

562. *Against transferring negotiable paper.*—From indorsing, assigning, or in any way transferring [here describe the paper in question, for instance, thus:] a bill of exchange drawn by M. N. upon the above-named A. B. for _____ dollars, bearing date on or about the _____ day of _____, 18____, and payable _____ months after said date, and accepted by said A. B. [or thus, the 2,286 first mortgage bonds of the D. & N. O. R. R. Company, numbered from 1 to 2,286, inclusive, or 25,400 shares of the capital stock of the said D. & N. O. R. R. Company, or any part thereof, assigned and transferred by the defendant the D. & N. O. Railway Construction Company to the defendant the M. Trust Company].

563. *Against transfer of stock.*—From transferring, assigning, hypothecating, incumbering or in any manner disposing of or interfering with the _____ shares of the stock of the _____ Company [mentioned and referred to in the complaint herein²] [except to the plaintiff], and from making any transfers thereof on the books of said _____ Company or otherwise [except to the plaintiff] [and the said company are, in like manner, restrained from permitting such sale, transfer, except as aforesaid], and from incumbering the same—and from paying any dividend thereon [except to the plaintiff] without the order of this court.

564. *Against transferring assets.*—From selling, assigning, transferring, pledging, or otherwise disposing of any of his property [except what is by law exempt from execution³], or from in any manner interfering therewith⁴ [and from confessing judgment, or giving preference to any other creditor, over this plaintiff] until the further order of the court.

565. *Against assigning, &c., patents.*—From making any transfers or assignments of, or granting any licenses, rights or privileges secured by or under the letters patent mentioned in the complaint,⁵ and known as the _____ patents, or granting any licenses or rights of any kind for the use of the invention covered by said patents, or making any contracts therefor [in the name of the _____ Company, or as directors thereof] in any manner whatsoever, or in any way incumbering or interfering therewith, until the further order of the court.

Trenor v. Jackson, 15 Abb. Pr., N. S., 115; s. c., 46 How. Pr., 389; Agate v. Lowenbein, 4 Daly, 62.

¹ Granted in 41 Hun, 542.

² It is better to describe it than to refer thus to the complaint. See last Form.

³ If the ground of injunction is fraud on creditors, this exception is proper.

⁴ An offer to sell goods is not a violation of an injunction against the sale or parting with the control of them, but it may be good cause for appointing a receiver. Tyler v. Poppe, 4 Edw., 430.

⁵ It is better to identify them. See Form 573.

566. *Against removing chattels.*—From removing or interfering with any property of the plaintiff or the firm of Y. Z. & Co., contained in the store No. _____ street, in the city of _____, or interfering in any way with the plaintiff or his said firm in the peaceable enjoyment and possession thereof.¹

567. *Against receiving moneys from the sheriff.*—From receiving or collecting from the said sheriffs of _____ county, Pennsylvania, any part of the proceeds in their hands of a sale of [*designating assets*] or from preventing directly or indirectly the said proceeds from remaining in the hands of said sheriffs respectively until the trial and determination of this action.

But nothing herein contained shall be held or be taken in any manner to impair or affect any lien which the defendants may have acquired by virtue of their said actions or proceedings in Pennsylvania, it being the purpose and intent of this order that, until the trial and decision of this action, the parties should remain in precisely the same condition in respect to said facts that they were in at the time of the argument of this motion.²

3. AS TO PRODUCTIONS OF MIND OR ART.

568. *Against publishing book.*—From printing, publishing, or causing or being in any way concerned in the printing, publishing, or selling, or exposing to sale, or otherwise disposing of, any copies of [*designate book*], or any other book purporting to be or resembling the book so printed, published, and sold by or for plaintiff [other than and except plaintiff's own selection, printed and published by plaintiff's order, and for plaintiff's use and benefit].

569. *Against imitating plaintiff's publications.*—[From publishing, issuing, circulating, selling, or exposing for sale, the books or pamphlets referred to in the complaint in this action as having been published, issued, sold and exposed for sale by the defendants,³ and thus using and violating the trade-mark of plaintiffs, as set forth in said complaint, and from publishing, issuing, circulating, selling or exposing for sale any imitation or colorable imitation of the books or pamphlets set forth in said complaint, and thus using and violating the trade-mark of plaintiffs, as set forth in said complaint; and from publishing, issuing, circulating, selling or exposing for sale, any imitation or colorable imitation of the books or pamphlets as set forth in said complaint, and thus using and violating said trade-mark, as in said complaint alleged, and⁴] from using the name of "National System of Penmanship" in connection with any books or pamphlets published or sold by said defendants, or any of them, resembling the "Payson, Dunton & Scribner's National System of Penmanship," and from [issuing, circulating, selling or exposing for sale, any books or pamphlets, and⁴] using any trade-marks so contrived or expressed as by colorable imitation or otherwise to represent that the books and pamphlets published and sold by defendants, or either of them, are the same as those published and sold by plaintiffs called the "Payson, Dunton & Scribner's National System of Penmanship."

570. *Against sale or disposition, but not against use of plates, &c., for publication.*⁵—From assigning, transferring, selling or disposing of the plates,

¹ If the injunction does not relate to all the property on the premises, it is better and usually necessary to specify what is covered.

² See *Warner v. Jaffray*, 96 N. Y., 248.

³ Better describe them.

⁴ The clauses in brackets indicate

relief which can only be sought in courts of the United States. *Potter v. MacPherson*, 21 Hun, 559. Compare *Isaacs v. Daly*, 39 Super. Ct. (J. & S.), 511.

⁵ See *Stearns v. Sherman*, 42 Hun, 659; s. c., 4 N. Y. State Rep., 507.

illustrations and material used for and in the publication of the books, and all the property, assets, books and accounts of the Publishing Company, and from removing the said plates, illustrations, material, property, assets, books and accounts from the office of the company in the city of New York during the pendency of this action.

571. *Against representation of drama.*¹—From further representing or exhibiting or using the play or drama or composition entitled "Taken from Life," the scenes, incidents, stage business, stage appurtenances, cast of characters, the individualities thereof, dress, deportment of the *dramatis personæ* and the stage settings of the plaintiff's said play or drama, and from representing, exhibiting, or performing, or causing to be represented, exhibited or performed, any play or drama under the title of the plaintiff's play or drama hereinbefore mentioned, or any simulation thereof; and from performing, exhibiting or representing, or causing to be represented, exhibited or performed any play or drama or the scenes, incidents, stage appurtenances, cast of characters, the individualities thereof, or the dress or deportment of the *dramatis personæ*, similar to the plaintiff's said play or drama, or the scenes, incidents, stage business, stage appurtenances, cast of characters, the individualities thereof, or the dress or deportment of the *dramatis personæ* of the plaintiff's play or drama composition and origination.

572. *Against publishing private letter.*²—From printing, publishing, circulating, or in any manner, either by writing or otherwise, making public a letter written by M. N. on or about the day of , 18 , and forwarded to O. P. at , or any part thereof.

573. *Against utilizing patents.*—From manufacturing, doing business under, using, making any contract for or in relation to the employment of licensing, leasing, selling rights under, receiving, selling, assigning or transferring or otherwise disposing of the patents set forth in said affidavit, viz.: Patents numbers to , both inclusive, or any of them, and the rights accruing thereunder to some or any other person or persons or body corporate other than plaintiff, and from taking any proceedings thereunder, in any way or ways whatsoever [and from putting up, or in use, the implements, machines, contrivances, inventions, appliances or any of them, or the parts of them, or any of them, pertaining to said patents and systems in any way whatsoever.³

574. *Against resuming practice, after having sold business.*⁴—From practicing as an attorney or solicitor in any part of , either in his own name

¹ Sustained in *Colville v. McDonough*, 16 *Weekly Dig.*, 189.

² See *Woolsey v. Judd*, 4 *Duer*, 379; s. c., 11 *How. Pr.*, 49.

³ In *Continental Store Service Co. v. Clark*, 100 *N. Y.*, 365, the clause here indicated in brackets was struck out on appeal, and the decision in this respect affirmed on the ground that it exceeded the jurisdiction of a State court.

⁴ In *Mogford v. Courtenay* (*Chan. Div.*, 1881), 29 *Weekly Rep.*, 864.

Fry, J., granted an injunction restraining the defendant from the issue of the circulars soliciting trade of customers of his firm when its term was about to expire, and also restraining him, his partner, servants and agents, from applying to any person

who was a customer or correspondent of the late firm prior to the 30th of June, privately by letter, personally, or by traveler, asking such person or correspondent to continue to have dealings with the defendant, or not to deal with the plaintiff.

He said, "I enlarge the words which were used by the late Master of the Rolls in *Labouchere v. Dawson*, 13 *L. R. Eq.*, 322; from "customer," to "customer and correspondent," because it appears that a considerable part of the value of this trade depends, not upon persons who are distinctly customers, but upon agencies and correspondents; and, therefore, as this same principle applies to both, I think it only just to extend it."

or in the name of any other person ; and from endeavoring to induce any persons who were the clients of B. & C. to cease or abstain from employing A. & B. as their attorneys or solicitors.

575. *Against Disclosure of secrets by clerk.*—From taking or retaining any copies of, or extracts from, any of the books, papers, documents, or extracts of the above-named A. B. & Co., or either of them, in the possession, custody, or power of the defendant; and from communicating the said particulars, or the contents thereof, or any of the information therein contained, to any person or persons whatever; and from communicating any of the information possessed or acquired by him relating to the said copartnership, or the affairs or secrets thereof, or the clients thereof, by means of his having been employed as accountant or clerk by said A. B. & Co., and having access to said books, papers and documents.

576. *Against use of a secret in trade, by one who acquired it in violation of contract.*—From selling, or causing or procuring to be sold, under the title and designation of “ Universal Medicine,” or “ Vegetable Universal Medicine,” any medicine made or manufactured by the defendant, or by or under his order or direction; and from making or compounding any medicines according to the secret in the complaint mentioned, &c.; and from in any manner using the secret of compounding the said medicines, or any part thereof.¹

577. *Against infringing patent.*—From making, using or selling and also from procuring to be made, used or sold any in accordance with, in whole or in part, the invention described and claimed in the letters patent of the United States issued on the day of , 18 , to the complainant herein, Rafael Pentlarge, for a certain “Improvement in ”—said letters patent being distinguished as number , a copy of which said description and claim is hereunto annexed, together with a copy of the drawings appertaining thereto, all of the same being made a part of this order.

578. *Against infringement of trade-mark.*—That the defendant R. C., his clerks, servants, agents and consignees be and they are hereby restrained and prohibited, until the further order of the court, from selling or offering for sale or otherwise disposing of or advertising any needles covered by or bearing upon them or the packages in which the same are put up, the following labels:

[Specimens of defendant's infringing labels pasted in here.]

And the said R. C., his clerks, servants, agents and consignees are hereby restrained and prohibited until the further order of the court, from selling needles bearing labels which shall imitate or resemble the following labels:

[Specimens of the plaintiff's labels pasted in here.]

And the said R. C., his clerks, servants, agents and consignees, are hereby restrained and prohibited, until the further order of the court, from selling or otherwise disposing of needles enclosed in packages, bearing red labels or any other labels upon which the words “English” or “English Needles” are so printed or stamped as to form or be a colorable imitation of the names and words J. English & Co. or John English & Co., printed or stamped upon the labels of the plaintiffs.

¹ This Form is from *Morison v. also Tabor v. Hoffman*, 41 Hun, 5, Moat, 9 Hare (41 Eng. Ch.), 241. See and cas. cit.

579. *Another Form.*¹—From selling or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day & Martin, in bottles, having affixed thereto such labels as are mentioned in the complaint,² or any other labels, so contrived or expressed as, by colorable imitation or otherwise, to represent the composition or blacking sold by the said defendant to be manufactured and sold by the plaintiff; and from using trade-cards, so contrived or expressed as to represent that any composition or blacking sold, or proposed to be sold by the defendant, is the same as that manufactured or sold by the plaintiff.

580. *Another Form* ³—From preparing, putting up, selling or offering to sell or dispose of any article of polishing powder or similar article under, by or with the name or designation of Silicon, or any name or designation of which said word Silicon is a part; or from in any manner affixing, applying or using said word Silicon to, on or with any article of polishing powder or similar article, as a whole or any part of the name or designation thereof; or from in any manner using on or with any article of polishing powder or similar article, any label, wrapper, box or package, having thereon said word Silicon, or any colorable imitation thereof, as the whole or any part of the name or designation of such polishing powder or other article; or from in any manner representing by any name, label, wrapper, circular or otherwise, that the defendants' article of polishing powder or any other article (not the plaintiff's article) to be the plaintiff's article or the same as the plaintiff's article; or from in any manner using in the manufacture, sale or disposition of any article of polishing powder or similar article any name or label, in imitation of the plaintiff's said name and label; or any label like or similar to the labels of the defendants above described in the complaint herein.⁴

581. *Another Form.*—From stamping, marking, printing, affixing, applying, or in any manner using, on, for or with, any plaster or similar article, or any box, package, label, trade-circular or advertisement used thereon, therewith, or therefor, the words "Allcock's," "India Rubber," or "Porous," or either of said words, or any colorable imitation thereof; as the name or designation, or any part of the name or designation of any such plaster or similar article, and from shipping, supplying, or disposing of, or advertising, or offering to sell or dispose of any article of plaster or similar article (not the plaintiff's article), under, by, or with any name or designation of which either of said words "Allcock's," "India Rubber," or "Porous," is the whole or part, and from using on, with or for, any article of plaster or similar article, any label, wrapper, or box, with any circle, device, like or similar to that now used on the defendant's plaster, and described in the complaint herein,⁴ or any statement or representation like the following, viz.:

"Made after
 "Allcock's Patent,
 "No. 3985,
 "March 26, 1845,"

Or any circular like "Exhibit F," annexed to said complaint,⁴ or any name, label, wrapper or boxes like or similar to those of the plaintiff, or in any manner representing or holding out to the public that defendant's plasters, or any plasters, not the plaintiff's plaster, are the plaintiff's plasters.

¹ Sustained by *Croft v. Day*, 7 *Beav.*, 84.

² See note 2, p. 38, and the preceding Form.

³ From *Electro-Silicon Co. v. Hazard*, 29 *Hun.*, 369.

⁴ See note 2, on p. 38, and Form 578.

582. *Against infringement of name, and taking letters from post-office.*¹—From interfering in any way with the business carried on by the plaintiff at No. street, in the city of , or with plaintiff's customers, and from circulating or distributing to the public or otherwise, the circular annexed to the complaint or any other circular, to the effect that The Otto Stietz New York Glass Letter Company has removed its place of business from street in said city to street, or elsewhere, or to any similar effect, and from publishing the advertisement annexed to and described in the complaint herein, or any other advertisement, to the effect that the defendants have bought out or become entitled to the business or the enjoyment of the name of The Otto Stietz New York Glass Letter Company, or that the defendants have succeeded to the rights of said company in any way or manner, and from publishing any other advertisement calculated to injure the plaintiff in its business aforesaid, and from using plaintiff's name or trade-marks or patents, and from holding themselves out in any way to the public as entitled to make use of plaintiff's name, trade-marks, patents or business, or as being proprietors thereof or successors thereto, and from diverting in any way or receiving or taking out the post-office or meddling with letters or other mail matter addressed to The Otto Stietz New York Glass Letter Company, or in any other way intermeddling with plaintiff's business, name, trade-marks, patents or property.²

Ordered further, that a copy of this order be served upon the postmaster of the city of , as evidence that the plaintiff herein, doing business at No. street, in the city of , is entitled to receive and to have delivered to it, all letters and mail matter addressed to The Otto Stietz New York Glass Letter Company, until the further order of the court herein.

583. *Against infringement of sign, &c.*³—From displaying upon their signs, or in any way whatever, the words "Established 1780" and from using the same or the trade term "1780" upon any letter or bill heads, circulars, trade-marks or labels, and from making any use of the same in their business, and from representing in any way, by any combination of words, letters, or figures, that the firm of the defendants, whether under the name and style of C. & M., or C., M. & Co., was founded in the year 1780, and from representing to the public by oral statement, or in writing, or by signs, or in printed papers, or otherwise, that such firm or firms was or were established in 1780, and from any act calculated to make the public believe that the defendants are the successors to the business or the firm founded by C. F. in the year 1780.

584. *Another Form.*—From running, or in any manner using or causing to be used, for the conveyance of passengers, any omnibus, having painted, stamped, printed, or written thereon the words or names, "London Conveyance," or "Original Conveyance for Company," or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or to be a colorable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs.⁴

¹ For another Form on the latter point, see Form No. 519, and *Zellinkoff v. Collins*, 23 *Hun*, 156.

² In an unreported case the court ordered that the mail matter might be delivered to the clerk of the court to be opened by him, and such as relates to the business of the late firm to be delivered to plaintiff, and such as relates to

the defendant's private business to be delivered to defendant.

³ From *Hazard v. Caswell*, where this Form was settled by Westbrook, J., though the judgment was reversed on the merits in 93 *N. Y.*, 259.

⁴ Sustained by *Knott v. Morgan*, 2 *Keen* (15 *Eng. Ch.*), 213. See also *N. Y. Cab Co. v. Mooney*, 15 *Abb. N. C.*, 152.

4. PARTIES IN PECULIAR RELATIONS.

585. *In creditor's actions.*¹—From selling, assigning, or transferring, receiving, collecting, discharging, or incumbering, or in any manner disposing of or interfering with any property, real or personal (not exempt by law from execution), things in action, or other equitable property or interests, of any kind whatever, held or controlled by him,² or by any other person held in trust for him or for his use and benefit, or in which he has any interest whatever. [And where the complaint seeks to reach the surplus proceeds of a trust beyond what is necessary for the debtor's support, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the said defendant, add: And said defendant and his agents are further enjoined from receiving or using, or suffering to be applied to his use, any more of [here designate fund or income], than the [annual sum or rate of dollars.³]

And said defendant and his agents are further enjoined from making any assignment of his property, and from confessing any judgment, for the purpose of giving preference to any other creditor over the plaintiff, or from doing any other act or thing to enable other creditors or persons to obtain any portion of his said property.⁴

586. *Against carrying out void assignments.*—That the defendant S. T. be restrained from paying out any money collected by him as assignee of said A. D. F. to the parties named in the assignment to him, as preferred or general creditors, and that said A. D. F. be restrained from executing any new assignment or making any disposition of the property of [the firm of F. & E., of], or interfering with the same in any way whatever.

587. *Against paying or receiving proceeds.*—And it is further ordered, that the defendant The Mutual Life Insurance Company of New York, be and it is hereby enjoined and restrained from paying or delivering to the defendant Y. Z., or to any person or persons whomsoever, except by order of this court, any money, property or interest of any kind or nature whatsoever that may be due and owing to said defendant Y. Z. by said defendant The Mutual Life Insurance Company of New York, or that may arise out of, or accrue by reason of the action now pending in the court of , brought by the de-

¹ See on this subject note in 61 *Abb. N. C.*, 20.

² Under the ordinary injunction in a creditor's suit, it is a contempt to collect money earned before service of the injunction and apply it to debts contracted for family supplies. *Taggard v. Talcott*, 2 *Edw.*, 629.

But it seems that the debtor would not be prevented by it from proceeding to judgment, in a suit commenced before the injunction. *Parker v. Wakeman*, 10 *Paige*, 485. Nor is his act, in suing for a trespass, of itself a breach of the injunction. *Hudson v. Plets*, 11 *id.*, 480 (see a further injunction in next Form but one).

So, too, merely carrying into effect, by procuring novation, a previous assignment of a right of action, is not a breach of the injunction in a creditor's suit. *Richardson v. Rust*, 9 *Paige*,

243. To similar effect is *Ireland v. Smith*, 3 *How. Pr.*, 244.

³ The injunction should go without the qualification as to trust funds created by or proceeding from others, mentioned in 2 *R. S.*, 174, § 38 (now *N. Y. Code Civ. Pro.*, § 1871, &c.); or it should contain a provision specifying the portion of the trust fund which the judgment-debtor may use for his support. *Rider v. Mason*, 4 *Sandf. Ch.*, 351. See the statutes contrasted in 16 *Abb. N. C.*, 34.

⁴ As to the necessity of a special clause restraining confession of judgment, &c., compare *McCredie v. Senior*, 4 *Paige*, 378; *Ross v. Clusman*, 3 *Sandf.*, 676; *Fenner v. Sanborn*, 37 *Barb.*, 610.

See also as to its effect, *O'Callaghan v. Fraser*, 37 *Hun*, 483.

fendant Y. Z. against The Mutual Life Insurance Company of New York, to recover on a certain policy of life insurance [and which is more fully set out and described in the complaint herein¹], until the further order of this court.

588 *Against husband's interference with wife's property.*—From in any manner interfering with any and all the property of the plaintiff of each and every name, nature and kind, and from collecting or receiving or attempting to collect or receive, and from asking, suing and demanding from any and all person and persons and bodies corporate and politic, any and all sum or sums of money, rents, issues, income, profits, stocks, bonds, shares, debts, dues, demands, bills, notes, or other evidences of indebtedness belonging to the plaintiff, and from in any manner molesting, hindering or interfering with the plaintiff's possession and control and receipt and care, custody and management of any of the above or any goods, wares, chattels and merchandise and property of what nature and kind soever now due, owing or belonging to her, or in which she has any legal or equitable right or interest, or hereafter so to be or become, and from squandering, expending or disposing of any and all moneys, stocks, bonds, shares, or other values or valuables now in his hands and belonging to the separate estate of the plaintiff at or at any time since her marriage, or purchased by him with moneys derived from the separate estate of the plaintiff at any time since her marriage, or the rents, increase, issues or profits thereof, and from disposing of or destroying any and all deeds, documents and other instruments in writing belonging to the plaintiff, or relating to her separate estate.²

589. *Against entering confession of judgment.*³—From entering up judgment on a statement of confession [or, a warrant of attorney], executed by the plaintiff A. B. to the defendant Y. Z. [or otherwise naming the parties], and dated on or about the day of , 18 , and from commencing any proceedings thereon.

590. *Against disposing of partnership assets.*—From selling, assigning, transferring, receiving, collecting, discharging or encumbering, or in any manner disposing of or interfering with any of the property, either real and personal, or things in action, or interests or rights of any kind, of or belonging to the firm of B., S. & Co., a copartnership existing between the parties to this action [or to any partnership in which both the said parties ever had or now have any interest], whether standing in the name of such copartnership or individuals belonging to the same, and from doing or suffering to be done any act or thing to enable any person to obtain the said property or any portion thereof.

But nothing herein contained shall prevent the payment of debts of the firm on contract which were already accrued and payable before the day of , 18 .

591. *Another Form; where dissolution is not sought.*—From applying any of the moneys and effects of the copartnership now existing between plaintiff and defendant, otherwise than in its ordinary business, and from obstructing or interfering with the plaintiff in the exercise and enjoyment of his rights under the partnership articles.

¹ It is better to identify it sufficiently by description here.

² Sustained in *Seabra v. Seabra, N. Y. Daily Reg.*, April 11, 1883 (in wife's action against husband for an

accounting); s. p., *Holmes v. Holmes*, 4 Barb., 295. Compare *Noe v. Noe*, 13 Hun, 436. See also Forms 525 and 621.

³ See also Form 585.

592. *Against interference with fund to be reached.*—From making any further sales of the [*designate property*], or from transferring or disposing of in any way, any of the proceeds thereof, or from withdrawing from the banks or deposit companies hereinafter named, any of the moneys deposited in them respectively, by or in the name of any of the said defendants, or from withdrawing from said banks or safe deposit companies, any of the bonds, mortgages, or other evidences of debt now deposited by any of said defendants in said banks or deposit companies.

And the [*naming banks, &c.*] are hereby respectively enjoined and restrained from paying out any of the moneys deposited with them respectively in the names of any of the defendants in this action, to wit [*naming them*], or delivering up to any of said defendants, or to any person, any of said bonds or mortgages, or other evidences of debt held by them, said banks or deposit companies, for or on account of any of said defendants.¹

593. *Against assignee for benefit of creditors making payments.*—From making any payment out of, or transfers of any portion of the property assigned to the defendant W. X. by the defendant Y. Z. on the day of , 18 , or the proceeds thereof to or for the benefit of any creditors of the said defendants Y. Z. or of the late firm of Y. Z. & Co.

594. *Against bank paying over deposit made by agent.*—From paying over to any person whatever, the money or any part thereof, deposited in said bank on the day of , 18 , to the credit of S. V., by the said V., or by J. B., or by either or by both of them, of which money there now remains in said bank, to the credit of said V., as appears to me, the sum of dollars [and which was the avails of a certain check drawn upon the Bank, to the order of and endorsed by the said J. B.], until the further order of this court in the premises.

595. *Against the reorganization of a corporation.*²—That the said corporation, and the agents and officers thereof, be restrained from conveying, assigning, or making over the real and personal property of the , or any part thereof, to any person or persons, upon and for the purposes [*designating those intended*], or any of such purposes, or in any other manner, in furtherance of the intention of the society to surrender the existing charter; and from affixing the common seal of the society to any deed or instrument for such purposes, or any of them; and from surrendering the existing charter, and affixing the common seal of the society to any deed or instrument for that purpose; and from accepting a new charter, or any charter, inconsistent with the existing charter of the society.

596. *Against preventing use of records.*—From retaining possession, control and custody, and preventing the secretary of the defendant corporation from assuming and having such possession, custody and control of all books, papers, contracts and documents of the corporation, pursuant to the by-laws [excepting such as pertain to the office of treasurer], and from having possession, custody and control, and preventing the said secretary of the defendant corporation from assuming and having such possession, custody and control of the seal of said corporation and the sole right to affix the same to all documents of said corporation requiring a seal; and from assuming to perform any of the duties pertaining to the office of secretary and treasurer; and from preventing said secretary and treasurer from performing said duties and all and each of them, as are required of them by the by-laws of said corporation.

¹ See, as to action to establish a trust in property bought with funds embezzled, *N. Y., &c., Ferry Co. v. Moore*, 18 *Abb. N. C.*, 106.

As to what is a violation, see *Stubbs v. Ripley*, 39 *Hun*, 626.

² See *Blatchford v. Ross*, 54 *Barb.*, 42; s. c., 37 *How. Pr.*, 110; 5 *Abb. Pr.*, *N. S.*, 434.

597. *Against creating or filling vacancies.*—From declaring or adjudging the office of [director] now filled by [the defendant] W. X. vacant, and from filling such alleged vacancy, or removing the said W. X. as [director], or preventing or impeding him in acting as such.¹

598. *Against holding corporate election.*²—That the Company, of , its stockholders, officers and agents, and each and every of them be and they hereby are enjoined, restrained, and forbidden from holding and causing to be held any election of directors of said company, until the further order of this court in this action.

And it is further ordered, that the defendants W. X. and Y. Z., inspectors of election, and each of them, do desist and refrain from holding any election of directors of said company, until the further order of the court, and that the defendants John Doe and Richard Roe, and any other person or persons that may be appointed as such inspectors, as well as said inspectors already appointed, and each of them, do desist and refrain, until the further order of this court, from holding any such election, and from receiving, counting or canvassing any votes which may be cast at any election, or attempted election, for directors of said company.

599. *Against voting on stock.*—From voting or attempting to vote at any meeting of the stockholders of the Company of , or at any election to be held by the said company or its stockholders, for directors, inspectors, or other officers, upon any of the shares of stock represented by certificates Nos. to , or upon any shares of stock in the said company in excess of the shares which were issued prior to the issue of the shares hereinbefore particularly mentioned.

600. *Against giving proxy.*—From giving any proxy or power to any other person authorizing such shares, or any part thereof, to be voted on at any such meeting as aforesaid.

601. *Against inspectors receiving votes.*—And the defendants E. A. and H. R. S. are hereby restrained and enjoined from receiving, accepting, taking or granting, as inspectors of election or otherwise, any vote or votes cast or offered for the said R. A. or any one else on said shares of stock issued to said R. A. as aforesaid; and from recognizing any transfer upon the transfer-book of said corporation, of any of said stock so issued or assumed to have been issued to said defendant R. A., as aforesaid, which said shares are respectively represented by certificates numbered .

602. *Against issue or transfer of stock, &c., to an officer.*—From voting, assigning, transferring or setting over to said R. A. any other or additional stock, excepting for cash at the par value thereof, and from voting, assigning, transferring and setting over to any other officer or director of said company any stock, excepting for cash at the par value thereof.

And the defendant R. A. is hereby enjoined and restrained from selling, transferring, assigning or disposing of any part or portion of the shares given and transferred, or purporting to have been given or transferred, at any time prior to , 18 , or any part or portion of the shares given or transferred to the said R. A., or purporting to have been given or transferred to him on the day of , 18 , or at any time thereafter, by virtue of any vote, resolution or action of the board of directors of the defendant corporation, or otherwise, or from suffering, causing or permitting any of the said shares of stock to be sold, assigned, transferred or set over to any person or persons whatever; and from voting on said stock or any portion

¹ See *Ranst v. N. Y. Coll. of Vet. Surg.*, 4 *Hun.*, 620; *Bergh v. Busteed*, 4 *Hun.*, 661.

² See *People v. Alb., &c., R. R. Co.*, 57 *N. Y.*, 161; 5 *Lans.*, 25; 7 *Abb. Pr.*, *N. S.*, 265.

thereof at any meeting of the stockholders, or at any election held by the said company or its stockholders; and from offering to vote upon the same at any such meeting or election; and from granting proxies to any person to vote upon said stock, or any of it, to be transferred on the transfer book of the defendant corporation; and from recording or permitting to be recorded in said transfer stock-book the issuance of said stock to said R. A.

603. *Against mortgaging railroad.*—To secure the complainant, and at the same time not to embarrass or obstruct the building and completion of the road, it is further ordered that the said railroad company and its officers be, and they are hereby temporarily restrained from executing any mortgage, or otherwise incumbering the said road, so far as it is now completed, to wit, from to , without the order of the court first obtained; and also from selling, leasing, incumbering or mortgaging the existing rolling stock of the said company, or from removing the said rolling stock off the road or out of the [district]; which said prohibitions shall apply not only to the said railroad company and its officers, but also to the said U. V. and W. X., and all the other defendants, until further order.

And the said defendants and each of them are hereby restrained from issuing any further bonds under the mortgage to M. N., without a previous application to the court for that purpose; and the said and are hereby restrained until further order from selling, incumbering or removing beyond the district or usual place of business or operation of the company any of its existing property, and this prohibition shall apply to U. V. and W. X. and the other defendants; and the said company shall within days file a bond with sufficient security in the sum of \$, conditioned that the obligors will pay any sum which may be finally decreed to the said A. B. in respect to and his claims concerning the same; said bond to be approved by the clerk and with him filed.

604. *Against issuing corporate bonds.*¹—From issuing any bonds or other evidences of indebtedness of the company, whether secured by mortgage or not, and from delivering the same to said defendants or either of them, or any other person or persons. Also from issuing or delivering any bonds or other evidences of indebtedness of said company to any or either of said defendants, or in any way appropriating the same or the proceeds thereof to the use of said defendants who claim to be directors of said company as in the complaint alleged, or any of them.

605. *Against paying interest on bonds.*—From ascertaining, determining, declaring or paying any interest whatever upon any of the (so-called) income bonds of the Company.

606. *Against officers of a corporation executing a contract.*—From performing, executing, carrying out, fulfilling, ratifying or approving the contract or agreement made or purporting to be made between and , set forth in the complaint herein [or any other contract providing for [&c.].

607. *Against violation of agreement respecting corporate business.*—From removing, using, or in any manner interfering with any of the property, effects, assets, correspondence, books, papers, rights or things in action of the said "New York Underwriters' Agency," and from in any manner interfering with the business of said agency, and from incurring, or creating, or attempting to incur or create, any obligation or liability against said "New York Underwriters' Agency," and from using the name of "The New York Underwriters' Agency" in connection with any other company than the plaintiff,

¹ See *Rogers v. Mich. South. & Nell v. Utica, &c., R. R. Co.*, 61 *How. N. I. R. Co.*, 28 *Barb.*, 539; *Cor- Pr.*, 184.

and from doing any acts for the present or future creation or establishment of any business under the name of "The New York Underwriters' Agency," in any other connection than with the plaintiff.

608. *Another Form.*].—During the pendency of the existing agreement, which expires , 18 , from using the joint employees or agents of the , to promote the business of the new Underwriters' Agency, which is to commence operations upon the of , 18 , or from using them in any other manner save in the strict line of their duty as such joint employees or agents; and during the like period from using for a similar purpose as are above forbidden the joint office, books, papers and materials.

609. *Mandatory injunction against refusal to pay over funds,*¹ *pursuant to a continuing contract.*].—From in any manner preventing or interfering with

¹ An injunction *pendente lite* in these terms was sustained in *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 33 *Hun*, 539.

In modifying the clause here following, the court at general term say: "Something of this nature was required to allow the settlement of the business of the agency to proceed. That could not be done without the use of some of the funds passing into the hands of the treasurer, and if he persistently withheld them, the business itself would necessarily be brought for the time to an end, and that would violate the obligations of the agreement which these companies had entered into for the settlement of the affairs of this agency, and it was as important that this should be prevented, as it was that the defendant Stoddard should be secured in the exercise of his authority to close the affairs of the agency. And some effectual direction was accordingly necessary to prevent the agreement which the parties had entered into for this purpose from being defeated. Whether an injunction is merely restraining in its effect or mandatory, is often a subject which cannot be clearly defined. The dividing line must necessarily, to some extent, be shadowy and intangible. That is shown by the authority of *Rogers Locomotive Works v. Erie Railway Company*, 20 *N. J.*, 579, where it was held that the court will not ordinarily award a mandatory injunction until the final hearing and disposition of the action. But that the court will do by means of this process what is necessary to prevent a defendant from defeating and frustrating the rights of other parties is maintained by the authori-

ties referred to in this decision and by those referred to in *Hilliard on Injunctions* (3d ed., 7-11).

"This subject and the authorities relating to it were elaborately considered in the opinion of Sharswood, J., appended as a note to page 7 of that work, and both from the text of the work itself and cases referred to in this opinion, it is evident that the court may extend its restraints by means of an injunction so far as that may be necessary to meet the emergencies of the particular case and prevent injustice. Possibly in this instance the injunction has gone further than the authorities will maintain it. But there certainly will be no impropriety in prohibiting the defendant Kahl, as the treasurer of this agency, from withholding the funds in his hands or under his control, in that capacity, from the payment of any proper demand arising in the course of the settlement of the business of this agency. While that would not be precisely in the form in which the injunction has been issued, and therefore not obnoxious to any of these authorities, it would still be as effectual for all the purposes of this business. Although the objection that this injunction has been extended too far may be well made, it may be modified in this manner without reducing its efficiency. For if the defendant Kahl should, while under such a restraint, withhold the funds from the uses which the business requires should be made of them, he would be as much liable to punishment as he probably would be under the broad language of the present injunction, to which exception may probably be taken. The facts of this case require

the closing up by the defendant S., his agents or servants, of the business of the said N. Y. U. A. mentioned in the complaint herein, and from in any manner hindering or interfering with the direction or management of such closing up by the said S., or with the agents, assets, moneys, property or matters pertaining to the liquidation or closing up of the said business, and from appointing or otherwise authorizing any person other than the said S. to act in or about the liquidation, settling or closing up the said business; and that the said J. E. K. be restrained in like manner from preventing or obstructing the closing up of the same; and that the said companies be severally enjoined and restrained during the pendency of this action from refusing, neglecting or omitting to pay from time to time simultaneously and concurrently with each other, unless the said companies otherwise agree, their respective proportions of any adjusted loss, or any debt, charge, expense or liability, payable by them respectively, under the agreement dated , 18 , set forth in the complaint, and for which payment a demand shall be made by the said A. S., in manner authorized by the said agreement, or in any manner customary or usual heretofore in transacting the business of said agency.

610. *Against railroad company interfering with construction of cross-road.*]—From interfering with or obstructing, hindering, or preventing the plaintiffs, their servants and agents from making and constructing the said bridge across and over the said Sherburn branch of the Clarence Railway, in the line or course prescribed by , and of the materials, and in the manner specified and directed by ; and they are in like manner restrained from continuing to maintain and uphold the walls [*describing them*] erected by the said defendants, or any other walls [&c.], whereby the plaintiffs, their agents [&c.], may be prevented from constructing the said platform, and from making up and completing the said bridge; and also from pulling down, taking up, or removing any scaffolding or other works or materials to be made, deposited, or laid down by the plaintiffs, their servants and agents, on the sides or slopes of the said Sherburn Branch Railway, for the purpose of making and constructing the same bridge; and from preventing or hindering the agents, servants, or workmen of the plaintiffs from passing across the said last-mentioned railway, at proper and seasonable times, during the progress of the said works, for the purposes thereof, and taking down or removing (if necessary) any such walls [&c.] (the plaintiffs undertaking, during the progress of the said works, and every of them, not in any manner to interfere with or obstruct the traffic upon said Clarence Railway, and not in any respect to injure or damage the said Clarence Railway, or the works thereof, and undertaking to make and pay satisfaction to the defendants for any injury or damage which may be sustained by the defendants, by or from any temporary use of their land on the sides or slopes of the said railway).¹

611. *Against usurping office and taking the fees.*²]—From molesting, interfering with, or disturbing the plaintiffs, or any of them, in the use, enjoyment, or exercise of the said duties respectively appertaining to the plaintiffs as the master and wardens of the port of New York and their clerk; and from taking the fees thereof, and from demanding or receiving fees or emolu-

no further modification. For this restraint imposed by the injunction will not be obnoxious to any of the cases which have been referred to, nor to that of *Akrill v. Selden*, 1 *Barb.*, 316, but will be sustained by the legal principles required to be observed in the issuing of injunctions."

¹ From North of Engl. &c., *Rw.*

Co. v. Clarence R. R. Co., 1 *Coll.* (28 *Eng. Ch.*), 507. See *Osborne v. Jersey City, &c.*, *Rw. Co.*, 27 *Hun.*, 587.

² Compare *Morris v. Whelan*, 11 *Abb. N. C.*, 64, which disapproves *Palmer v. Foley*, 36 *Super. Ct. (J. & S.)*, 14.

ments from any person or persons for any such services; and from acting as surveyors of any vessel deemed unfit to proceed to sea, and from judging or acting as judges of the repairs which might be necessary for the safety of such vessel on the intended voyage; and from selling, under their inspection, vessels or goods arriving at the port of New York damaged, and for the benefit of underwriters out of the city of New York; and from certifying the cause of such damage, the amount of sale of such vessel or goods, and the charges attending the sale; and from taking or making any survey on board of any ship or vessel, or at any store in the city of New York, or along the docks or wharves thereof, or damaged goods; and from giving or granting any certificate in consequence of damaged goods; and from taking or making any survey on board of, or relating to, any ship or vessel put into the port of New York in distress, to ascertain the damage sustained thereby, and whether any such ship or vessel shall pay or be liable for foreign duties and tonnage, or otherwise.

612. *Against police interference.*¹—That the defendants, its superintendent, inspectors, captains, sergeants, roundsmen, patrolmen, &c., be enjoined and restrained from arresting or taking into custody any person [merely because] engaged upon the premises of the plaintiff in the transaction of the business of the plaintiff, and from interfering with or hindering any such persons [therefor] in the transaction of said business, and from in any manner proceeding against such persons [therefor] by arrest, or otherwise in the conduct of said business on plaintiff's premises, and from in any manner interfering with or hindering plaintiff or such person or persons authorized in carrying on the business as aforesaid.

613. *Against interference with health board.*²—From entering into, taking possession of, holding, using, occupying or interfering in any manner with the use and occupancy of the said rooms and offices by the said plaintiff, its bureaux, officers, agents and employees; and from neglecting and refusing to permit the occupancy of said offices and rooms, or any part thereof, by the plaintiff; and from neglecting and refusing to give up to the use of the plaintiff and its corps of vaccinators the rooms and offices now and heretofore held by them, of which the said defendants, their officers or agents, may have taken forcible possession without an order of the court, and without due process of law; and from ejecting or removing any records, books, papers, furniture, instruments or apparatus belonging to the plaintiff from such

¹ The power to grant an injunction in a proper case, against unlawful police interference, is deemed to be established in *Cercle Francaise de L'Harmonie v. French*, 19 *Abb. N. C.*, 32; *Manhattan Iron Works Co. v. French*, 12 *Abb. N. C.*, 446, and other cases there collected.

The Form in the text, without the clauses in bracket, was held too broad in *Kramer v. Board of Police*, 53 *Super. Ct. (J. & S.)*, 492. The court, on reversing the order on this ground, say: "The order granted in this case went further than to restrain the arrest of the plaintiff and his employees. The defendants are 'enjoined from arresting or taking into custody any person engaged upon the premises of the plaintiff in the transaction of any business with the plaintiff,

and from in any manner proceeding against any such person by arrest, or otherwise, in the conduct of said business upon plaintiff's premises.'

"Such an injunction would give any person engaged upon the premises of the plaintiff in the transaction of any business, immunity from arrest for any crime and practically nullify the statute which gives to the members of the police force power and authority to arrest and take into custody any person who shall commit, or threaten, or attempt to commit in the presence of such officer any offense prohibited by law."

² Sustained in *Health Department v. Police Department*, 41 *Super. Ct. (J. & S.)*, 323. See, as to mandatory part, p. 40, and p. 80, note.

rooms and offices; and until the hearing and decision as aforesaid, the said defendants, each and all of them, are ordered to permit the use and occupancy of such rooms and offices as heretofore enjoyed by the plaintiff, its officers, agents and employees.

5. RESTRAINT OF LEGAL PROCEEDINGS.¹

614. *Injunction and stay of proceedings against plaintiff in cross-action, and all others similarly situated, against suing, pending litigation on a precedent question.*²—From prosecuting the action commenced and now pending, in the court, county of , wherein M. L. H. is plaintiff, and J. N. H. and F. H. are defendants, and all further proceedings by or on behalf of the plaintiff in said action, are hereby stayed until after the hearing and determination of any and all appeals taken or which may hereafter be taken to secure a review of the decree made by the surrogate of the county of in the matter of the estate of A. H., deceased, on the of 18 .

It is further ordered, that the defendants above-named, and each of them, their and each of their attorneys, agents, servants and employees be, and they and each of them hereby are, enjoined and restrained during the pendency of this action, from commencing, instituting, or prosecuting any action or actions in this or any other court, for the purpose of enforcing, collecting, prosecuting, or suing upon the bond executed by the plaintiff J. N. H. and defendant D. M., as sureties for F. H., as executors of the estate of A. H., deceased. [And why—or, and—the time to answer the complaint in said action commenced by said M. L. H., should not be—or, is hereby—extended until days after the determination of said appeal and due notice thereof.³]

615. *Against proceedings at law; ejectment.*—From proceeding further against the plaintiff A. B., in the action commenced by the defendant Y. Z. against him in the Court of this State, for the recovery of the possession of [designating premises], with their appurtenances; and, also, from instituting or proceeding in any new or other action at law for the recovery of the possession of said premises, or any part thereof.

¹ As to security in this class of cases, see p. 89.

² In this case Barrett, J., said: "There can be no doubt that equity and good conscience demand that the action on the bond should be stayed until the decision of the appeal or appeals from the surrogate's decree. * * *

The only question in my mind was, whether the surety should not be remitted to a motion for a stay in the Westchester county action. I am satisfied, however, upon reflection and upon consideration of all the facts which he presents, that relief should be afforded in this independent action. The reason is obvious. The plaintiff in the Westchester county action sues upon behalf of himself and a number of other persons who are interested in the estate. These other persons are not parties to that action, nor is the plaintiff herself in her rep-

resentative capacity. A stay as to the plaintiff there individually would not prevent any one of these other parties from commencing other actions, nor would it probably prevent the plaintiff herself as executrix. Thus the present plaintiff clearly brings himself within a familiar ground of equity jurisdiction, and the case of *The Erie W. Railway Co. v. Ramsey* (45 N. Y., 637) is in point. Upon the whole, I am of the opinion that the motion should be granted, with costs, to abide the event, and that all parties in interest, as well as the particular plaintiff moving, should be enjoined as prayed for." This order was reversed solely because the relief in this case could be had by stay in the other action. *Hayward v. Hood*, 39 Hun, 596.

³ See as to extension of time, Vol. I, p. 81.

616. *The same; action for damages, &c.*—From proceeding further in the action brought by said Y. Z. in the Court, against A. B. above named [upon the bond of the said A. B., dated the day of]; and from instituting or proceeding in any new or other action [upon such bond]; and from commencing any action or actions against the plaintiff for the recovery of [designating the alleged debt or demand].¹

617. *The same; with leave to proceed to judgment.*—[As above, adding:] But said Y. Z. is at liberty, without prejudice to the equitable rights of the plaintiff herein to proceed to judgment only in the suit which said Y. Z. has already commenced against the said A. B., notwithstanding this injunction.

618. *The same; in a case of interpleader.*—[Add to Form 616:] upon the plaintiff paying into the hands of the clerk of this court the sum of dollars, mentioned in the complaint in this action.²

619. *Another Form.*—From bringing, or further prosecuting, or carrying on any action, including the action brought by A. B. in the Court, against Y. Z. [and the enforcement of any order or direction heretofore made therein], and from taking any steps or proceedings to recover [the sum of \$400 deposited with the plaintiff by the defendant's deceased husband] until further order of the court.³

620. *Another Form; action affecting specific property.*—And the said W. X. and Y. Z., as assignees for the benefit of creditors of said M. N., and each of them, and their successors, and each of their attorneys, agents and servants be, and they are hereby restrained and enjoined from bringing or prosecuting any action or proceeding against this plaintiff relative to the property mentioned in the complaint,⁴ except in this action, or from any manner interfering with said property.

621. *Against prosecuting divorce in another State.*—From further prosecuting by yourself, or by any counselor, attorney, or agent, the suit or action for a divorce commenced or attempted to be commenced by you against C. N. F., the above named plaintiff, by libel, in the Court of Common Pleas for the city and county of Philadelphia, in the State of Pennsylvania, or any other suit or action for a like divorce in any other State than the State of New York; and from coming into any house or place where she, the said C. N. F., may reside or be, and from removing or taking any measures in person, or by your counselors, attorneys, or agents, to remove the said C. N. F. from or out of the State of New York; and you, the said E. F., your counselors, attorneys, and agents, are also hereby ordered and enjoined, until the further order of

¹ See note 2 on p. 83. For another Form see 614.

² The common order for an injunction in an interpleading suit, is irregular, if it does not make the issuing of the injunction dependent on the payment of the money into court. *Pauli v. Von Melle*, 8 *Sim.* (8 *Eng. Ch.*), 327.

³ From *German Savings Bank v. Habel*, 80 *N. Y.*, 273. In that case the first clause in brackets above inserted was not in the order, and there was no allusion in the recitals or body of the order to costs of the action enjoined; and the attorney proceeded to enforce payment of costs of a motion previously granted.

Per curiam: "The injunction clause in the order did not prohibit the collection of the costs awarded, but the prosecution of the action, or any steps to recover the \$400 on deposit in the name of Habel.

"Under these circumstances, the costs were collectible and the attorney was justified in issuing the precept. If it had been intended to prevent the collection of the costs, the order should have been broad enough to cover them."

For another Form see No. 667.

⁴ It is better to describe it sufficiently to identify it.

this court, absolutely to desist and refrain from selling, conveying, or in any manner disposing of, or parting with, or incumbering the lands, tenements, and real estate of you, the said E. F., situate in the State of New York, or any part thereof.¹

622. *Against sale on execution.*²—That W. B. S., as survivor of M. L. S. and C. E. O., individually and as executor of and trustee under the last will and testament of said M. L. S., deceased, the defendants in this action, their attorneys, agents and servants, during the pendency of this action, be and they hereby are enjoined and restrained, and this court doth hereby order and require them and each of them absolutely to refrain from making and permitting to be made any sale of the right, title and interest of J. C., Jr. (the plaintiff herein) which he had on the day of , 18 , or at any time afterwards, of, in and to the premises and property, situate in the [city and] county of , and known by the street number street, under and by virtue of a certain execution dated , 18 , issued to the sheriff of the [city and] county of , under the judgment mentioned in said execution and in the complaint herein, as rendered on the day of , 18 , in an action in the Supreme Court of the State of New York, between M. L. S. and W. B. S., plaintiffs, and J. T. D. and J. C., Jr., defendants, and from making or permitting to be made any sale whatever of such right, title and interest, and from all further and other proceedings under said execution, and from issuing any further or other execution or executions upon said judgment, and from all further and other proceedings to collect or enforce said judgment.

623. *Against sheriff executing writ of assistance.*—That the above named defendants and all coroners and each of them do immediately and absolutely and until the further order of this court desist and refrain from executing or attempting to execute any paper purporting to be a writ of assistance, or a copy thereof, in an action in which A. C. is plaintiff and the Albany and Susquehanna Railroad Company and J. H. R. and others are defendants, and that the above defendants do also each of them refrain from executing or attempting to execute any paper in the nature of such a writ [against or affecting the plaintiff in this action or his property until, &c.].

624. *Against proceedings for dispossession.*³—From taking any proceedings to dispossess the plaintiff from the house and lot No. street, in the city of , and particularly from issuing any warrant of removal, or taking possession under proceedings commenced before Judge M. N., of the court of , on the ground that [the demised premises were deserted by the tenant—or, that rent is unpaid]; and from beginning any other suit or proceeding for the recovery of the possession of the premises aforesaid, or from entering upon said premises, or from interfering, in any way, with the plaintiff's possession of the same.

625. *Another Form.*—From further prosecution of any and all proceedings to summarily or otherwise evict or dispossess the plaintiff from the ground or first floor of the premises No. street, in the city of , and from otherwise disturbing the plaintiff in the full and peaceable possession and enjoyment thereof.⁴

¹ This Form was used in *Forrest v. Forrest*.

² From an unreported case in which this injunction was sustained on the ground that the claim had been satisfied before judgment, and the judgment obtained by fraud.

³ See notes on p. 41.

⁴ Sustained in *McRobert v. Harrison*, 20 *Weekly Dig.*, 228, where it was held that if summary proceedings to evict a tenant who is equitably entitled to a new lease are brought in a court having no equitable jurisdiction, for the purpose of putting into possession a new tenant who has taken a

626. *Another Form.*']—[*As in last Form to the †, continuing*] from instituting or carrying on any summary proceedings to eject the plaintiff from the premises described in the complaint, on the ground that his term has expired by reason of its limitation.

627. *Another Form.*].—From in any wise interfering with the peaceable enjoyment by the plaintiff herein, of the premises known as No. street, in [the city of New York], by virtue of any pretended judgment rendered in summary proceedings by the defendant Y. Z., or by the District Court of the City of New York, for the Third Judicial District.²

IV. AFFIDAVIT AND ORDER TO STAY WASTE.

Form No. 628.

Affidavit to obtain order to restrain waste.³

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says :

I. That he is the plaintiff above named.

II. That this action is brought [*here state object—e. g., to recover possession of the lands mentioned in the complaint hereto annexed—or, to have the lease held by the defendant of the lands mentioned in the complaint annexed adjudged to be forfeited, and to recover possession of said lands, with damages for the waste*]; and that all the allegations of said complaint are true, to the knowledge of this deponent.

III. That on or about the day of , said defendant proceeded to cut and take off, and put up into cord-wood, the wood and timber then growing and being on said premises, and

lease with knowledge of the equitable rights of the other, their prosecution may be enjoined in an action brought to obtain a decree declaring the second lessee to be a trustee for the first. s. p., *Crawford v. Kastner*, 26 *Hun*, 440; s. c., 63 *How. Pr.*, 90. See also Form 522 and note.

¹ Sustained in *Crawford v. Kastner*, 26 *Hun*, 440; s. c., 63 *How. Pr.*, 90, where the objection to the proceedings was plaintiff's right to a renewal lease, a question not within the jurisdiction of the district court.

² See Form 522 and note.

³ This application may be *ex parte* (*People v. Alberty*, 11 *Wend.*, 160), except where the plaintiff sues to recover only an undivided share of the premises. *Denning v. Corwin*, 4 *Wend.*, 208. As to whether the removal of timber already cut may be forbidden by such order, compare *People v. Alberty*, 11 *Wend.*, 160; *Watson v. Hunter*, 5 *Johns. Ch.*, 169; and *Code of Procedure*, § 219; *Spear v. Cutter*, 5 *Barb.*, 486; *Johnson v. White*, 11 *id.*, 194.

It may be, if the order is so framed as to be regular, also as an injunction.

has now cut and piled up on said premises, ready to be taken therefrom, as deponent is informed and believes, several hundred cords of said cord-wood, of the value of several hundred dollars. And the deponent further says, that the said wood and timber so cut and corded is not required for the necessary reparation of any fences, buildings, or erections which were upon said premises at the time of the said sale, nor for the necessary firewood for the use of the family of the said defendant.

IV. That the said defendant has made preparations to destroy the remaining wood and timber growing upon said premises, and is continuing daily to cut the same; and that, as deponent is also informed, he, the said defendant, together with one M. N., and others whose names are unknown to deponent, and to whom he, the said defendant, has contracted or proposed to dispose of said wood, or a portion thereof, threaten to, and are actually proceeding, with their boatmen, cartmen, servants, and persons in their employ, to take and remove off and dispose of, the said cord-wood, wood, and timber. Deponent is so informed by said M. N., who, however, refuses to make an affidavit thereof for this motion.

V. That the land so purchased by him is principally valuable for the sake of said wood and timber, and that the destruction thereof, as aforesaid, is a permanent injury to the freehold.

VI. That the defendant is wholly insolvent and irresponsible, and unable to answer to the plaintiff in damages in the premises; and the plaintiff, as he verily believes, will be left without remedy as to the timber already cut unless the defendant is enjoined from removing or interfering with it.

[*Jurat.*

[*Signature.*]

Form No. 629.

Order to stay waste.¹

[*Name of*] Court [*or if a court order*]

At a special term [*&c., as in Form No. 493, p. 4, of this Volume*].

[*Title of action.*]

On the annexed affidavit of A. B., and on motion of M. N., his attorney,

¹ This order may be granted, by the court or a judge thereof, *ex parte*, and without security. *N. Y. Code Civ. Pro.*, § 1681.

For order to stay waste after sale on execution, see chapter on EXECUTION.

ORDERED, that the defendant above named be restrained and prohibited from committing any further waste upon or damage to the premises therein described.

[Date.] [Signature of judge and initials of title.]

[Or if a court order] Enter [signature by initials of name and title].

SECTION II.

THE SECURITY.

- | | |
|--|--|
| 1. Power of the court. | (631.) Undertaking on injunction, in ordinary cases (under Code). |
| 2. Statutory requirements. | (632.) — — — to stay trial of money action after issue. |
| 3. The practice. | (633.) — — — to stay proceedings in money action after verdict, report or decision, and before final judgment. |
| 4. Form. | (634.) — — — to stay proceedings on a money judgment (where amount is paid into court). |
| 5. Consent to reference, &c. | (635.) The same ; where undertaking is given in lieu of payment into court. |
| 6. Security on staying proceedings at law. | (636.) Undertaking on injunction to stay proceedings in ejectment, or for dower. |
| 7. — in what cases. | |
| 8. — fraud. | |
| 9. — corporation cases. | |
| 10. — persons not in privity. | |
| 11. Relief from the obligation. | |
- FORMS.
- (630.) Bond required by the court on granting injunction (common Form where there is no statute).

1. *Power of the court.*—The power to grant an injunction being discretionary, the court have inherent power to impose, as a condition of granting it, that security be given;¹ and the settled practice, in the absence of statute, is to require a bond or undertaking as a condition of granting an injunction *pendente lite*,² unless a case free from doubt and from danger of injustice to defendant be made out.³

¹ Russell v. Farley, 105 U. S., 433, 438.

² Smith v. Day, L. R., 21 Ch. Div., 421; Seton on Decrees, 65.

The reason is, that according to the better opinion, the party enjoined by an improvident injunction has otherwise no redress, unless he can make out a case of malicious prosecution or abuse of process. Palmer v. Foley, 71 N. Y., 106, rev'g 42 Super. Ct. (J. & S.), 365; s. p., Russell v. Farley, 105 U. S., 433, 437. Contra, Florence v. Nixon, 3 La., 89.

³ Dodd v. Flavell, 2 C. E. Green, 255 (holding that where plaintiff's right is clear and the infraction of that right is satisfactorily established, no security need be required to protect defendant against such damages as may be incurred by reason of the injunction).

Where the requirement is thus discretionary because there is no statute, the form and condition of the security is equally in the discretion of the court; and on continuing an injunction the court may require a new bond, and may prescribe as a condition of continuing the injunction, that the old bond be cancelled.¹

2. *Statutory requirements.*—The Codes of Procedure have extended this safeguard by requiring security in all cases, but leaving both the amount and the propriety of requiring sureties in the discretion of the court, except in those cases where the object of the injunction is to stay proceedings in an action for the recovery of money, or in ejectment or dower.²

This requirement of at least some security applies to the common temporary order restraining defendant pending a motion for a temporary injunction;³ and to the injunction clauses in an order appointing a receiver, if they go beyond enjoining interference with the receiver.⁴

But it does not apply to a stay of proceedings in the action in which the stay is applied for,⁵ nor to an order forbidding interference with a receiver or other officer of the court, nor to an order to stay waste.⁶

3. *The practice.*—The injunction may be expressed to be conditional upon the giving of security in a specified sum, or, the court having fixed the amount, the security may be given before entering or signing the injunction, and the fact that it has been given be recited in it; and the latter is the better practice.⁷

¹ See paragraph 11, and *Kent v. Bierce*, 6 *Ohio*, 336.

² *N. Y. Code Civ. Pro.*, §§ 611–620.

As to compelling new undertaking from time to time, see Volume I, p. 490.

³ *Sheldon v. Allerton*, 1 *Sandf.*, 700; s. p., *Methodist Churches v. Barker*, 18 *N. Y.*, 463 (*dictum*).

⁴ *Pratt v. Underwood*, 4 *Civ. Pro. R. (Browne)*, 167 (holding that the power to appoint a receiver does not dispense with the statutory requirement of security on issuing an injunction).

But it may be that in such case the undertaking only covers damages sustained before the receiver takes possession. *Kerngood v. Gusdorf* (*Supm. Ct., Dist. Colum.*, 1886), 3 *Central Rep.*, 759.

⁵ *Watt v. Rogers*, 2 *Abb. Pr.*, 261, 266.

⁶ *Woerishoffer v. North River Constr. Co.*, 99 *N. Y.*, 398.

⁷ See *Elliott v. Osborne*, 1 *Cal.*, 396, and *Pell v. Lander*, 8 *B. Mon.*, 554, to

4. *Form.*—The undertaking to be given on the granting of a provisional or temporary injunction-order must conform, in terms or in substance, to the requirements of the Code therefor;¹ but the court may in its discretion add more onerous or specific obligations than the statutory form would necessarily involve.²

5 *Consent to reference, &c.*—If either the statute³ or the undertaking itself⁴ provides that the damages may be ascertained upon a reference or otherwise, this course may be pursued to fix the amount, leaving only the question of liability to be determined by action, but a provision in the undertaking is necessary to secure this effect, unless it is contained in the statute.⁵

6. *Security on staying proceedings at law.*—Before the existing statute, the Court of Chancery was accustomed to refuse to stay proceedings in a personal action at law—that is to say, an action for the recovery of a money judgment—unless the complainant would pay the amount into court, or give security not only for the payment of any damages caused by the injunction, but for payment of the demand sued for if judgment should be recovered; and it was held proper to do this on proof

effect that an order for injunction need not be regarded until security is given; but this is too broad.

¹ *Palmer v. Foley*, 71 *N. Y.*, 106 (*dictum*).

² Thus in *Candee v. Wilcox*, 26 *Hun*, 666, an order allowing an injunction without prejudice to an action of ejectment was granted, on condition "that the plaintiffs therein should give an undertaking in their action for the payment of the defendant's costs, adjudged against the plaintiffs in that action or in the action at law in which the right to said premises and the possession should be tried and determined, and the value of the use and occupation of said premises from [date], during the pendency of said action, in which such trial and determination should be had, and against the commission of waste; but in case of plaintiffs' failure to give said undertaking, then the said injunction to be dissolved," was held within the power of the court; and the undertaking, though not prescribed by statute, was held valid.

As to what damages are recoverable on an injunction bond, see *Cook v. Chapman*, 41 *N. J. Eq.*, 152; s. c., 2 *Central Rep.*, 193, and cas. cit.; *Krug v. Bishop*, 44 *Ohio St.*, 221; *Foster v. Stafford Natl. Bk.*, 58 *Vt.*, 658; s. c., 2 *New Eng. Rep.*, 806.

³ *Higgins v. Allen*, 6 *How. Pr.*, 30.

⁴ *Garcie v. Sheldon*, 3 *Barb.*, 232.

⁵ *Id.*

Contra are dicta in *Russell v. Farley*, 105 *U. S.*, 433; *Browning v. Porter*, 12 *Fed. Rep.*, 460.

of danger of insolvency, although not on mere allegation of fear of it.¹

This rule, embodied in the New York Revised Statutes,² as a restriction on chancery injunctions against proceedings "at law, in personal actions," and in actions "to recover lands or the possession" thereof, is revised in the Code of Civil Procedure, where it is expressed as a restriction on staying proceedings "in an action in which the complaint demands judgment for a sum of money only," and in an action for ejectment, or for dower.³

7. — *in what cases.*]—A judgment confessed is a judgment in an action, within the meaning of this rule.⁴ And any legal step, whether in court⁵ or taken by an officer of the court⁶ in pursuance of the judgment, is a "proceeding."

8. — *fraud.*]—Cases where actual fraud in the recovery of the judgment is the ground of the injunction are excepted by the statute;⁷ and it seems that circumstances which would make

¹ *Rodgers v. Rodgers*, 1 *Paige*, 426.

² 2 *N. Y. R. S.*, 189, §§ 141-143.

The practice in respect to issuing injunctions under this statute is stated in *Jenkins v. Wilde*, 2 *Paige*, 394.

In *Snyder v. Seeman*, 41 *N. J. Eq.*, 405; s. c., 4 *Cent. Rep.*, 54, it was held that when a temporary injunction to restrain eviction under an action of ejectment, granted on a bill not stating that the ejectment action had proceeded to judgment, is continued after it appears from the answer that judgment had been obtained in such action, the complainant must give such security as would have been required upon the granting of the injunction had it been known that a judgment had been entered in the ejectment action—the bond to cover damages from the commencement of the injunction suit.

³ *N. Y. Code Civ. Pro.*, §§ 611, 616.

It appears from a note of Mr. Throop's to the commissioner's report that this was intended to exclude equitable actions.

⁴ *Burns v. Morse*, 6 *Paige*, 108, and see Volume I, p. 600, note.

⁵ *Dickey v. Craig*, 5 *Paige*, 283, holding that *scire facias* to revive a judgment, although for some purposes treated as an independent action, is a continuation of the original action, and to obtain an injunction against it security must be given.

⁶ *Boker v. Curtis*, 2 *Edw. Ch.*, 110, holding that the sheriff's act in paying over money made by him on execution is a proceeding, within the statute, and an injunction to stay it requires security.

⁷ The fraud in the recovery of the judgment, which will enable the court to dispense with a deposit and bond, is such a fraud as a false statement, a substitution of one paper for another, or the like. A failure to perform a promise or condition on which the judgment was given is not such a fraud. *Cook v. Dickerson*, 2 *Sandf.*, 690.

Confession of judgment for a sum not yet due, and already secured, made

its enforcement operate as a fraud—such as the fact that the judgment has already been paid—will justify the court in dispensing with security.¹

9. — *corporation cases.*]—The special provisions of statute allowing a plaintiff suing a corporation for sequestration, to enjoin other creditors, constitute an implied exception to this rule, and do not require the usual security on staying proceedings at law.²

10. — *persons not in privity.*]—Where the plaintiff in the injunction suit is an entire stranger to the judgment, the collection of which is enjoined, the statute does not apply, for it relates only to parties in the same action and their privies;³ and where there is no privity the statute is not applicable; as for instance where the action is to enjoin defendant from enforcing his judgment against one who was a stranger to the suit in which it was recovered, and against his property which was not bound by the judgment.⁴

But one whose land is apparently charged with the payment of the judgment by reason of its being docketed so as to constitute an apparent lien, is in privity with the parties within the rule.⁵

11. *Relief from the obligation.*]—Security required by the

for the purpose of levy and sale to defeat other creditors—*held* fraud within the statute. *Burns v. Morse*, 6 *Paige*, 108.

¹ *Christie v. Bogardus*, 1 *Barb. Ch.*, 167, 172. *Dictum*, that if the plaintiff establishes beyond reasonable doubt that the judgment has been paid in whole or in part, the court may dispense with the statutory security; but holding that it cannot do so on a general allegation of payment. The party who seeks to be excused from depositing the money, or giving security, for the whole amount claimed by the adverse party to be due, must state the time, circumstances, and amount of each payment, so as to enable the court, by mere computation, to fix the amount of the deposit, or of the bond, and to give the party who is sought to be enjoined an opportunity to meet and deny the fact of such payments.

² *Hutchinson v. N. Y. Central Mills*, 2 *Abb. Pr.*, 394. The reason is that he is suing, not in hostility to other creditors, but for equitable distribution among all.

³ *Packer v. Nevin*, 67 *N. Y.*, 550.

⁴ *Hegeman v. Wilson*, 8 *Paige*, 29.

⁵ *Rosow v. Bank of Commerce*, 22 *Week. Dig.*, 448.

court by virtue of its inherent power, as distinguished from a statutory requirement making it the right of the party enjoined to have such security, is under control of the court, and it has power at a subsequent stage of the cause to relieve the party from it as justice may require.¹

Form No. 630.

Bond required by the court on granting injunction (common Form where there is no statute).

[*Usual penal clause, see Form 25, p. 69 of Vol. I, to the word "WHEREAS," naming defendant as the beneficiary: and continuing:*] WHEREAS, the above bounden [name of plaintiff] has applied or is about to apply to the court for an injunction restraining the above-named [name of defendants] in respect of [indicating concisely the object of the injunction]:

Now the condition of this obligation is such that if the above bounden [name of plaintiff] shall pay all damages which the defendant in said suit may sustain in consequence of said injunction being granted, should the same be thereafter dissolved,² then this obligation to be void, otherwise to be of full force and effect.

[Signatures and seals.]

Signed, sealed and delivered

in presence of

[Signature of witness.]

¹ *Russell v. Farley*, 105 *U. S.*, 433, 442, and see *Kent v. Bierce*, 6 *Ohio*, 336.

² This is the proper form according to established chancery practice. *Bein v. Heath*, 12 *How. (U. S.)*, 175.

In *Meyers v. Block*, 7 *U. S. Supm. Ct. Rep.*, 525, the words: "all such damages as he may recover against us by reason of the effects of said injunction, in case it should be decided that the injunction was wrongfully issued," were held to cover damages resulting from the injunction even though before the bond was given; and that an action will lie on the bond without a previous recovery of such damages; practically superseding the different construction on the latter point in *Bein v. Heath*, 12 *How. (U. S.)*, 175.

In *Browning v. Porter*, 12 *Fed.*

Rep., 460, an injunction bond was conditioned to abide the decision which shall be made therein [the original suit], and pay all sums of money, damages, and costs that shall be adjudged against them, if said injunction shall be dissolved."

Held, that this did not cover the amount of the original judgment and its costs, nor the attorney's fee.

In *Russell v. Farley*, 105 *U. S.*, 433, the condition was that "the plaintiff will pay the parties enjoined by such injunction, or detained thereby, such damages as they, or either or any of them, may sustain by reason of such injunction, if the court finally decide that the party was not entitled thereto."

[*Acknowledgment as in Form 495, of this Vol., p. 6. Affidavit of sufficiency and approval as in Forms 496 to 499, pp. 6-8, of this Vol. File with clerk; notice of filing as in Form 500, p. 8.*]

[*Exceptions by defendant, and justification as in Vol. I, p. 495, Form 223, &c.*]

Form No. 631.

Undertaking on injunction, in ordinary cases¹ (under Code).

[*Title of court, and of action
in which the injunction is asked.*]

WHEREAS, the plaintiff above-named is about to apply or has applied for an injunction restraining the above-named [*name of defendant*], his agents, attorneys and servants in respect to [*indicate concisely the scope of the injunction* :]

NOW, THEREFORE, the undersigned [*name or names with residences and vocations of sureties if any*], do hereby [*if more than one sign say, jointly and severally*] undertake that said plaintiff will pay to the said defendant² [*or, defendants or either of them*] such damages not exceeding dollars, as he [*or, they*] may sustain by reason of the injunction, if the court³ shall finally decide that the plaintiff is not entitled thereto. [And the damages may be ascertained by a reference or otherwise, as the court shall direct.]

[*Date.*]

[*Signatures.*]

[*Directions as under last Form.*]

Form No. 632.

Undertaking on injunction to stay trial of money action after issue.⁴

[*Title of court and action
in which injunction is asked.*]

WHEREAS, the above-named plaintiff, A. B., has applied or is about to apply for an injunction in this action, restraining

¹ Whether plaintiff must sign, and, if surety is required, whether there must be more than one, is for the court or judge to say. Vol. I, p. 468; *N. Y. Code Civ. Pro.*, § 811.

² "Defendant" here means all that are enjoined and obey whether they have appeared or not. *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 15 *Abb. Pr.*, 78; s. c., 39 *Barb.*, 16.

³ "The court" here means a court having jurisdiction to decide, and includes an appellate court. *Town of Guilford v. Cornell*, 4 *Abb. Pr.*, 223.

⁴ Whether the plaintiff must sign, and whether, if surety is required, more than one surety must be given, is for the court or judge to say. Vol. I, p. 468, &c.; *N. Y. Code Civ. Pro.*, § 811.

the above-named Y. Z. from proceeding* to the trial of an action pending in the court of , wherein said Y. Z. is plaintiff, and the said A. B. is defendant, and the complaint demands judgment for a sum of money only, and issue has been joined,

Now, THEREFORE, we, C. D., of No. street, in the city of , county of , and State of New York, merchant, and E. F., of No. street, in the town of and county of , and State aforesaid, farmer, do hereby [*if more than one sign say*, jointly and severally] undertake to and with the said defendant Y. Z., pursuant to the statute, that the plaintiff A. B. will pay to the said defendant Y. Z. [*the party enjoined*], or his representative, all damages and costs which may be recovered by him in the said action stayed by said injunction, not exceeding dollars; and, also, all damages and costs that may be awarded to him in this action in which the injunction order is granted. [And the damages in this action may be ascertained by reference or otherwise, as the court may direct].

[*Date.*]

[*Signatures.*]

[*Directions as under Form 630.*]

Form No. 633.

Undertaking on injunction to stay proceedings in money action after verdict, report or decision, and before final judgment.¹

[*As in last Form to the *, continuing:*] in a certain action pending in the Court of , wherein the said Y. Z. is plaintiff and the said A. B. is defendant, and the complaint demands judgment for a sum of money only, and a verdict [*or*, a report of a referee—*or*, a decision of the court] has been rendered, but final judgment has not been entered; and the said plaintiff A. B. elects to give this undertaking, pursuant to the statute, in lieu of payment into court:

Now, THEREFORE, we [*names, residences and occupations*], do hereby [*if more than one sign, say*, jointly and severally] undertake to and with said Y. Z., pursuant to the statute, that the plaintiff A. B. will pay the sum of [*sum awarded by verdict, &c.*], with interest from the day of , 18 ,

¹ In this case there must be two or more sureties (*N. Y. Code Civ. Pro.*, § 618), unless one is a fidelity or guaranty company (Volume I, p. 468).

Whether plaintiff must also sign is for the court or judge to say. *N. Y. Code Civ. Pro.*, § 811; Volume I, p. 469.

and all costs of said action which is stayed by such injunction, amounting together to the sum of dollars, with interest thereon from the date hereof [*here add as may be directed by the court, for instance*] to the said Y. Z. or his representative, in case this court shall finally decide that said A. B. was not entitled to the injunction. [And the damages may be ascertained by a reference or otherwise, as this court may direct.]

[Date.]

[Signatures.]

[Directions as under Form 630.]

Form No. 634.

Undertaking on injunction to stay proceedings on a money judgment (where amount is paid into court).¹

[*As in Form 632 to the *, continuing:*] upon a judgment for a sum of money recovered by said Y. Z. against said A. B. in the Court of , on the day of , 18 , in an action wherein the said Y. Z. was [plaintiff] and the said A. B. was [defendant]:

NOW, THEREFORE, we [*name or names, with residences and occupations*] do hereby [*if more than one sign, say, jointly and severally*] undertake to and with said Y. Z., pursuant to the statute, that the plaintiff A. B. will pay to said defendant Y. Z. all damages and costs which may be awarded to him by the court in this action in which such injunction order is granted, not exceeding the sum of dollars. [And the damages may be ascertained by a reference or otherwise, as the court may direct.]

[Date.]

[Signatures.]

[Directions as under Form 630.]

Form No. 635.

The same; where undertaking is given in lieu of payment into court.²

[*As in Form 632 to the *, continuing:*] upon a judgment for a sum of money recovered by said Y. Z. against said A. B.

¹ Whether plaintiff must sign, and whether, if surety is required, there must be more than one, is for the court or judge to say. *N. Y. Code Civ. Pro.*, § 811; Volume I, p. 468.

² In this class of cases there must be two or more sureties (*N. Y. Code*

Civ. Pro., § 618), unless a fidelity or guaranty company is one. Volume I, p. 468. Whether plaintiff also must sign is for the court or judge to say. Volume I, p. 469; *N. Y. Code Civ. Pro.*, § 811.

in an action in the Court of , on the day of , 18 , wherein the said Y. Z. was [plaintiff] and the said A. B. was [defendant]; and said plaintiff elects to give an undertaking pursuant to the statute in lieu of payment into court, as well as to secure damages and costs:

Now, THEREFORE, we [names, residences and occupations] do hereby [if more than one sign, say, jointly and severally] undertake to and with the said Y. Z., pursuant to the statute, that the plaintiff A. B. will pay the sum of dollars [specify the full amount of the judgment, including interest and costs], with interest from the day of , 18 [here add the directions of the court; see, for instance, clause in Form No. 633], and further, that the plaintiff A. B. will pay to the said defendant Y. Z. all damages and costs which may be awarded to him by the court in this action in which such injunction order is granted, not exceeding the sum of dollars, in addition to the amount and interest herein above specified. [And the damages may be ascertained by a reference or otherwise, as this court may direct.]

[Date.]

[Signatures.]

[Directions as under Form 630.]

Form No. 636.

Undertaking on injunction to stay proceedings in ejectment, or for dower.¹

[As in Form 632 to the *, continuing:] in an action of ejectment [or, for dower] pending in the Court of , wherein said Y. Z. is plaintiff and the said A. B. is defendant, and a verdict [or, the report of a referee—or, the decision of the court] has been had:

Now, THEREFORE [name or names, and residences and occupations of sureties, if any], does [or, do] hereby [if more than one sign, say, jointly and severally] undertake to and with said Y. Z., pursuant to the statute, that the plaintiff A. B. will pay to the said defendant Y. Z., or his representative, all damages and costs not exceeding the sum of dollars, which may be awarded to him in this action wherein such injunction

¹ Whether plaintiff shall join, and whether, if surety is required, there must be one or two, is for the court to say. Volume I, 468, 469; *N. Y. Code Civ. Pro.*, § 811.

It would appear from Mr. Throop's

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note to *N. Y. Code Civ. Pro.*, § 616, that the Commissioners of the Code regarded this undertaking as not to be required on staying proceedings in an equity action.

is granted. [And the damages may be ascertained by reference or otherwise, as this court may direct.]

[Date.]

[Signatures.]

[Directions as under Form 630.]

SECTION III.

SERVING AND ENFORCING AN INJUNCTION.

1. Personal service.
2. Actual notice.
3. Proof of service.
4. Disobedience.

FORMS.

- (637.) Affidavit of service of injunction granted by a judge.
- (638.) Affidavit of service of injunction granted by the court.

1. *Personal service.*—Wherever practicable serve the order personally on each person whom it is desired to be able to punish for contempt in case of disobedience; as the courts often justly refuse to punish a party for contempt after service only on the attorney; although the power to do so sometimes exists.

If a judge's order, deliver an ordinary copy and exhibit the original, showing the judge's signature.

If a court order, the best method is to serve a certified copy. But service of an ordinary copy, accompanied by exhibiting a certified copy and showing the certificate and seal, is enough.

2. *Actual notice.*—In case personal service is delayed by distance or other hindrance, it is usually good policy to give actual notice, which may be by telegraph or otherwise, taking care that it is both distinct and provable.¹

¹ Cape May, &c., R. R. Co. v. Johnson, 8 Stew. (N. J.), 422; s. c., 14 Reporter, 595. In Mayor, &c., of N. Y. v. Staten Island F. Co., 40 Super. Ct. (J. & S.), 300 (aff'd in 64 N. Y., 622). Curtis, J., said: "The objection that the last injunction order was not served in such a way as would justify the proceedings by attachment is without force, as the papers show that certified copies of it were served upon both the attorney and Mr. P. Even parties simply hearing that an order for injunction has been granted, and, disregarding it, can be adjudged guilty of contempt." (Citing Hull v. Thomas, 3 Edw., 236; People ex rel. Morrison v. Brower, 4 Paige, 405; Hearn v. Tennant, 14 Vesey, 136.)

3. *Proof of service.*—It is best to specify the hour of service in the affidavits of service and to have the affidavits verified immediately upon effecting service, without awaiting the time when it may be desired to use them.

4. *Disobedience.*—Disobedience may be punished by proceedings for contempt,¹ and is also ground for refusing to allow the delinquent to proceed in the action generally.²

Form No. 637.

Affidavit of service of injunction granted by a judge.³

[*Title of court and cause.*]

[*Venue.*]

C. D., being duly sworn, says, that he is the managing clerk in the office of O. P., the plaintiff's attorney in this action, and that at _____, on the _____ day of _____, 18____, at _____ minutes past _____ o'clock, in the _____ noon, he⁴ served the injunction-order, of which annexed is a copy, personally upon the defendant Y. Z.,* by showing the original order to said defendant and the signature of Hon. J. K. thereon, and delivering a copy of said order [*if the order was ex parte, add, together with a copy of—designating the papers on which the order was granted*] to said defendant [*or, if defendant is a corporation, say, by showing the original order and signature of Hon. J. K. thereon, to M. N., the president of the company, defendant above named—or designate other officer or agent on whom service was made—and delivering a copy of said order—and if the order was ex parte—together with a copy of—designating the papers on which it was granted—to said M. N.*], and leaving said copies with him; and † that deponent knew the person so served to be the defendant [*or, to be such president*] as aforesaid.

[*Jurat.*]

[*Signature.*]

¹ See chapter on CONTEMPT.

² See Volume I, p. 174.

³ Sustained by Mayor, &c., of N. Y. v. Staten Island F. Co., 64 N. Y., 622; aff'g 40 Super. Ct. (J. & S.), 300, where a much more meager affidavit

of service was held sufficient to support an attachment for contempt

⁴ If service of summons is included, insert statement as to age. See Volume I, p. 627.

[If proof of service of summons is inserted, add statement of the age of deponent. See Form No. 323, Volume I, p. 627.]

Form No. 638.

Affidavit of service of injunction granted by the court.

[As in last Form to the asterisk, continuing:] by delivering to said defendant, and leaving with him [or, if on a corporation, by delivering to M. N., the president—or designate other officer or agent on whom service was made—of the company, defendant above named, and leaving with him] a certified copy thereof [if the order was made *ex parte*, add, together with a copy of the—specifying papers on which it was granted], and [continue as in last Form from the †].

SECTION IV.

GETTING RID OF AN INJUNCTION.

- | | |
|--|--|
| 1. Power to refuse or dissolve on the giving of indemnity. | (640.) Order vacating <i>ex parte</i> an injunction granted <i>ex parte</i> . |
| 2. — the practice. | (641.) Order to show cause why injunction should not be vacated or modified. |
| 3. Motion to vacate or modify,—injunction granted on notice. | (642.) Notice of motion to vacate or modify injunction. |
| 4. — — <i>ex parte</i> injunction. | (643.) Order granting or denying motion (on notice or order to show cause) to vacate or modify injunction. |
| 5. — — temporary restraining order. | (644.) The same; on the ground of abatement. |
| 6. — application on new facts. | (645.) The same; dissolving as to some and continuing as to others. |
| 7. Appeal. | |
| 8. — stay or suspension. | |
| 9. Motion and appeal. | |
| 10. Effect of judgment. | |
- FORMS.
(639.) Affidavit to apply *ex parte* to judge to vacate *ex parte* injunction.

1. *Power to refuse or dissolve on the giving of indemnity.*]

—The court has a discretionary power to dissolve even a proper injunction on the defendant giving indemnity;¹ but this is not matter of right on the part of defendant.² and the provision

¹ Northern Pac. R. R. Co. v. St. Paul, &c., R. R. Co., 2 McCrary, 260; S. C., Myers' Fed. Dec., 1675; 4 Fed. Rep., 688.

² McWilliams Mfg. Co. v. Blundell, 11 Fed. Rep., 419 (Patent case).

of the New York statute declaring that "the court or judge must, where the alleged wrong or injury is not irreparable and is capable of being adequately compensated for in money, vacate the injunction order upon the defendant's executing an undertaking in such form and amount and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against any loss sustained by reason of vacating such injunction order"—was not intended to require this to be done where plaintiff's right is clear, and the conduct restrained would be illegal.¹

2. — *the practice.*—Application for such relief should be made to the judge or court by whom the injunction was granted,² but it may be made before decision on an order to show cause why an injunction should not be granted or continued.³

The affidavit must state facts and circumstances on which the court can determine as matter of proof, that the injury is not irreparable but is capable of adequate compensation in damages. A general allegation on this point is but matter of opinion and insufficient.⁴

The undertaking should afford a full indemnity; and under the New York statute an order dissolving an injunction upon an undertaking which does not follow the terms of the statute above stated, is error, if the damages sustained by vacating might prove more than those stated as indemnified against.⁵

¹ *Thayer v. Rochester City, &c., R. R. Co.*, 15 *Abb. N. C.*, 52, and *cas. cit.*

² *Metropolitan Elev. R. R. Co. v. Manhattan Ry. Co.*, 65 *How. Pr.*, 277.

³ *Metropolitan Elev. R. R. Co. v. Manhattan Ry. Co.*, 11 *Daly*, 367; *s. c.*, 65 *How. Pr.*, 319; 2 *Civ. Pro. R. (McCarty)*, 473, which see at p. 166 of Vol. I of this work.

Unsuccessfully resisting such an order to show cause, without offering to give security to dissolve, has been held to preclude a subsequent application. *Quantrell v. Boynton (ANDREWS, J.)*, *N. Y. Daily Reg.*, June 17, 1886.

⁴ *Metropolitan Elev. R. R. Co. v. Manhattan R. R. Co.*, 65 *How. Pr.*, 277.

⁵ *Chamberlin v. Buffalo, N. Y., &c., R. R. Co.*, 31 *Hun.*, 339.

Otherwise of a voluntary undertaking given to secure dissolution by consent. *Candee v. Wilcox*, 26 *Hun.*, 666.

In the case in 11 *Daly*, 367 (*above*), it was directed that the undertaking be in such form as to indemnify the plaintiffs against any loss or injury they may sustain by the vacating of the injunction from time of vacating it to the trial and judgment.

3. *Motion to vacate or modify:—injunction granted on notice.*—One who omits to oppose the granting or continuance of an injunction upon notice or after order to show cause, or opposes it unsuccessfully, cannot (except on subsequently occurring facts) move to vacate or modify it without leave,¹ which ought to be reserved in the order granting or continuing the injunction² in order to secure the right.

If such reservation was not made, the party is left to his motion for leave, or to resettle the order by expressing leave.³

In either case, the application should be made on notice, and to the judge or court that granted the injunction,⁴ and, if to the court, then at a term at which a contested motion can be heard.

The application may be made upon the original papers (except that if leave is to be asked there must be affidavits supporting that request), or upon papers on defendant's part in opposition, or both. If defendant had leave reserved in the injunction, he may apply if he choose on the original papers, and if unsuccessful may apply again on papers in opposition.⁵

To apply on defendant's papers in opposition lets in plaintiff, under the New York practice, to produce new affidavits in support of the injunction.⁶

4. — — *ex parte injunction.*—To vacate, in whole or in part, an injunction granted *ex parte*, an *ex parte* application may be made, either,

1. If granted by a judge, to the same judge, or to the general term; or (upon affidavit to the statutory reason), to another judge of the court or to the court at special term.

2. If granted by the court at special term, to the judge who held court when it was granted (applying either in court or

¹ The rules here stated are the result of the application of sound general principles (see Vol. I, pp. 188–196), and are expressly applied to injunctions by *N. Y. Code Civ. Pro.*, §§ 626–628.

² See Forms 529, 530.

³ See Vol. I, of this work, p. 190.

⁴ *Id.*, p. 195.

⁵ *N. Y. Code Civ. Pro.*, § 627.

⁶ *N. Y. Code Civ. Pro.*, § 627.

out), or to the general term; or (upon affidavit to the statutory reason) to a special term held by another judge of the court.

3. If made by the general term, to the general term.¹

In either case there is power to entertain *ex parte* an application to vacate an *ex parte* injunction;² but unless some wrong practice in obtaining the order, or inadvertence or imprudence in granting it, call for immediate retraction, or the emergency does not justly admit of the necessary delay, the court or judge will usually leave the party to his motion. If this is done, the proper practice is not to call in the adverse party to a hearing on the application already presented *ex parte*, but to take an order to show cause returnable before the judge, if he granted the injunction, or before a term at which a contested motion can be heard, so as to bring the motion within the rule last stated on the previous page.³

5. — *temporary restraining order*]—A temporary restraining order, pending an order to show cause why the defendant should not be enjoined pending the action, is an injunction within these rules; but an application to vacate such an order is not generally to be allowed to supersede the hearing on the order to show cause, but only to quicken it if need be or to make a temporary modification in the *interim*.

6. — *application on new facts*.]—Neither a decision of a motion for injunction on notice, nor the decision of an application regularly made on notice to vacate an injunction, whether the application be made on the original papers, or on papers in opposition, precludes an application founded on new facts occurring since then,⁴ or upon the fact that a complaint made since such decision fails to show a cause of action sufficient to

¹ The fact that the present general term is not composed of the same judges as that which granted it does not preclude the application.

² P. 124, &c., of Vol. I; *N. Y. Code Civ. Pro.*, § 626; s. p., *Bruce v. Del. & H. Canal Co.*, 8 *How. Pr.*, 440; *Coffin v. Prospect Park, &c.*, R. R. Co., 61 *How. Pr.*, 105.

³ For instances of the denial of *ex parte* applications, see *Gere v. N. Y. Central, &c.*, R. R. Co., 38 *Hun.*, 231; *Peck v. Yorks*, 41 *Barb.*, 547; *aff'd* 24 *How. Pr.*, 363.

⁴ See Vol. I, p. 193.

entitle plaintiff to an injunction for a cause of action stated in the injunction.¹

7. *Appeal.*—An order granting an injunction is appealable to the general term;² but not to the Court of Appeals unless there was a clear want of power to grant it, or a gross abuse of discretion.³

8. — *stay or suspension.*—Where an appeal lies, the court may grant a stay of the respondent's proceedings on the injunction, as in the case of other orders;⁴ but the stay does not leave the appellant at liberty to disobey the order, it only suspends the respondent's right to proceed in court upon it meanwhile.⁵

The appellate court have power, in advance of the hearing, to modify or suspend the injunction;⁶ but this power is only to be invoked in an extreme case.

9. *Motion and appeal.*—The pendency of an appeal does

¹ *N. Y. Code Civ. Pro.*, § 628.

² One not expressly restrained may appeal if he is prejudiced by the effect of the injunction, as where it forbids a co-defendant from paying money to him. *Landers v. Fisher*, 24 *Hun*, 648.

³ In *Hatch v. The Western Un. Tel. Co.*, 93 *N. Y.*, 640, the court say: "The rule is well settled that the granting or refusing of an injunction *pendente lite* is in the discretion of the court of original jurisdiction, subject to review by the General Term, which is the final appellate jurisdiction. (Citing *Van Dewater v. Kelsey*, 1 *N. Y.*, 533; *Paul v. Munger*, 47 *N. Y.*, 469; *Calkin v. Manhattan Oil Co.*, 65 *id.*, 557).

"There is an exception where it plainly appears upon the face of the complaint that the case is one in which, by settled adjudications, the plaintiff, upon the facts stated, is not entitled to final relief. The granting of an injunction *pendente lite* in such a case is error of law which may be reviewed in this court." (Citing *McHenry v. Jewett*, 90 *N. Y.*, 58.)

But in the case at bar, it not being plain on the face of the complaint, that the facts did not justify such equitable relief, the appeal was dismissed; *s. p.*, *Woerishoffer v. North River Construction Co.*, 99 *N. Y.*, 398 (where appeal was dismissed on ground of order being discretionary).

⁴ *Sixth Ave. Elev. R. R. Co. v. Gilbert Elev. Ry. Co.*, 3 *Abb. N. C.*, 53, 56.

⁵ *Sixth Ave. Elev. R. R. Co. v. Gilbert Elev. R. R. Co.*, 71 *N. Y.*, 430 (so held in case of appeal from a judgment).

See also *Leonard v. Ozark Land Co.*, 115 *U. S.*, 465, where the Supreme Court reiterates the rule laid down in the *Slaughter-house* case, 10 *Wall.*, 273, 297, that "neither an injunction nor a decree dissolving an injunction passed in a Circuit Court, is reversed or nullified by an appeal or writ of error before the cause is heard in this court." (Citing also *Hovey v. McDonald*, 109 *U. S.*, 161.)

⁶ See *Leonard v. Ozark Land Co.* (above cited).

not preclude a motion to vacate the injunction,¹ nor does the pendency of a motion to vacate preclude an appeal.²

10. *Effect of judgment.*—A final judgment, whether in favor of³ or adverse to the plaintiff, and whether on the merits or merely dismissing his suit,⁴ of itself terminates a temporary injunction. If the judgment be in his favor, the continuance of restraint depends on the insertion of an injunction in the judgment.

Form No. 639.

Affidavit to apply ex parte to judge to vacate ex parte injunction.

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is the defendant above-named, and that on the day of , 18 , the copy injunction order hereto annexed was served on him, with the copies of the papers on which it was granted, which are also annexed.

II. That [*here state the condition of the cause in respect to service of the summons and other proceedings: indicating also the irregularity, if any, affecting the injunction*].

III. That said injunction order was granted without notice to defendant or his attorney.

IV. That this defendant has fully and fairly stated the case to , his counsel, who resides at , and that he has a good and substantial defense on the merits to the action,

¹ Ireland v. Nichols, 9 Abb. Pr., N. S., 71, and Vol. I, of this work, pp. 161, 176.

² Same pages.

³ Musgrave v. Staylor, 36 Md., 123; Gardner v. Gardner, 87 N. Y., 14; s. c., 62 How. Pr., 265; rev'g 24 Hun, 627; Webber v. Wilcox, 45 Cal., 301 (holding sureties not liable for damages accruing after judgment though the judgment was subsequently reversed).

⁴ See Bishop v. Bascoe, 9 Week. Cin. L. Bul., 111, and cas. cit.

As to effect of amending complaint upon demurrer sustained, see Shipman v. Superior Ct. (Cal., 1887). 12 Pacif. Rep., 787.

as he is advised by his said counsel, after such statement, and verily believes.¹

V. [*In case of disability or absence of judge who made the injunction or held the term of court when it was made:*] That Hon. J. K., who granted the said injunction order [*or, who held the term of the court at which the said injunction order was granted*], is absent from the country [*here state the particulars of absence or other disability of the judge; or, if granted by general term, that the general term has adjourned; or otherwise show the inability to make application to the same judge or court*].

VI. That deponent is advised and believes that he is entitled to have the said injunction order vacated [*or, modified—stating particulars*]; but that, by reason of the foregoing circumstances, the application cannot be made to the judge or court by whom the order was granted, and that the defendant will be exposed to great injury by the delay required for an application upon notice, by reason of the following circumstances: [*here set forth the details, showing the injury inflicted by the injunction, and the way in which delay is prejudicial, and the date of next term, or otherwise show the earliest time at which an application made on notice could be heard.*]

VII. That no previous application for an order of vacating or modifying said injunction has been made [*except, &c., see Vol. I, p. 149*].

[*Jurat.*]

[*Signature.*]

Form No. 640.

Order vacating ex parte an injunction granted ex parte.

[*Name of*] Court [*or if a court order*]

At a special term [*&c., as in Form No. 491, p. 3, of this Volume*].

[*Title of action.*]

On reading and filing the annexed affidavit of [the defendant] Y. Z., verified on the day of , 18 [*if made by a judge other than he who granted the injunction, say, making satisfactory proof that by reason of the absence—or other disability—of the judge who granted the injunction order in this action, dated the day of , 18 , the application to vacate the same cannot be made to him, and that*

¹ This oath to merits is not essential, but may be useful.

the defendant above named will be exposed to great injury by the delay required for an application upon notice], and it appearing to me [or, to the court], from the papers on which it was granted, that it ought to be vacated [or, modified as follows]:

ORDERED [*&c.*, as in next Form].

[*Authentication as in Form 492 or 493, p. 4, of this Volume.*]

[*Under N. Y. Code Civ. Pro., § 626, file this order, and the affidavit on which it was obtained, with the clerk of the court in which the injunction was issued, and serve a copy of both before acting on the vacating of the injunction.*]

Form No. 641.

Order to show cause why injunction should not be vacated or modified.¹

[*Name of*] Court [*or if a court order*]

At a special term [*&c.*, as in Form No. 491, p. 3, of this Volume].

[*Title of action.*]

On [*if applying on the original papers*] the injunction herein, dated the day of , 18 , and the papers on which it was granted [*or, if applying on papers in opposition, or on both, add or substitute, and the [two] affidavits—and the answer²—copies of which are hereto annexed³—and if the complaint has meanwhile been made, and does not support the injunction,⁴ add, and on the complaint herein*]:

ORDERED [*continuing as in Form No. 491, p. 3, of this Volume, from the *, but inserting, in place of the italic clause between the ‡ and ¶, the following: why said injunction herein should not be vacated—or, vacated or modified—or, modified*]

¹ As to whom to apply to, and where to be returnable, see paragraph (above).

As to affidavit in support of this order, see Form 489, p. 2, of this Volume.

The statement, paragraph II, as to the condition of the cause, is in practice dispensed with in these motions, and the reason for asking an order to show cause (paragraph III) is often sufficiently apparent from the nature of the case.

If a previous application has been made, state details. See Form 490, p. 2.

² Answer is not essential. *Metrop. G. & S. Exch. v. Chicago Board of Trade*, 15 *Fed. Rep.*, 847; *Town of Middletown v. Rondout &c., R. R. Co.*, 12 *Abb. Pr.*, N. S., 276; s. c., 43 *How. Pr.*, 144; *aff'd in id.*, 481.

³ *Hardt v. Liberty Hall Consol. M. Co.*, 27 *Fed. Rep.*, 788.

⁴ *N. Y. Code Civ. Pro.*, § 628.

by adding the following clause, *stating it—or, so as to permit,—&c., stating what is desired*].

[*If irregularity is part of the ground, specify it, for instance, thus: on the ground, among others, that no deposit was made or security given for the payment of the judgment mentioned in the injunction.*]

Form No. 642.

Notice of motion to vacate or modify injunction.¹

[*Title of court and action.*]

Please take notice, that on [*if applying on the original papers*] the injunction herein dated the day of , 18 , and the papers on which it was granted [*or if applying on papers in opposition, or both, add or substitute, and the [two] affidavits—and answer—copies of which are hereto annexed—and if the complaint has meanwhile been made and does not support the injunction, and on the complaint herein*], the undersigned will move [*continuing as in Form No. 488, p. 1, of this Volume, inserting in place of the italic clause between the ‡ and the ¶*] that the injunction herein dated the day of , 18 , be vacated [*or, vacated or modified—or, modified by adding the following clause—stating it—or, so as to permit—&c., stating what is desired*].

[*If irregularity is objected to, specify it, for instance, thus*] on the ground, among others, that no deposit was made or security given for the payment of the judgment mentioned in said injunction.

Form No. 643.

Order granting or denying motion (on notice or order to show cause) to vacate or modify injunction.²

[*Insert in Form 492 or 493, on p. 4, of this Volume, after "ORDERED,"*] that said motion of said defendant to vacate the injunction herein dated the day of , 18 , be denied [*with costs against the defendant, to abide the event of the action*]. [*If denied upon condition, say, upon condition³—stating it.*]

¹ See notes to last Form.

² As to conditions in orders, see

³ As to award of costs in an order, Volume I, p. 258.
see Volume I, p. 261, &c.

[*Or*, be granted, and said injunction is hereby dissolved¹ [with dollars costs against plaintiff, to abide the event of the action] [upon condition—*for instance, thus*—that defendant give security in an undertaking with two sureties, to pay any judgment that plaintiff may recover herein—*or otherwise*].

[*Or, if modified, for instance, thus*: ORDERED, that the injunction herein, dated the day of , 18 , be modified by vacating the provision thereof which restrained—*stating it*—and that said injunction stand in the respects in which it is not so modified, with dollars costs to be paid by to —*or*, to abide the event of the action.]

[*If directed that the effect of the dissolution be postponed*: This order is made on condition that it shall not take effect until service has been made, and until the inst., at o'clock in the noon.]

Form No. 644.

The same ; on the ground of abatement.

[*Insert in Form 492 or 493, on p. 4, of this Volume, after* ORDERED,] that the plaintiff [*or*, the legal representatives of the deceased plaintiff] revive and continue this action against the [legal representatives of the] defendant within days; or that, in default thereof, the injunction granted herein by me [*or*, by this court—*or*, by Hon. J. K., a justice of this court—*or*, county judge of county], on the day of , 18 , against the above named Y. Z., be vacated and dissolved, with dollars costs.

Form No. 645.

The same ; dissolving as to some and continuing as to others.

[*Ordering part may be*] that the said motion be, and the same hereby is, granted as to the defendant Y. Z., and the injunction granted by said order be, and the same hereby is, dissolved as to said defendant, and that said motion be, and the same

¹ If irregularity is among the grounds, say, "upon the ground, [among others] that, &c., specifying it."

May insert other directions, for instance, "and defendant is hereby per-

mitted, and leave is given to him, to enforce the satisfaction of the aforesaid judgment described above and set forth in the complaint, and to issue execution upon said judgment."

hereby is, in all respects, denied as to the defendant W. X., and the injunction granted by said order be, and the same hereby is, continued as to said W. X. until the further order of the court.

SECTION V.

ENFORCING THE SECURITY.

- | | |
|--|--|
| 1. Attorney's authority. | or writ of inquiry to ascertain damages caused by injunction. |
| 2. Power of court. | |
| 3. Proceeding before judgment premature. | (648.) Order of reference, or writ of inquiry to ascertain damages caused by injunction. |
| 4. Action necessary to recover. | (649.) Notice to sureties of reference or writ of inquiry to ascertain damages caused by injunction. |
| FORMS. | (650.) Report of referee as to damages caused by injunction. |
| (646.) Undertaking on the part of creditor enjoined, to obtain money paid into court on enjoining him. | |
| (647.) Notice of motion for reference | |

1. *Attorney's authority.*—The attorney for the defendant has, by virtue of his general retainer, authority to proceed to fix the liability of the sureties on the undertaking.

The better opinion is that he should seek authority from his client before he proceeds to fresh suit against the sureties.¹

2. *Power of court.*—Since the statute² under which the injunction undertaking is given provides that the damages may be ascertained by a reference or otherwise as the court may direct, the court have power to direct a reference or otherwise determine the amount, although no express consent to such course be contained in the injunction.³

The court may by direction in the order of reference allow other than common-law evidence to be received by the referee.⁴

3. *Proceeding before judgment premature.*—An order of reference or other inquiry to ascertain damages is not regular until the judgment has been entered.⁵

¹ Walradt v. Maynard, 3 Barb., 584. Compare p. 409 of Vol. I.

² N. Y. Code Civ. Pro., § 623.

³ Higgins v. Allen, 6 How. Pr., 30.

⁴ Roberts v. White, 73 N. Y., 375; aff'g 43 Super. Ct. (J. & S.), 455.

⁵ Lawton v. Green, 64 N. Y., 326, modifying 5 Hun, 157 (where, however,

The objection that it is made before entry of judgment, even though expressly taken, is waived by proceeding on the reference.¹

4. *Action necessary to recover.*—Judgment on the undertaking cannot be rendered against the sureties without an action on the undertaking.²

Form No. 646.

Undertaking on the part of creditor enjoined, to obtain money paid into court on enjoining him.³

[*Title of action in which the injunction issued:*]

The above-named plaintiff having paid into court the sum of dollars, to cover the sum awarded by the verdict [*or, report of the referee,—or, the decision of the court*], in an action for the sum of money only [*or if the stay was after judgment, say, having paid into court the sum of dollars, being the amount of the judgment for a sum of money, including interest and costs, recovered*] by the above-named defendant Y. Z. against said A. B., in the court, of , wherein said Y. Z. was [plaintiff], and the said A. B. was [defendant];⁴ and this court having directed said sum to be paid over to said Y. Z., upon his giving an undertaking conditioned as follows:

Now, THEREFORE [I—*or, we—naming surety or sureties as required by the order, with their places of residence and occupations*], do hereby [jointly and severally] undertake to and with the people of the State of New York, pursuant to the statute, in the sum of dollars [*fixed by the court*], to pay the said sum of dollars, and interest thereon from the day of , 18 , or any part thereof, as and when directed

the irregularity was held waived by consent to the entry of the order of reference).

¹ Roberts v. White, 73 N. Y., 375; aff'g 43 Super. Ct. (J. & S.), 455.

² Troxell v. Haynes, 16 Abb. Pr., N. S., 1; s. c., 5 Daly, 389; Randall v. Carpenter, 47 Super. Ct. (J. & S.), 205; Easton v. N. Y. & L. B. R. R. Co., 26 N. J. Eq., 359.

Contra, Amalgamating Co. v. Ore Dressing Co., 79 N. C., 43, and so were earlier New York cases.

³ As to the general principles governing undertakings, see Vol. I, p. 461.

⁴ As to the necessary privity between the parties, see Hegeman v. Wilson, 8 Paige, 28.

by the order or judgment of the court [*or state directions, if given in anticipation*].

[*Date.*]

[*Signatures.*]

[*Affidavit of Sufficiency or Justification; and Acknowledgment, as in Forms 495-498; Approval of court, as in Form 499.*]

[*Order for payment to be made by the court on notice, and entered; and certified copy, countersigned by the judge, to be presented. N. Y. Code Civ. Pro., § 751; N. Y. Gen. Rules, No. 70, of 1884.*]

Form No. 647.

Notice of motion for reference or writ of inquiry to ascertain damages caused by injunction.¹

[*Notice motion before the court,² as in Form 488, p. 1, of this Vol., substituting for the italic clause between the † and ¶, the following clause:*] for a reference [*or, a writ of inquiry—or may ask both in the alternative*] to ascertain the damages sustained by the defendant by reason of the injunction granted in this cause on the day of last.

Form No. 648.

Order of reference, or writ of inquiry to ascertain damages caused by injunction.³

[*Caption and recitals, see Form 493, p. 4, of this Vol.*]

ORDERED, that it be referred to R. F., Esq., of , to

¹ Usually it will be well to move on affidavit also, stating the condition of the cause.

Notice must be given to the plaintiff. Notice to the sureties is not essential, but rests in the discretion of the court. *Methodist Churches of N. Y. v. Barker*, 18 *N. Y.*, 463.

A defendant who was enjoined and obeyed the injunction, may make this motion even though he did not appear in the action. In such case let his notice of motion include appearance of his attorney. All of several defendants enjoined should unite in the motion, or, if any refuse, they

should be served with notice of the motion.

² See note to next Form.

³ Under *N. Y. Code Civ. Pro.*, § 623, this order is made by the court, in which was the action wherein the injunction order was granted; and it is discretionary with the court whether the order shall be upon notice to the sureties upon the undertaking. The court may direct the mode of giving such notice.

It should be required, especially where the motion for the reference was made without notice to the sureties. See *Wilde v. Joel*, 15 *How. Pr.*, 320; *Hoffm., Prov. R.*, 333.

ascertain the damages sustained by the defendant [*or*, by the defendants or either of them], by reason of the said injunction, and to report the same to the court [and that days' notice of the hearing, to C. D. and E. F., the sureties named in the undertaking given on obtaining said injunction, be given by depositing in the post-office, in the city of , at least [six] days before such hearing, a notice of such hearing contained in a securely closed post-paid wrapper directed to said C. D. and E. F., at].

Enter: [*signature by initials of name and title of judge.*]

Form No. 649.

Notice to sureties of reference or writ of inquiry to ascertain damages caused by injunction.¹

[*Title of court and action.*]

Please take notice, that on the day of , at in , a hearing will be had before R. F., Esq., a referee appointed by this court [*or*, before the sheriff of county and a jury summoned by him pursuant to a writ of inquiry issued by this court], in the above action, to ascertain and determine the damages sustained by reason of the injunction heretofore granted herein [upon the issue of which you became surety in the undertaking given on the part of the plaintiff].

[*Signature and office address of*]

[*Date.*]

Attorney for defendant.

[*Address*] To [*the sureties and plaintiff*].

Form No. 650.

Report of referee as to damages caused by injunction.²

[*Title of court and action.*]

To the Court of .

The undersigned, to whom it was referred by an order dated the day of , 18 , to ascertain and determine the damages sustained by the defendants [*or*, either of them]

¹ It is the fairer course to give this notice. *Jordan v. Volkenning*, 72 *N. Y.*, 300. ² Sustained in *Matthews v. Murchison*, 14 *Abb. N. C.*, 512, n.

by reason of the injunction granted in this cause on the day of _____, 18____, and to report the same to the court, respectfully reports :¹

I. That before proceeding with said reference, I took the oath required by law, which is hereto annexed and made part of this my report.

II. That the following persons appeared before me upon the said reference :

A. T., Esq., counsel for the plaintiff; Z. T., Esq., for the defendants; and M. N., the surety upon the undertaking given upon issuing said injunction [*or in default of appearance of any one to whom notice was required, say:* and the defendant produced due proof by the affidavit of C. D., verified the day of _____, and hereto annexed, that notice of the hearing before me was duly given M. N., the surety, &c.].

III. That having taken the testimony of the witnesses produced before me from time to time on behalf of the plaintiff and defendants [and sureties] respectively, and having duly considered the matter, I find :¹

First. That the defendants have sustained damages by reason of said injunction, in the sum of _____ dollars, by [*here state cause or nature of damage*].²

Second. That they have sustained no other damage.

Third. That a reasonable allowance to the counsel for the defendants for his services upon the reference will be the sum of _____ dollars, besides disbursements which amount to the sum of _____ dollars for stenographer's fees and _____ dollars for referee's fees.

All of which is respectfully submitted.

[*Date.*]

[*Signature*]

Referee.

[*For Forms of Exceptions to report, motion to confirm, and order confirming or setting aside, see REFERENCE.*]

¹ It is usually better to state conclusions of fact and law separately, as on a trial. See REFERENCE. But this is not essential to the regularity of a report on such a reference as this. *Matthews v. Murchison*, 14 *Abb. N. C.*, 512, n.

² The object that the report in

the case from which this precedent is taken did not sufficiently specify the nature or cause of the damage to the defendants, was overruled because, if well taken, it was supplied by the agreement upon the argument that the referee's opinion should be considered a part of the referee's report.

ARTICLE IV.

RECEIVER (INCLUDING MANAGER CONTINUING BUSINESS).

SECTION I.—OBTAINING RECEIVER.

II.—SECURITY AND OATH.

III.—THE RECEIVER'S TITLE, POSSESSION AND CONTROL.

IV.—INSTRUCTIONS.

V.—ACCOUNTS.

VI.—DISCHARGING.

SECTION I.

OBTAINING RECEIVER.

- | | |
|---|---|
| 1. Inherent power of the court. | 22. — designating property. |
| 2. Agreement to submit to receivership. | 23. — date; relation back. |
| 3. Statutory power. | 24. — duration. |
| 4. Property in a foreign jurisdiction. | 25. — powers. |
| 5. Common-law and statutory receivers distinguished. | 26. — usual powers; special directions. |
| 6. Powers of common-law receivers. | 27. — corporation receivers. |
| 7. Sequestrator. | 28. — assignment to receiver. |
| 8. Action necessary. | 29. — direction to collect debts. |
| 9. The practice; application to court. | 30. — to give possession; attorn, &c. |
| 10. — — order to show cause. | 31. — to lease. |
| 11. — when. | 32. — to carry on business. |
| 12. — injunction. | 33. — to sell. |
| 13. — in what county. | 34. — suits by; express authority. |
| 14. — three methods of moving. | 35. — in other jurisdictions. |
| 15. — the complaint and affidavits; rules for drawing them. | 36. — compromises. |
| 16. — notice required. | 37. — suits against. |
| 17. — in corporation cases. | 38. — distribution. |
| 18. — — to the attorney-general. | 39. — direction for security. |
| 19. — form of notice. | 40. — saving clause as to further instructions. |
| 20. Selection. | 41. Motion on pleadings for permanent receiver. |
| 21. Prudential rules for drawing order appointing receiver;—recitals. | 42. Ancillary receivers. |
| | 43. Double receiverships. |
| | 44. Special receivers. |

[For list of Forms, see p. 141.]

1. *Inherent power of the court.*—Under the new procedure the inherent power of equity to appoint a receiver is continued except so far as expressly and positively limited.¹

¹ Hollenbeck v. Donnell, 94 N. Y., 342; rev'g, on another point, 29 Hun, 94; N. Y. Code Civ. Pro., § 217; U. S. Trust Co. v. N. Y., West Shore, &c., R. R. Co., 101 N. Y., 488.

The New York statute¹ defines generally the power to appoint a receiver before final judgment [in addition to the cases specially provided for by law, such as some particular classes of corporations], thus: "on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party,² and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed."³ And the statute includes the county courts with the supreme and superior city courts, as having this power.

The foregoing statutory definition of the cases for a receiver is not exhaustive, and does not deprive courts, having equitable jurisdiction, of the inherent power in any case in which it may be exercised according to the course and practice of courts of equity.⁴

¹ *N. Y. Code Civ. Pro.*, § 713.

² A party not in possession who does not disclose who is in possession, cannot defeat a motion for receiver by objecting that the property is not in possession of any party to the action. *Smith v. Tiffany*, 13 *Hun*, 671.

³ "Property" here includes rents, profits, income and increase (*id.*), and "injury to property" does not necessarily imply impairment of the physical thing, see § 3343, subd. 10. An "inherent right" here does not require an exclusive right to be shown. *Hollenbeck v. Donnell*, 94 *N. Y.*, 342; *rev'g* 29 *Hun*, 94.

⁴ *Hollenbeck v. Donnell*, and other cases above cited; *s. r.*, *Barbour v. Nathl. Exch. Bank (Ohio)*, 1887, 12 *Northeastern Rep.*, 5; *N. Y. Code Civ. Pro.*, § 217; *s. r.*, *Skinner v. Maxwell*, 66 *N. C.*, 45.

The statement in *High on Recs.*, 2d ed., 23, that the statute excludes all unenumerated cases, is an error.

In *Fellows v. Heermans*, 13 *Abb. Pr.*, *N. S.*, 1, it was held that as the writ of injunction was abolished by the "Code," and an order of injunction substituted, such an order, as a process in the action and as a provisional remedy, must find its warrant in that statute or it cannot stand. This decision has led some to think that the power to appoint a receiver has also been made purely statutory. I doubt whether such a rule would be laid down as to injunctions now, were the question now open. It does not seem to have been observed, that the abolition is expressed as of the writ, as a form, not of the power of the court, and that the same statute declares that each court "shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed by this act" (*N. Y. Code Civ. Pro.*, § 4), and continues chancery jurisdiction of the Supreme Court (*id.*, § 217); and reaffirms the ancient powers of the court to devise and make new process and forms of proceedings necessary to carry into effect the powers and jurisdiction possessed by it (§ 7, subd. 3).

But even if the power of the court to grant injunctions must be deemed purely statutory (except in the case of stay of proceedings, and in the case of enjoining the conduct of, or interference with, the conduct of its officers—where the common-law power clearly remains), the effect of the code in the power to appoint receivers is different, and the common-law power continues, as stated in the text.

But the mere necessity of preserving property pending litigation is held not enough to enable one whose interest is not admitted or established, to move for a receiver; unless some statute authorizes it.¹

2. *Agreement to submit to receivership.*—The consent of the parties does not, so far at least as third persons are concerned, give the court power to appoint a receiver in a case not within the general rules of law and equity;² nor even as between the parties to such an agreement, is the court controlled by a covenant that a receiver may be appointed;³ but such a stipulation is often a sufficient ground for appointment in an otherwise doubtful case.⁴ So where partners have agreed that one shall take charge of liquidation, he has usually the preference in being appointed receiver.

¹ *Adee v. Bigler*, 81 N. Y., 349, holding therefore that the provisions of N. Y. Code Civ. Pro., § 713, allowing a receiver when plaintiff has established an "apparent" right, do not suffice to authorize a plaintiff without judgment, to maintain a creditor's action against a corporation to set aside an assignment made by it when insolvent, in contravention of the statute.

² "The consent of the parties," says Deady, J., in the *Holladay* case, 29 Fed. Rep., 126, "so far, at least, as third persons are concerned, does not give a court jurisdiction to appoint a receiver (*Whelpley v. Erie Ry. Co.*, 6 Blatchf., 271, 274); and in Louisiana it has been decided that a receiver of partnership funds, appointed by consent of both partners pending a suit for the dissolution of the firm, is not an officer of the court, but merely an agent of the parties. *Kellar v. Williams*, 3 Rob., 321; cited in note to section 1, in *High on Receivers*."

³ The fact that both complaint and answer ask a receiver, is not conclusive against defendants' objection that sufficient grounds are not shown. *Dusenbury v. Dusenbury*, 2 Civ. Pro. R. (*McCarthy*), 91.

⁴ In *McLane v. Placerville, &c., Ry. Co.*, 66 Cal., 606; s. c., 6 Pacif. Rep., 748, 754 (an action by the trustee in a trust deed), the court say, in disposing of the objection, that a receiver could not be appointed because the property was not in danger nor the security inadequate, the court, by Thornton, J., say: "In reply we have to say that this action is not one to foreclose a mortgage. It is a suit brought to enforce the specific execution of the terms and stipulations of a mortgage, by which, on the happening of a specific event, the trustees, or the survivor of them, are entitled to take possession of the property mortgaged, hold it, receive and collect the income and profits arising from it, and apply such income and profits as are stated above. The *casus federis*, which the surviving trustee was to take possession, having occurred, on his application the court made the order. This is so clearly within the province of a court of equity that we can see no reason to doubt its power or the regularity of the proceeding. It comes within the provisions of section 564, subd. 6, of the Code of Civil Procedure, authorizing such appointments where receivers have heretofore been appointed by the usages of courts of equity. There are several cases where such a proceeding has been had, which have been sanctioned and approved by courts of the most undoubted learning and ability. See *Shepley v. Atlantic & St. Lawrence R. Co.*, 55 Me., 395; *Shaw v. Norfolk Co. R. Co.*, 5 Gray, 162; *American Bridge Co. v. Heidelberg*, 94 U. S., 798."

3. *Statutory power.*—In recent times statutes have been passed conferring power to appoint in cases that were not within the inherent power, or where that power was doubted or deemed to be inapplicable.

The most notable of these is the power conferred to appoint a receiver for the dissolution of a corporation.¹

Other cases are the statute as to creditors' actions,² and that allowing the court having jurisdiction of an action involving the distribution of a decedent's estate, to appoint a receiver on the death of a sole surviving executor or administrator;³ and the statute allowing a receiver in a creditor's proceedings supplementary to judgment and execution.⁴

Such a statute conferring on the court the power to appoint a receiver in a case not previously within its equitable cognizance, although it prescribe specifically the receiver's powers and duties, is not to be regarded as necessarily creating a special statutory proceeding, but rather as making an addition to or extension of the general equity powers of the court.⁵

4. *Property in a foreign jurisdiction.*—The mere fact that the property is in a foreign state is not ground for refusing to appoint a receiver, if the parties are subject to the jurisdiction.⁶

¹ *N. Y. Code Civ. Pro.*, §§ 1788, 1801, revising 2 *N. Y. R. S.*, 463.

² *N. Y. Code Civ. Pro.*, § 1877.

³ *N. Y. Code Civ. Pro.*, § 1869, revising *N. Y. L.*, 1863, c. 466.

⁴ *N. Y. Code Civ. Pro.*, § 2464, revising *Code Pro.*, § 298.

⁵ *Palmer v. Clark*, 4 *Abb. N. C.*, 25; *Ferry v. Bank of Central N. Y.*, 15 *How. Pr.*, 445, 458; *W. F. Allen, J.*

⁶ *Barbour v. Lockhard*, 11 *Weekly Cin. L. Bul.*, 319 (appointing receiver, between Ohio owners of mine in Nicaragua, because they were unable to agree on its working, and it was in danger).

The court say: "As all the owners are here in court, who is to prevent him (the receiver) from getting possession? It is not to be assumed that any of the parties, by themselves or their agents, will attempt to resist the order of the court. Nor is it to be assumed that the officers of the government of Nicaragua will, of their own motion, interfere to prevent possession from being taken. There is a class of cases in which it has been held that a receiver cannot be permitted to take possession of property outside the jurisdiction of the court appointing him—the leading one of which is *Booth v. Clark* (17 *How.*, *U. S.*, 322).

"But there is also another class of cases in which it is held that a receiver appointed in one State will be permitted to take possession of property in another (*Bank v. McLeod*, 38 *O. S.*, 174, 184; *Hurd v. City of Elizabeth*, 41 *New Jersey L.*, 1).

"The principal ground of distinction between the two classes of cases ap-

But the receiver should have an assignment so as not to claim alone under the appointment.

He can receive in the foreign jurisdiction a voluntary delivery, and this gives him lawful possession even though it were coerced by the order of court or by fear of proceedings of contempt; but if a question arises, in the courts of such other jurisdiction, between him and third persons claiming there adversely, neither his appointment nor an involuntary assignment to him will preclude the courts of such jurisdiction from giving a preference to the claims of creditors and others within their own territory;¹ and such proceedings in the foreign jurisdiction will be respected by the courts of the jurisdiction in which the receiver was appointed.²

5. *Common-law and statutory receivers distinguished.*—The term "statutory receiver" in New York practice is used to designate a receiver who is vested with the powers and subject to the duties of trustees under insolvent assignments made under the Revised Statutes.³ These powers are for the most part defined in great detail.⁴ The main distinctions are, that a statutory receiver is, by force of the statute, an assignee and vested with title without the formality of an assignment; that it is his duty to advertise for claims; and he has statutory powers to discover and coerce delivery of the assets; to call meetings of creditors; to refer or compromise disputed

pears to be this: Where there are creditors, or other persons having claims upon the property, residing within the State where it is situated, the courts of that State will not permit the foreign receiver to take possession, preferring the rights of its own citizens to those of the people of another jurisdiction, but if there be no party within such State, claiming an interest in the property, the courts thereof will permit, and in a proper case will assist, the receiver appointed by the courts of the State where the owners reside to take possession."

See also *Patterson v. Lynde*, 112 *Ill.*, 196; *mem.* 20 *Cent. L. J.*, 217, and articles in 22 *Am. Law Reg.*, 289; 7 *South. L. J.*, 233; *Lycoming Fire Ins. Co. v. Wright*, 55 *Vt.*, 526.

¹ *Matter of Waite*, 99 *N. Y.*, 433, limiting the reasoning but not the conclusion in *Booth v. Clark*, 17 *How. U. S.*, 322, where territorial limits to a receiver's power were strongly insisted on; but it was only held that a New York receiver in a creditor's action, who took no assignment from the debtor, could not in the courts of another jurisdiction, recover *as against creditors there*, the proceeds of a foreign claim.

² *O'Callaghan v. Fraser*, 37 *Hun*, 483.

³ Part II, c. 5.

⁴ 2 *N. Y. R. S.*, 39-51, art. 8.

claims; to allow set-off; and to make distribution. In a general sense, a receiver, any of the important powers of whom are defined by statute, is sometimes spoken of as a statutory receiver, but the technical meaning of the phrase is in its application, in the law of corporate litigation, to the permanent receiver [*i. e.*, a receiver appointed by final judgment] in an action to sequester the assets of a corporation, and to distribute them among creditors, or to dissolve a corporation and to distribute the assets, or to forfeit or vacate charters, and to receivers appointed in the special proceedings provided by law for the voluntary dissolution of a corporation.¹ By a recent statute² the court may confer on a *temporary* receiver, in an action to sequester the property of a corporation and to distribute it or to dissolve or forfeit its charter, the powers of a statutory receiver, except that no distribution can be made by him without an order of the court.³

6. *Powers of common-law receivers.*—Under the old practice a common-law receiver was simply what his name indicated, an officer to get in assets and hold and preserve them, until it should be time to deliver over; he was merely a custodian. When he held property it was by possession, not by title; when he sued to recover property or debts due the party, he sued in the name of the party of whose property he was receiver. If it became desirable for him to take any active step not directed in the order appointing him, some party to the cause must move the court; it was not the receiver's function to act without directions nor to ask leave or directions to do anything.

Successive statutes have enlarged the powers of receivers, by enabling them to sue in their own names,⁴ to take and hold title to real and personal property,⁵ to disaffirm, treat as void, and resist acts done in fraud of creditors,⁶ and to recover assets and damages from fraudulent transferees;⁷ and the rules of court

¹ *N. Y. Code Civ. Pro.*, § 2419.

² *L.* 1882, c. 331, am'd'g *L.* 1880, c. 537.

³ See the cases on the subject of statutory receivers collected in 19 *Abb. N. C.*

⁴ *N. Y. L.*, 1845, p. 90, c. 112, § 2.

⁵ *Id.*, § 1, revised in *N. Y. Code Civ. Pro.*, § 716.

⁶ *N. Y. L.*, 1858, c. 314, § 1.

⁷ *Id.*, § 2.

have conferred some incidental powers stated below, such as otherwise would need to be repeated in every order of appointment, or in subsequent instructions.

It results that under the present practice a common-law receiver; as well as a statutory receiver, is an officer with active duties, who after his appointment is not to wait for the parties to set him in motion. His powers are defined by the court (so far as necessary in addition to these statutes and rules of court) according to the necessities of each case, the guiding principle being that the power to appoint a receiver includes all that is reasonably necessary for conserving and realizing the assets.

7. *Sequestrator.*—A sequestrator is in American practice a receiver,¹ and may be either a common-law or a statutory receiver, according to the case. The appointment of a receiver who takes possession is a sequestration.

8. *Action necessary.*—Under the new procedure the appointment cannot, except by express statutory authority,² be made, unless an action is brought or about to be brought.³ It

¹ *Donnelly v. West*, 17 *Hun*, 564 (and cas. cit.), rev'g *Donnelly v. Shaw*, 7 *Abb. N. C.*, 264.

² As in case of voluntary dissolution under *N. Y. Code Civ. Pro.*, § 2419, &c. (revising 2 *R. S.*, 467), or in some cases of moneyed corporations, specially regulated.

The appointment of a receiver in place of the trustees of a dissolved manufacturing company under *N. Y. L.*, 1852, c. 361, § 3, may be made on petition to the Supreme Court, without action. *Matter of Pontius*, 26 *Hun*, 232.

³ See Volume I, p. 115, paragraph 18, note 2. Compare *People v. Norton*, 1 *Paige*, 17; *McCarthy v. Peake*, 9 *Abb. Pr.*, 164.

In *Pressly v. Harrison*, 102 *Ind.*, 14; s. c., 1 *Northeastern Rep.*, 188, Mitchell, J., delivering the opinion of the court, on holding that appointment of a receiver on the written consent of a defendant not served nor appearing was illegal, says: "We know of no decided case, except where the court was authorized by statute to preserve the estates of infants and lunatics, in which a receiver was appointed before a suit was pending. If an immediate necessity therefor is shown to exist, the application for a receiver may be entertained when the action is commenced, which, under the rule here, is when process is issued, or an appearance to the action is entered in the manner recognized; but as the appointment of a receiver in any case is a provisional remedy, auxiliary to the action, or the relief prayed for therein, neither the court in term nor judge in vacation can acquire jurisdiction to appoint a receiver until there is an action pending. The application for a receiver is an interlocutory proceeding in a pending suit. *Brinkman v. Ritzinger*, 82 *Ind.*, 358; *Dale v. Kent*, 58 *Ind.*, 584; *Merchants & Manufacturers' Bank v. Kent Circuit Judge*, 43 *Mich.*, 292; s. c., 5 *N. W. Rep.*, 637. Unless it is shown that on

cannot be made on petition when no action is contemplated ; nor in a special proceeding.¹ When it is part of the final relief, a complaint should be presented ; but the court have jurisdiction to grant it like any other provisional remedy, on the issue of the summons, and in anticipation of its service, and when so granted it is deemed to be granted in the action, and the court has jurisdiction from the time of making the order, provided service of summons is made in due course.²

9. *The practice ; application to court.*—Application must be made to the court, not to a judge out of court,³ except in those instances where, as in the case of supplementary proceedings under the New York statute, the power is expressly given to a judge.⁴ Even a general provision allowing a judge out of court to hear and decide motions does not necessarily include the power to appoint a receiver ;⁵ but such an appointment by a judge in vacation, if afterwards confirmed by the court in term, will be deemed to have been made by the court itself.⁶

But the *court* may delegate the power of appointment to a referee,⁷ except in supplementary proceedings.

10. — — *order to show cause.*—A judge out of court may make an order to show cause why a receiver should not be appointed by the court,⁸ and why an injunction should not be granted ; and if injunction is sought, the judge may (except

account of absence, or for some other cause, process cannot be served on the defendant, the application should not be entertained until after service and notice."

¹ *Matter of Hancock*, 27 *Hun*, 575, holding that the fact that an appeal to the Supreme Court, from an order of a surrogate vacating probate, is pending, does not bring the administration into the Supreme Court so as to give that court jurisdiction to appoint a receiver of the estate, on motion.

² *N. Y. Code Civ. Pro.*, § 416.

³ *N. Y. Code Civ. Pro.*, §§ 713, 1810 ; *Pressly v. Harrison*, 102 *Ind.*, 14 ; s. c., 1 *Northeastern Rep.*, 188, 190.

⁴ *N. Y. Code Civ. Pro.*, § 2464.

⁵ *Hammock v. Farmers' Loan & Trust Co.*, 105 *U. S.*, 77.

⁶ *Hervey v. Illinois Midland Ry. Co.*, 28 *Fed. Rep.*, 169.

⁷ *N. Y. Code Civ. Pro.*, § 827, preserves the old power in this respect in those cases where a receiver can be appointed *by the court*.

⁸ See paragraph 13 (*below*), and Volume I, p. 161.

in the corporation cases below stated), by the same *ex parte* order, enjoin meanwhile.¹

11. — *when.*]—Under the old practice the motion was usually made upon the coming in of the answer, but on grounds of emergency was allowed before answer. Under the present practice it is usual to apply at the commencement of the action in cases of insolvency, and in other cases either before or after answer, according to the necessity of the case.

12. — *injunction.*]—If the action is by a judgment-creditor to sequester the property of a corporation,² or by the attorney-general, either for dissolution of an insolvent or suspended corporation,³ or to vacate a charter, &c.,⁴ or in any action if the injunction is one “suspending the general and ordinary business of a corporation, or of a joint-stock association, consisting of seven or more persons, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof,”⁵ the restraining order or injunction under the New York statute cannot be granted by a judge, even pending a motion for receiver; except of course in the first judicial district, where a judge may make an order that the court might.⁶

13. — *in what county.*]—Under the New York statute the motion for a receiver of a corporation in an action to sequester all its property, or dissolve it, and for distribution, must be made at special term in the judicial district, or a county adjoining the judicial district within which its principal business office was at the beginning of the action.⁷

¹ See p. 33 of this Volume.

² *N. Y. Code Civ. Pro.*, §§ 1784, 1787.

³ *Id.*, §§ 1785, 1787.

⁴ *Id.*, §§ 1798, 1802, 1810.

⁵ *Id.*, § 1809, and see note (*below*).

⁶ See Volume I, p. 123.

⁷ For the rule applicable to motions in other actions, see Volume I, p. 134. It is provided by *N. Y. L.* 1883, c. 378, § 1, that “every application hereafter made for the appointment of a receiver of a corporation [meaning for the appointment of a receiver in proceedings to dissolve it or sequester and distri-

This does not apply to a judgment-creditor's action to remove a fraudulent obstruction to the enforcement of the lien of his judgment on specific property as distinguished from one to sequester and distribute its assets generally for the benefit of other creditors besides the plaintiff.

14. — *three methods of moving.*—There are three methods of proceeding for the appointment of a receiver. In ordinary cases the court makes the appointment, either naming the receiver, or inserting on the settlement of the order the name of one agreed on by the parties.¹ Another method is to refer it to a referee, to appoint and take security; and this is a convenient method, now as well as formerly, where a reference is necessary for the purpose of examining the defendant on oath, and superintending the transfer of the assets. The third method is to refer it to a referee, to report the name of a receiver to be appointed by the court; and this is still occasionally used where, from the importance of the trust or peculiar circumstances of the case, an extended inquiry is desirable in making a selection.

Where the second of these methods is pursued, the appointment by the referee is effectual without an order of confirmation; but any party in interest may except to the report, or petition that the report may be reviewed;² and this is a proper practice under the Code of Procedure.³

bute all its effects: U. S. Trust Co. v. N. Y., West Shore, &c., Ry. Co., 101 N. Y., 478; 35 Hun, 341] shall be made at a special term of the court held in and for the judicial district in which the principal business office of the corporation was located at the commencement of the action wherein such receiver is appointed, or in and for a county adjoining such district; and any order appointing a receiver, otherwise made, shall be void."

Section 9 of the same act provides that "all applications to the court contemplated by this act shall be made in the judicial district where the principal office of the insolvent corporation was located; and the venue of all actions or proceedings now pending, not in the judicial district where the principal office of the insolvent corporation was located, are hereby changed and transferred to the county and judicial district where such principal office was located." L. 1883, c. 378.

¹ Suggestion of selection by a stranger reproved. O'Mahoney v. Belmont, 62 N. Y., 133; aff'd 37 Super. Ct. (J. & S.), 223; *Id.*, 380.

² Matter of Eagle Iron Works, 8 Paige, 385; Bowersbank v. Collasseau, 3 Ves., 164.

³ Wetter v. Schlieper, 7 Abb. Pr., 92.

15. — *the complaint and affidavits; rules for drawing them.*—The rules stated on this subject (on pages 35 to 39) apply to motions for a receiver as well as to those for injunctions,¹ except that there is, I believe, no respectable authority for requiring the complaint to ask the appointment of a temporary receiver.²

A prayer in the complaint for a receiver as a part of the final relief, is sufficient notice to sustain a clause for receiver in the judgment.³

The grounds for receivership other than those which form part of the cause of action, need not be alleged in the complaint,⁴ even where a permanent receivership is part of the ultimate relief sought.⁵

16. — *notice required.*—As a naked question of power, the court, unless restrained by statute, can appoint *ex parte*, but the power is rarely and cautiously exercised, and only in the case of an absentee defendant⁶ or some pressing emergency.⁷ As a general rule, notice should be given, which should

¹ Mr. High (*on Recs.*, 2 ed., 86) says, "it would ordinarily seem to be sufficient if the facts upon which the application is based are verified by the affidavit of plaintiff alone." But *Simmons v. Wood*, 45 *How. Pr.*, 262, 269, is the only authority cited. If the author means sufficient to give power to make the order, he is clearly right. If it is meant ordinarily sufficient to satisfy the court, the proposition is doubtful.

² In *Pressly v. Harrison*, 102 *Ind.*, 14; s. c., 1 *Northeastern Rep.*, 188, it is well said that a complaint is not essential.

³ *High on Recs.*, 2 ed., 93, citing *Newell v. Schnull*, 73 *Ind.*, 241.

⁴ *High on Recs.*, 2 ed., 76.

Thus in an action for the dissolution of a partnership the facts which show an interest in the assets, and a right to dissolution, and an accounting and payment, must be pleaded; but the additional fact (which with these forms the ground for receivership) that the assets are in danger, need not be pleaded. *Hottenstein v. Conrad*, 9 *Kans.*, 435.

⁵ *High (on Recs.)*, 2 ed., 75, also p. 87) says, it is not indispensable to the appointment either of a temporary or a permanent receiver that the bill should contain a specific prayer for a receiver, if the facts stated are sufficient to justify the appointment [citing a number of cases].

The omission of the prayer for a receiver in the complaint was, however, adverted to as material (*Latimer v. Eddy*, 46 *Barb.*, 61, 66), where injunction was asked for, the effect of which would be to suspend all the powers of the officers.

⁶ See Form No. 661. *Alford v. Berkele*, 29 *Hun*, 633 (holding notice to non-resident partner not necessary, in action to dissolve partnership).

⁷ *People v. Albany and Susq. R. R. Co.*, 55 *Barb.*, 344; 38 *How. Pr.*, 228.

be personal, but may be by order to show cause, with an injunction meanwhile.¹

Under the New York statute² *ex parte* appointment before judgment, in cases within the scope of the statute,³ is forbidden, "unless the adverse party has failed to appear⁴ in the action, and the time for his appearance has expired," or unless service by publication has been ordered.

The notice of motion may be served with the summons and complaint.⁵

Where there are several defendants, the court may act on proof of service on one defendant for himself and for a co-defendant whom he represents as authorized agent in the management of the property in question.⁶

The court may act on the appearance of counsel to oppose the motion, without service of notice.⁷

17. — *in corporation cases.*]—If an injunction is sought "suspending the general and ordinary business⁸ of a corporation,

¹ *Devoe v. Ithaca & O. R. R. Co.*, 5 *Paige*, 521; *Verplanck v. Merc. Ins. Co.*, 2 *id.*, 438.

² *N. Y. Code Civ. Pro.*, § 714. "Adverse party" here appears to mean the party in possession. § 713, subd. 1.

³ *Alford v. Berkele*, 29 *Hun*, 633, where the court, in an action to dissolve a partnership, say: "It was always the rule of the Court of Chancery to appoint a receiver in like cases without notice to a non-resident partner. [Citing *People v. Norton*, 1 *Paige*, 17; *Verplanck v. Merc. Ins. Co.*, 2 *id.*, 438; *Bloodgood v. Clark*, 4 *id.*, 574.] There was then, and there is now, no way to serve a notice of motion out of the State. Section 713, Code, provides for cases in addition to cases specially provided by law. Section 1947, Code, specially gives power to the court to appoint a receiver in cases of partnership." Hence appointment without notice to a non-resident defendant was sustained.

⁴ See Volume I, p. 711, note 1.

The requirement of notice relates to the creation of the receivership, not necessarily to the appointment of a successor on the death of the first appointee. *Nicholl v. Boyd*, 90 *N. Y.*, 516.

⁵ *High (on Recs.*, 93, 2 ed.) expresses the opinion that formal service of process is not essential, but cites, to the contrary, *Whitehead v. Wooten*, 43 *Miss.*, 523.

⁶ *High on Recs.*, 2 ed., 94, citing *Mays v. Rose*, *Freem. (Miss.)*, 703; *Maguire v. Allen*, 1 *Ball & B.*, 75, and see note 1 (*above*).

⁷ *McLean v. Lafayette Bk.*, 3 *McLean*, 503; *High on Recs.*, 2 ed., 94.

Whether serving an affidavit is a sufficient appearance to dispense with service of notice, see *High on Recs.*, 2 ed. 84, citing *Vann v. Barnett*, 2 *Bro. C. C.*, 158, holding that it is.

⁸ As to what is such suspension, see *Howlett v. N. Y., West Shore, &c., R. R. Co.*, 14 *Abb. N. C.*, 328.

or of a joint-stock association, consisting of seven or more persons, or suspending from office or restraining from the performance of his duties a trustee, director or other officer thereof," personal notice of the application therefor must, under the New York statute, be given to the proper officer of the corporation or association, or to the trustee, director or other officer enjoined."¹

The appearance of the corporation by attorney on an application for an injunction, a receiver and a decree dissolving the corporation, is presumed to be authorized, as is an appearance in an ordinary action; such appearance gives jurisdiction to the same extent as though it were on actual service of process.²

18. — — *to the attorney-general.*]—Under the New York statute³ notice must be given to the attorney-general of all motions in actions or proceedings for the dissolution of a corporation or a distribution of its assets; and this is understood to include not only an action to dissolve a corporation or forfeit or vacate its charter, but also a creditor's action which contemplates the sequestration of all its property for the benefit of all its creditors, as distinguished from an

¹ *N. Y. Code Civ. Pro.*, §§ 1809, 1810, under subd. 4. An injunction in violation of this is void. *Id.* This provision, on a view of the whole section, will be found to be of broader application than the Act of 1883, requiring notice to the attorney-general in actions for sequestration, or dissolution and distribution.

The vice-president of a bank, being also a director, is a proper officer on whom to serve notice of motion for a receiver. *People v. Central City Bank*, 53 *Barb.*, 412; s. c., 35 *How. Pr.*, 428.

A plaintiff who is an officer of the corporation cannot get jurisdiction by having service of summons for it made on himself. *St. Louis, &c., Co v. Sandoval Coal & Min. Co.*, 111 *Ill.*, 32; s. c., 17 *Ohic. Leg. N.*, 135, and *cas. cited.*

As to proceeding when no officer can be found to be served, see *Dayton v. Borst*, 7 *Bosw.*, 115, 118.

² *Matter of Atty.-Gen. v. Guardian Mut. Life Ins. Co.*, 77 *N. Y.*, 272.

³ *N. Y. L.*, 1883, c. 378, § 8, is as follows: "§ 8. A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding now pending for the dissolution of a corporation or a distribution of its assets, or which shall hereafter be commenced for such purpose, shall, in all cases, be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this law would be

action in the nature of a creditor's action to reach for his exclusive benefit specific property upon which the creditor has acquired a lien by judgment or issue of execution giving him priority.

Such notice must be given even of motions otherwise *ex parte*, except that it is not necessary to serve the papers on the attorney-general before applying for an order to show cause.¹

An order void for want of notice to the attorney-general may be cured by an order confirming it, made on notice to him, at least so far as to make it valid from the date of making the latter order.² But notice of the application for the confirming order must be given to a receiver or other person, who, though not a party to the action, had already moved in the action for relief against the void order.³

19. — *form of notice.*]—The notice of motion should express shortly but clearly the object of the application, for in general the court will not extend the order beyond the notice.⁴

The *property* should be indicated, but it is enough to say "of all the property" of a defendant named; or, of the rents and profits of all his real property.

Unless specific *directions* are asked, it is enough to say, "with the usual powers;" but it is desirable to add the usual

ex parte or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy or order, unless the attorney-general shall appear on the return day and have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general."

¹ *Greason v. Goodwillie Wyman Co.*, 22 *Week. Dig.*, 560; s. c., less clearly reported on this point in 38 *Hun.*, 138.

² *Morrison v. Menhaden Co.*, 37 *Hun.*, 522.

³ *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 *Hun.*, 164; s. c., 5 *Civ. Pro. R.*, 118.

⁴ *Edwards on Receivers in Eq.* (12th ed.), 77; 1 *Grant's Ch. Pr.*, 144. See *Whitney v. Buckman*, 26 *Cal.*, 447 (receiver appointed in a proper case, though the notice of motion was only for an injunction).

clause, for such other or further relief as to the court may seem just.

Where notice to the *attorney-general* is required by the New York statute, it must be given by serving a copy of the proposed order or judgment; and if he does not appear, or does appear and objects, no relief substantially different from that stated in the proposed form can be granted.

20. *Selection.*—A receiver should be a resident within the jurisdiction,¹ but the court have power to appoint a non-resident, and may properly do so where he is also receiver of the same defendant in another jurisdiction.²

A trust company may, under a recent New York statute, be appointed without giving security.³

21. *Prudential rules for drawing order appointing receiver;—recitals.*—See that the recitals include the appearances, or due notice; and, in case of property of an absentee, the making of an order for service by publication; and, in corporation cases, the personal service; also the service on the attorney-general with copy of proposed order;—or appearances equivalent thereto.⁴

22. — *designating property.*—An order for a receiver ought, if practicable, to state so distinctly, on the face of it, over what property the receiver is appointed, that one who reads it may

¹ *Chamberlain v. Greenleaf*, 4 Abb. N. C., 92.

The rules guiding the choice of a party or the officer or agent of a party, are so peculiar to the class of actions involved that it would scarcely be useful to state them here further than to say that in a controversy between debtor and creditor (other than foreclosure) a strictly indifferent person is sought. In controversies between partners, joint-owners, and in corporation cases, the fact of possession and converseance with the property are advantages in favor of appointing a party, or officer, or agent, against which is to be weighed whatever objection is made on the ground of unfairness or implication in the wrongs leading to the litigation.

² In *Woerishoffer v. N. R. C. Co.*, 99 N. Y., 398, a New Jersey receiver was appointed ancillary receiver here.

³ *N. Y. L.*, 1885, p. 735, c. 425.

⁴ For the importance of full and accurate recitals, see Volume I, p. 249.

know what it is of which the officer of the court is in possession, or directed to take possession.¹

A defect in this respect can be supplied however by amendment, or by a reference to ascertain the particulars; and in many classes of cases, all that is practicable in the order of appointment is a general designation, to be followed by a discovery of particulars.

In case of doubt as to whether an article of property is within the scope of the receivership, the court can appoint the receiver pending its determination.²

23. — *date; relation back.*]—As priority of right may depend on the time of making the order, the date of the making and entry of the order should appear.

As against the adverse interests of third persons, the court cannot even by an express clause give the appointment effect by relation back to an earlier time.³

24. — *duration.*]—The appointment is usually expressed to be “during the pendency of this action;” and an order which says nothing of the duration of the receivership will be construed as if so expressed.⁴

25. — *powers.*]—An order which says nothing of powers, or only that the appointment is “with the usual powers,” is valid; and the receiver will have such special powers as may

¹ O'Mahoney v. Belmont, 62 N. Y., 133; Crow v. Wood, 13 Beav., 271, s. p., As to injunction, p. 38, of this Vol.

² Barry v. Kennedy, 11 Abb. Pr., N. S., 421, 426 (*dictum*; a receiver being denied because the item was a market stand not capable of control by a receiver).

³ Artisans' Bank v. Treadwell, 34 Barb., 553, unless, perhaps, it may be to the time when the motion was brought on before the court.

The question as to the time when the appointment of a receiver takes effect may require a different answer according to whether it is raised as against creditors or as against an assignee in bankruptcy, or as against a *bona fide* purchaser from the defendant, or in respect to a continued course of dealing with the defendant and the receiver succeeding to the possession.

Compare Chamberlain v. Rochester, &c., Co., 7 Hun, 557; Matter of Berry, 26 Barb., 55; Cook v. Cole, 55 Iowa, 70; s. c., 7 Northwestern Rep., 489, and *cas. cit.*

As to who has priority where two receivers are appointed on the same day, see People v. Central City Bank, 53 Barb., 412; 35 How. Pr., 428.

As to successive receivers, see, also, Bank of Mut. Redemption v. Sturgis, 9 Bosw., 608; State v. Jacksonville, &c., R. R. Co., 15 Fla., 201.

⁴ *High on Recevs.*, 2d ed., 11, citing Weems v. Lathrop, 42 Tex., 207.

be given by general rule of court, or by subsequent order in the cause.¹

If the case is not one in which the statute authorizes the appointment of a statutory receiver—that is to say a receiver having the powers of an assignee in insolvency²—an order in general language conferring on him the powers of such a receiver does not make him such, but he is to be regarded as having the powers of a common-law receiver only, without statutory power to sell, and subject to the control of the court.³

26. — *usual powers ; special directions.*—Mere appointment, “with the usual powers,” imports that the receiver may, without further order, reduce the assets to possession, so far as he can do so without suit. The New York rules of court⁴ also give to the receiver of a debtor power, without special order, to sue on demands and to compromise such as are unsafe or doubtful, and to convert the personal estate and effects into money.

The powers conferred by statute on receivers in general, such as to sue, and to set aside fraudulent transfers, should not be exercised in any given case, not within the above statement, without the special direction of the court ; and although such direction may be obtained on subsequent application, it may facilitate the successful performance of the receiver’s duties, if those powers, a disposition to oppose or evade which may be anticipated, are expressly stated in the order of appointment.

27. — *corporation receivers.*—By N. Y. Code Civ. Pro.,

¹ In *Negus v. City of Brooklyn*, 10 *Abb. N. C.*, 180, 187, in holding that a tax-payer might maintain a suit to enjoin a municipal corporation from granting a new franchise to the receivers of an insolvent railroad company, it is said that: “Receivers, appointed *pendente lite*, except in cases (of which this case is not one) where by statute they are made assignees, have no powers which have not been conferred upon them by the order for their appointment. They are officers of the court, and their duty is merely to protect the property or fund during the litigation. Their acts are the acts of the court when duly sanctioned, but when not so sanctioned they have no greater effect than the acts of other unauthorized officers or agents.” This statement is undoubtedly sound, subject to the qualifications in the text.

² See paragraph 6, p. 120.

³ *Hackley v. Draper*, 60 *N. Y.*, 88, 95.

⁴ *N. Y. Gen. Rules*, No. 78, of 1884. See, however, p. 137, n. 4, of this Volume.

§ 1788, a receiver appointed before judgment in an action by a judgment creditor to sequester the property of a corporation and distribute it as in the case of voluntary dissolution, or in an equity action by the attorney-general or a creditor, or stockholder, to dissolve a corporation or forfeit its franchises [but incorporated library societies, religious corporations, select schools or academies, incorporated by the regents of the university, or by an act of the legislature, and municipal and other political corporations are excepted, § 1804], has only the following powers and those incidental to the exercise thereof, unless other powers of a statutory receiver are specially conferred upon him, viz., "to collect and receive the debts, demands, and other property of the corporation; to preserve the property, and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive, and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of those purposes."

A permanent receiver in any action of the same description as above stated, with the same exceptions (and "permanent" here includes a temporary receiver made permanent by a judgment), has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver appointed upon the voluntary dissolution of a corporation, that is to say he is a statutory receiver.¹

The same powers may be expressly conferred on a temporary receiver in the same cases, except that a temporary receiver cannot make any distribution among creditors or stockholders before final judgment unless specially directed to do so by the court.

28. — *assignment to receiver.*]—As the appointment of a common-law receiver does not, of itself, vest in him a salable title to real property,² and as question may arise as to whether it vests

¹ *N. Y. Code Civ. Pro.*, § 1788 (as am'd by *L.* 1882, c. 399), § 1789.

² This is the settled law, *Chautauque Bk. v. Risley*, 19 *N. Y.* 369; *St. Louis, &c., Mining Co. v. Sandoval, &c.*, Coal & Mining Co., 111 *Ill.*, 32; s. c., 17 *Chic. Leg. N.*, 135 (*dictum*); *Dawley v. Brown*, 65 *Barb.*, 107, common-law receiver's sale held to give no title because there was no assignment to him. s. p., *Union Bank v. Warner*, 12 *Hun.* 306; *Keeney v. Home Ins. Co.*, 71 *N. Y.*, 396, 401; s. c., 27 *Am. R.*, 60.

But cases to the contrary, which apply to statutory receivers and receivers

in him such title to personal property and things in action, especially in another jurisdiction, it is useful (except in cases where all the property is within the jurisdiction and mere custody is the object, or the receivership is of rents and profits only) to take a direction that the defendant assign and convey to the receiver. Of course this direction is less common in a receivership created as a provisional remedy than in a permanent receivership created by final judgment; and is rarely allowed before answer.

Taking such assignment vests the legal title in the receiver,¹ and supports his right to possession, and his action in his own name as receiver in those jurisdictions where an action may be brought in the name of an actual assignee or a trustee of an express trust.

A statutory receiver, that is one appointed by or after judgment in an action to dissolve a corporation or forfeit its charter, or to sequester and distribute all its assets, is by force of his appointment an assignee, without the execution of any instrument by the corporation;² and hence in such case no direction to assign is needed. In the same class of actions the court may now give to the appointment of a temporary receiver, as a provisional remedy, the same effect, and any other of the powers of a statutory receiver, except that of making distribution without special order.

By the N. Y. statute,³ a receiver, whether common-law or statutory, and whether *pendente lite* or permanent, may, if appointed in an action in the Supreme Court or a superior city court or county court, or in a special proceeding for the voluntary dissolution of a corporation, take and hold real property as

in supplementary proceedings, are often cited without qualification, as if they applied to common-law receivers. Many authorities declaring that a receiver acquires title to personalty without assignment, and by relation back, are really not on the question of salable title, but only affirm that he gets one prior to that of subsequent lienors, &c.

And this seems to be the point actually decided in *Atty.-Genl. v. Atlantic Mutual Life Ins. Co.*, 100 N. Y., 279, and is the point of the often cited opinion of V. C. SANDFORD, in *Mann v. Pentz*, 2 Sandf., 257 (rev'd in 3 N. Y., 415).

¹ See *Rockwell v. McGovern*, 69 N. Y., 294, aff'g 40 *Super. Ct. (J. & S.)*, 118, and modifying 54 N. Y., 210.

² The same is true of a receiver in supplementary proceedings, after due record of the order.

³ N. Y. L., 1845, c. 112, revised in N. Y. Code Civ. Pro., § 716.

the court may direct. Doubtless the like power can be conferred by order of court. But this statute gives no title, but only power to take title.

Where an assignment is directed to be made, if there be doubt as to the property, or as to defendant's compliance, a reference should be ordered.¹

The court, however, has power, in some cases at least, to transfer the title without depending on an assignment by the defendant.²

29. — *direction to collect debts.*]—A general authority to collect debts allows the receiver to receive them in advance of becoming due,³ and also to take a security or obligation in place of money, if the parties in interest consent to receive it.

30. — *direction to give possession, attorn, &c.*]—An implied or express direction to the receiver to take possession, &c., is enough to authorize the receiver to do so, and to make a refusal to deliver possession to him actionable. Moreover, after such direction, those who (having notice) actively interfere with such possession, will be guilty of contempt. But such a direction is not enough to make it a contempt to refuse to deliver.⁴ The order appointing a receiver should therefore usually contain a direction that the party and third persons in possession under him shall deliver possession to the receiver.

This direction should be so clearly expressed that the person intended can be punished for contempt if on service of a copy

¹ See Forms below.

² Mr. Justice Miller, in delivering the opinion of the court in *Silver v. Ladd*, 7 Wall., 219, 228, holding that plaintiff was equitably entitled to land which had been awarded to defendant, says: "The most usual mode under the chancery practice, unaffected by statute, is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose. In some of the States it is provided by statute that a decree of the court shall operate as a conveyance where it is so expressed in the decree, and additional relief may be granted by giving possession of the land to plaintiff, quieting his title as against defendants, and enjoining them from asserting theirs. The prayer for general relief in the bill in this case is sufficient to justify any or all these modes of relief." s. P., *Burrall v. Eames*, 5 Wisc., 260; *Sproule v. Winant*, 7 T. B. Monr. (Ky.), 195; *Baker v. City St. Louis*, 75 Mo., 671. s. P., Form 2071.

³ *Olcott v. Heermans*, 3 Hun, 431, 435.

⁴ *McKelsey v. Lewis*, 3 Abb. N. C., 61.

of the order and proper demand by the receiver he refuses to obey.

If there be doubt as to the specific articles, a reference should be ordered, or the receiver left to sue.

The receiver's appointment gives him no right to property in the custody of the defendant which the latter does not own, and his creditors cannot claim as against the real owner.¹

31. — *to lease.*—To avoid personal liability, the receiver will usually ask leave to lease vacant premises, unless leave be given by the order of appointment, although it is generally understood that leave to lease for periods not exceeding one year may be granted of course, without notice to the parties.²

Leasing for more than a year's term should not be done except by leave of court, had on notice to the parties in interest.³

32. — *to carry on business.*—The court have power to direct the receiver, whenever necessary for the benefit of the property in his possession and the interests of the parties therein, to carry on the business,⁴ so far at least as to keep a going concern still going; and even to complete the construction of an unfinished railroad.⁵

33. — *to sell.*—Authority may be conferred to sell personal property so far as necessary to realize the assets without loss or depreciation, and even where the receivership is merely for custody, such a direction may doubtless be given as to perishable property.⁶

34. — *suits by; express authority.*—Mere appointment as receiver does not, in the absence of statutory or judicial authority, enable to sue as receiver, even for the purpose of reducing the assets to possession.⁷

¹ *Corn Ex. Bank v. Blye*, 101 *N. Y.*, 306.

² See *N. Y. Gen. Rules*, No. 78, of 1884; *Booth v. Clark*, 17 *How. (U. S.)*, 322.

³ *Weeks v. Cornwall*, 19 *Abb. N. C.*, 356.

⁴ *Barton v. Barbour*, 104 *U. S.*, 126 (railroad). See also Forms 676, 683.

⁵ *Moran v. Lydecker*, 11 *Abb. N. C.*, 298.

⁶ See ATTACHMENT.

⁷ *Seymour v. Wilson*, 16 *Barb.*, 294; 2 *Dan. Ch. Pr.*, 938; *Battle v. Davis*,

A permanent receiver¹ appointed on the dissolution of a corporation, or the forfeiture of a charter, or on the sequestration of all the corporate assets for distribution, needs no judicial authority to sue, for he is a statutory receiver, with title by force of appointment, and, without assignment,² is authorized to sue in his own name.³

If there is a general statutory authority⁴ or rule of court⁵ authorizing receivers to sue, leave to sue is not needed, except for the better protection of the receiver from liability for costs,⁶ &c., if the case be doubtful and proves unsuccessful; or as supporting an intended suit in a foreign jurisdiction in which the receiver must rely on the comity of the courts.

But a general statute authority to receivers to sue in their own names, intended to supersede the old practice requiring them to sue in the name of the defendant, does not dispense with the necessity of leave to sue in any particular case.⁷

35. — — *in other jurisdictions.*]—The American doctrine as now settled in the State of New York and I believe in most of the other States, is that a receiver having an assignment, or the powers of a statutory assignee, may sue in any State, and will be recognized as having a standing in court; but the courts of a jurisdiction other than that from which he derives author-

66 *N. C.*, 252; *Singerly v. Fox*, 75 *Pa. St.*, 112; *Yeager v. Wallace*, 44 *id.*, 294, 296; *Screven v. Clark*, 48 *Ga.*, 41 (holding that authority "to collect" does not authorize suit). *Contra*, *Case v. Berwin*, 22 *La. Ann.*, 321; *Everett v. State*, 28 *Md.*, 190.

Where the receiver took neither an assignment nor leave to sue, held that the Statute of Limitations as against the party was not suspended. *Fincke v. Funke*, 25 *Hun*, 616.

¹ So of a receiver on voluntary dissolution. *N. Y. Code Civ. Pro.*, § 2419, &c., revising 2 *N. Y. R. S.*, 467, &c. And of a receiver in supplementary proceedings. *N. Y. Code Civ. Pro.*, § 2447, &c.

² *Gillet v. Fairchild*, 4 *Den.*, 80.

³ *Nathan v. Whitlock*, 9 *Paige*, 152; *aff'd* 3 *Edw.*, 215.

So a receiver of a national bank may sue in his own name or that of the bank (*First Natl. Bk. of Bethel v. Natl. Pabquioque Bk.*, 14 *Wall.*, 383, 401; *s. p.*, *Kennedy v. Gibson*, 8 *id.*, 498, 506), notwithstanding the statute is silent on the point.

⁴ As in case of statutory receivers in New York. *s. p.*, *Hayes v. Brotzman*, 46 *Md.*, 519.

⁵ *N. Y. Gen. Rules*, No. 78, of 1884.

⁶ See note in 5 *Abb. N. C.*, 346.

⁷ *Seymour v. Wilson*, 16 *Barb.*, 294.

ity will not usually recognize his claim to assets within their jurisdiction, to the prejudice of creditors resident there.¹

Hence it is important, in case of a receiver whose appointment does not by statute vest him with the powers of assignee, to take an assignment; and if there are assets and creditors in a sister State, it is the better practice in important cases to obtain there the appointment of an ancillary receiver, who may sue there without question.

36. — *compromises.*]—Power to compromise is implied in some cases; but application for leave, upon the special facts of each case, is safer in cases involving doubt or any large amount, rather than relying on a general direction.²

37. — *suits against.*]—The court may direct that he shall not be liable to suit unless leave is first obtained from the appointing court,³ except so far as the right to sue is given by statute, as in the case of the Act of Congress of March 3, 1887, § 3.

But it is the better opinion that such a clause in the order cannot protect the receiver from being sued personally to charge him in his individual capacity with damages, if by mistake or wrongfully he takes possession of the property of a stranger, or does any wrongful act for which he may be sued individually as a trespasser.⁴ But if he acted under order of

¹ The principle is fully discussed in the Matter of Waite, 99 *N. Y.*, 433. See also cases collected in 24 *Am. L. Reg.*, 403; 59 *Am. Dec.*, 524, note; 7 *South. Law Rev.*, 233; Howard Natl. Bk. v. King, 10 *Abb. N. C.*, 346; Lycoming Fire Ins. Co. v. Wright, 55 *Vt.*, 526, and *cas. cit.* A different principle applies to policy-holders in insurance companies. *Parsons v. Charter Oak Ins. Co.*, 31 *Fed. Rep.*, 305.

² See note in 5 *Abb. N. C.*, 346, and 1 *N. Y. L.*, 1882, p. 637, § 133, as to bank, &c., receivers. *N. Y. Gen. Rules*, No. 78, of 1884, gives this power to the receiver of "the debtor," but whether this applies otherwise than in supplementary proceedings has not so far as I know been determined.

³ *Barton v. Barbour*, 104 *U. S.*, 126.

⁴ *Hills v. Parker*, 111 *Mass.*, 508; *Curran v. Craig*, 22 *Fed. Rep.*, 101; *Barton v. Barbour*, 104 *U. S.*, 126. See the conflicting authorities reviewed in 21 *Am. Law Reg.*, *N. S.*, 553. The true distinction is not between actions which seek to reach specific property in his custody and actions for damages, but between actions a recovery in which would reduce the fund and actions a recovery in which could not do so nor properly appear in his accounts in any way. The modern doctrine and practice is that the title or possession is in the court, of which the receiver is only the servant, and that any proceeding to get satisfaction out of the assets directly or indirectly should be by application to the appointing court.

This is subject to the qualification that the courts of another jurisdiction

his court in the alleged trespass, that court should be applied to to correct its order before suing him.¹

38. — *distribution.*]—Directions as to distribution of proceeds should not usually be given in the order of appointment, for they depend on a determination of the merits, by judgment.²

39. — *direction for security.*]—The clause as to security formerly usual was that “upon executing a bond, &c., he be appointed receiver.” The better form, in consonance with the rule of priority now usually applied, is to say that he is appointed receiver, and before entering on the duties of his trust he must give bond. This expresses what is implied in the old form, that the lien of the receivership vests on, if not before, making of the order (or, as to real property, it may be on receiving an assignment), while his power to proceed is incomplete until he qualifies. This corresponds to the rule as to assignees for benefit of creditors.

The requirement of a bond may be waived by consent of all parties in interest.³ But since there is a statute requiring security, an order waiving it should recite that it was made on consent,⁴ and should express that the receiver is appointed without security.

40. — *saving clause as to further instructions.*]—A clause in the order reserving the right to either party to apply for further directions is not essential to preserve the power of the court to give such directions, but it may preclude the objection that such an application is a renewal of the motion, as being for

will aid creditors and claimants domiciled in that jurisdiction to reach and hold assets in that jurisdiction, as against a foreign receiver, whatever his expressed powers may be.

¹ *Curran v. Craig*, 22 *Fed. Rep.*, 101.

² *High on Recs.*, 2 ed., citing *West v. Chasten*, 12 *Fla.*, 315; *Hubbard v. Guild*, 2 *Duer*, 685 (order that the petitioner have payment, in priority, reversed, and funds stayed in receiver's hands with leave to the petitioner to sue).

³ An order entered by stipulation, appointing a receiver, is not void because requiring a bond with one surety only; but the court may, by virtue of its general equity powers, as well as under *Code Civ. Pro.*, §§ 722, 723, 730, amend it before judgment, so as to require a bond with two sureties. *Holmes v. McDowell*, 15 *Hun*, 585; *aff'd* in 76 *N. Y.*, 596, on this opinion.

⁴ See Volume I, p. 249, as to such recitals.

instructions that might have been originally asked; and such a clause should never be omitted where the order is made by consent or its extent is matter of contest.

A clause reserving the right to the receiver to apply is unnecessary except in a jurisdiction where the old rule may prevail, that a receiver cannot act of his own motion, but only be set in motion by a party.

41. *Motion on pleadings for permanent receiver.*—If the answer admits, expressly or by not denying, the material allegations of the complaint, plaintiff may move for judgment on the pleadings,¹ and the appointment of a permanent receiver may be made at once or directed by the judgment.

42. *Ancillary receivers.*—Where property lies in several jurisdictions, and a receiver has been appointed in one, an ancillary receiver may be appointed of the part of the property in another jurisdiction, in an action brought for the purpose in the latter.²

43. *Double receiverships.*—If, on application for the appointment of a receiver, it appears that a receiver of the same property has already been appointed in another action, it is usual to appoint the same person, or extend the first receivership to include the objects of the second application.³

The principal exceptions to this rule are made in the following cases:

(1) Where one of the causes is in a State court and the other in a Federal court.⁴

¹ See chapter on PRACTICE IN PLEADING. For instances see *People v. Northern R. R.*, 42 *N. Y.*, 217; aff'g 53 *Barb.*, 98; *People v. Excelsior Gas Light Co.*, Lawrence, J., *N. Y. Daily R.*, Jan. 26, 1886.

² *Woerishoffer v. North River Construction Co.*, 99 *N. Y.*, 398; *Bidlack v. Mason*, 26 *N. J. Eq.* (11 *C. E. Green*), 230.

For rules applicable to such receivers see *Taylor v. Atlan. & Grt. West R. R. Co.*, 57 *How. Pr.*, 9; *Central Trust Co. v. Wabash, &c., R. R. Co.*, 29 *Fed. Rep.*, 618.

³ As to the necessity of making the receiver in the first suit, or those whom he represents parties in the second, see *Bank of Mutual Redemption v. Sturgis*, 9 *Bosw.*, 608; compare a further decision in *id.*, 660; and see *Scheidt v. Sturgis*, 10 *id.*, 606.

⁴ *Young v. Aronson*, 27 *Fed. Rep.*, 241.

(2) Where the first appointment is in an action which precludes the other application, as where after receiver appointed in a creditor's action for the benefit of all creditors an application is made by another creditor in his separate action.¹

(3) Where the first appointment will be superseded by the second, as where, after a creditor has had a receiver of corporate property appointed, an action for dissolution is brought and an application for a receiver of all the assets is then made.

The appointment of the same person as receiver in two causes does not necessarily alter the rights of the parties;² but he acts subject to the directions of the court; and, on a reference for the purpose, or otherwise, the distinction of assets may be ascertained and preserved.

Appointment of a receiver in a second action is subject to the right of the court first acquiring jurisdiction and appointing a receiver to determine the destination of the fund.³

After receiver is appointed and vested with title in one suit, if a subsequent application for a receiver is made in another suit by adverse claimants, the defendant should set up the first receivership; and, if an order for a receiver in the second suit is granted, either have the same person appointed or his receivership extended, or should have the direction to

¹ In *Corning v. Mohawk Val. Ins. Co.*, 11 *How. Pr.*, 190, it was held that in a creditor's action to sequester the property of a corporation the fact that a receiver has already been appointed at suit of another creditor, is reason for denying an application; for the first receiver is for the benefit of all the creditors.

N. Y. Gen. Rules, No. 81, of 1884, after regulating motions for receiver on the sequestration of the property of a corporation, add: "And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary."

In *State Bank of Syracuse v. Gill*, 23 *Hun*, 410, it was held that the fact that a receiver of a judgment-debtor's property has already been appointed in supplementary proceedings does not bar an application for a receiver by a judgment-creditor in an action to reach assets, nor require that the same person should be appointed.

² See *Howell v. Ripley*, 10 *Paige*, 43; *Herring v. N. Y., Lake Erie & W. R. R. Co.*, 19 *Abb. N. C.*, 340.

³ *O'Mahoney v. Belmont*, 62 *N. Y.*, 133, 149; *aff'g* 37 *Super. Ct. (J. & S.)*, 223; *id.*, 380.

assign in the second suit qualified by excepting what has been assigned in the first.

If he lets the second appointment be made by consent or default, he cannot insist on such a qualification.¹

44. *Special receivers.*—The court has power, in an action brought by a receiver to reach particular property, to appoint a special receiver of that property;² but under the enlarged powers and more direct procedure now usual, this course is rarely resorted to.

A special receiver, when appointed, is a common-law receiver, and entirely subject to the direction of the court.

FORMS.

I. GENERAL FORMS.

- (651.) Affidavit to obtain order to show cause why receiver should not be appointed.
- (652.) Notice of motion for injunction and appointment of receiver.
- (653.) Another Form.—Order to show cause why receiver should not be appointed, with injunction.
- (654.) Suggestion of name for receiver.
- (655.) Order appointing receiver. (General Form.)
- (656.) Order of reference to appoint receiver. (General Form.)
- (657.) Report by referees of appointment of receiver.
- (658.) Order of reference to nominate a receiver, &c.
- (659.) Report of referee nominating receiver.
- (659a.) Another Form (in note); reporting several names.
- (659b.) Another Form (in note); in case of a corporation nominating several stockholders.

- (660.) Order confirming referee's report, and appointing receiver accordingly.
- (661.) Order *ex parte* appointing temporary receiver of property of absentee who cannot be personally served.
- (662.) Order appointing receiver, after report, findings, or verdict, on a trial of the issues.
- (663.) — — — after appointment in another jurisdiction of a receiver claiming adversely.
- (664.) Another Form.

II. ACTION TO REACH SPECIFIC CHATTELS.

- (665.) Order for receiver of specific personal property.

III. CREDITOR'S ACTION.

- (666.) Order of reference to appoint a receiver in a creditor's action.

¹ *Chittenden v. Brewster*, 2 *Wall.*, 191 (holding that where an assignee for benefit of creditors omitted to set up the first receivership as an objection to the second, it was error to except assets already assigned, and he was personally responsible in consequence).

² For instance, see *Leavitt v. Yates*, 4 *Edw. Ch.*, 134. Here a bill was filed by receiver of banking corporation to set aside trust deed and compel delivery to him of the company's notes illegally issued thereunder. Special receivers were appointed upon motion, and after trial had, a decree was made declaring the notes void as against the receiver.

- (667.) Order appointing receiver in creditor's action, with usual injunction.
- (668.) — — — without prejudice to the rights of prior lienors, and with optional leave to keep down charges.

IV. ESTATES OF DECEDENTS.

- (669.) Order appointing receiver of the estate of a deceased person; short Form.
- (670.) Another Form.—With full directions.
- (671.) Order of reference to appoint receiver of an estate.

V. FORECLOSURE.

- (672.) Affidavit to obtain appointment of receiver in foreclosure.
- (673.) The same.—Affidavit to the proceedings, to annex.
- (674.) Order appointing receiver of rents and profits in foreclosure or other action affecting real property; with injunction against defendant.
- (675.) The same on foreclosure, by the trustees of a corporation mortgage, for benefit of bondholders.
- (676.) Another Form.—Order for appointment of receiver in railroad foreclosure (including amendment of complaint, and with full general powers).

VI. PARTNERSHIP.

- (677.) Order appointing receiver of partnership assets, short Form; by consent.
- (678.) A fuller Form, with special powers and saving clause as to consent.
- (679.) Order appointing a partner receiver, with a reference to appoint some other person if he fail to qualify.
- (680.) Another Form.—Referring it to a referee to appoint and superintend assignment.
- (681.) The same.—Made pending a reference for an accounting.
- (682.) Order appointing, as receiver of partnership, their assignee for benefit of creditors, with full directions.
- (683.) Order authorizing partner to continue business.
- (684.) — appointing managing receiver of a joint business.

- (685.) — appointing manager of a mine,

VII. CORPORATION CASES.

A. Misconduct of officers.

- (686.) Notice of motion for receiver of assets of corporation and injunction against officers for their misconduct.
- (687.) Order to show cause why a receiver should not be appointed at suit of the People or a stockholder, officer or creditor, for misconduct of directors, etc.
- (688.) Order granting injunction and appointing receiver of property because of misconduct of officers (with suspension).

B. Sequestration at suit of judgment creditor.

- (689.) Affidavit to obtain appointment of receiver in a judgment-creditor's action to sequester corporate property.
- (690.) Complaint in such action.
- (691.) Order to show cause thereon.
- (692.) The same.—A fuller Form.
- (693.) Admission by attorney-general of service of motion papers, &c.
- (694.) Order appointing receiver in judgment-creditor's action, to sequester, &c.—Short Form.

C. Dissolution at suit of attorney-general.

- (695.) Complaint in action by People to dissolve insolvent corporation.
- (696.) Injunction on the foregoing complaint.
- (697.) Another Form.—Order granting injunction against corporation, and appointing receiver of all its property.

D. Dissolution at suit of stockholder or creditor.

- (698.) Petition of stockholder or creditor for leave to sue.
- (699.) Order granting leave to stockholder or creditor to commence action for dissolution.
- (700.) Order enjoining creditors from suing corporation pending action for sequestration or dissolution, &c.

I. GENERAL FORMS.

Form No. 651.

Affidavit to obtain order to show cause why receiver should not be appointed. (General Form.¹)

[As in Form No. 489, p. 2, of this Vol., stating, in place of paragraph II, the facts supporting the application except so far as they have been stated, and deemed to be sufficiently proved, by a verified complaint, or admitted by defendants' answer.]

[State value,² &c., as thus in case of receiver of rents and profits:]

That the lands, tenements, and premises [*or other property*], in the pleadings in this cause mentioned, and of which a receiver is sought to be appointed, are now at the clear yearly rent of _____ dollars, exclusive of taxes and all other deductions and outgoings.

Form No. 652.

Notice of motion for injunction and appointment of receiver.

*[As in Form No. 488, p. 1, of this Vol., substituting for the italic clause between the ‡ and the ¶, the following: if an injunction is asked, say] that an injunction issue herein according to the prayer of the complaint [*or state the terms desired; see Forms 532 to 629*], and for the appointment of a receiver [*may add or substitute*, or that it be referred to a referee to appoint a receiver] [*or*, that a receiver be appointed and a reference ordered to nominate a suitable person and report the amount of security and the sufficiency of sureties for him as receiver] of the property mentioned in the annexed complaint [*or identify it*] [*to take and hold the same pending this action*³], with the usual powers and directions [*or may specify powers. See other Forms, below.*]*

¹ For other Forms, see 672, 689.

² This is often needed to enable the court to select a receiver intelligently, and to fix the amount of the bond.

It may not be necessary in some cases, as in cases of judgment-creditors, where the amount of the judg-

ment is a general basis for the amount of security.

The above Form is from *Edw. on Rec.*, 90. The rents are sometimes stated in a schedule annexed.

³ A proper clause if custody for the time being only is sought.

Form No. 653.

Another Form.—Order to show cause why receiver should not be appointed, with injunction. (General Form.¹)

[As in Form 491, p. 3, of this Vol., inserting in place of the italic clause between the ‡ and the ¶] why a receiver should not be appointed [may add or substitute, or why it should not be referred to a referee to appoint a receiver²] [or, why a receiver should not be appointed and a reference be ordered to nominate a suitable person and report the amount of security and the sufficiency of sureties for him as receiver] of the property specified in the annexed complaint³ [it is better to identify it here], to take and hold the same pending this action,⁴ with the usual powers and directions [or may specify powers; see other Forms below].

[If injunction is sought, add, and why the defendant should not be enjoined and restrained from—&c., stating acts, and may add a restraining order ad interim,⁵ as in Form 516 or 524.]

Form No. 654.

Suggestion of name for receiver.

[Title of court and action.]

The [plaintiff] herein, respectfully suggests to the court, the name of R. L. E., of [counselor-at-law], as that of a suitable and proper person to be appointed receiver.

[Date.]

[Signature and office address of]

Attorneys for plaintiff.

¹ The order appointing a receiver is to be made by the court, upon notice (pp. 122, 125, paragr. 9, 16), *N. Y. Code Civ. Pro.*, §§ 713, 714; *Ireland v. Nichols*, 7 *Robt.*, 476; but the order to show cause may be made by the court returnable before itself, or by a judge thereof returnable at a special term thereof, appointed to be held in the district in which the action is triable. See Vol. I, pp. 160–163, for the requisites of any order to show cause and as to when it may be used as a short notice of motion. See, also, paragr. 17, p. 126 (*above*), as to corporation cases.

² Asking a reference was formerly common when an inquiry was necessary to ascertain the property or fix

the amount of the bond. It still may be asked in the notice or order to show cause, but the court have power to refer the motion without such a clause. Vol. I, p. 187.

³ Or if receivership of part only of the property affected by the action is desired, specify the part or share.

⁴ A proper clause when custody for the time being only is sought.

⁵ In such cases security is necessary under *N. Y. Code Civ. Pro.*, § 715, unless the restraint is merely to stay waste and other damages to real property.

It is not usual to ask costs unless the application is on the ground of personal misconduct.

Form No. 655.

Order appointing receiver. (General Form.)

At a special term [*&c., as in Form 493, p. 4, of this Volume*].

[*Title of action.*]

Upon [filing] the summons and complaint in this action, and upon reading and filing the affidavit of A. B. and C. D., verified the day of , 18 , whereby it satisfactorily appears to the court that [*indicating briefly the facts established*; ¹] and on reading and filing proof of due service of the said summons and complaint on [and proof of due notice of this motion to], and after hearing A. T., of counsel for plaintiff, and Z. T., of counsel [or, and no one appearing] for the defendant in opposition, and due deliberation having been had; now, on motion of A. T., attorney for plaintiff:

ORDERED, 1. That R. C., of , be and hereby is appointed receiver of [*clearly designating property* ²] with the usual powers, pending this action [*or state powers as in Forms 665 to 697*].

2. That before entering on the duties of his trust the said receiver execute to the people of the State of New York, and file with the clerk of this court, a bond with at least two sufficient sureties to be approved by a justice of this court, for the faithful discharge of his duties as receiver.

Enter: [*signature of judge by initials of name and title.*]

Form No. 656.

Order of reference to appoint receiver. (General Form.³)

[*Title (court order) and recitals as in last Form, or following Forms, continuing:*]

ORDERED, * I. That it be referred to R. F., of , counselor-at-law, to appoint a receiver of [*clearly designating the property*]; and that the said referee take from such receiver security for the faithful performance of his trust, to wit, a bond

¹ The omission of such clause does not vitiate, but its insertion may serve to aid the order.

² See, for instance, as to chattels Form 665, in foreclosure Form 674, in creditor's action Form 667.

³ The selection and appointment of a receiver and taking security from him is a proper matter for a reference. *Wetter v. Schlieper*, 7 *Abb. Pr.*, 92; *N. Y. Code Civ. Pro.*, § 817.

in the sum of dollars, with two or more sufficient sureties, approved by said referee, and file the same with the clerk of this court.

II. That upon the filing of such security, and of the said referee's report, such receiver shall be vested with the usual rights and powers of receivers under this court [*and here add any special powers*].

III. That thereupon the defendant Y. Z. deliver said [property] to such receiver, upon his demand [*or as in other Forms, see Nos. 667, 670-697*].

Enter: [*signature of judge by initials of name and title.*]

Form No. 657.

Report by referee of appointment of receiver.

[*Title of the action.*]

To the Court of .

In pursuance of an order of this court, made in the above entitled action, dated the day of , 18 , whereby it was referred to the undersigned to appoint a receiver of the estate of [*&c., or, partnership stock—&c., or, rents and profits of the estate of—&c., see other Forms*], and take from such receiver proper security, I, R. F., the referee named in said order, respectfully report:

I. That I have been attended on said reference by the attorneys and counsel of all the parties to this action¹ [*or, of the plaintiff A. B., and due proof was produced before me by the affidavit of M. N., verified the day of , 18 , of due notice given to all the other parties who have appeared¹*], and that I thereupon proceeded with the matters so referred.

II. That R. C., of No. street, in [counselor-at-law], was proposed on the part of the [plaintiff] as such receiver; and that no objection being made to this appointment [and no person proposed by the defendant], and said R. C. appearing to me to be a fit and proper person for such trust, I have appointed him receiver as aforesaid.

III. That the said R. C. proposed, as his sureties, C. D., of and E. F., of , and being satisfied by their affidavits [and other proof] that they were each of them worth the sum of dollars, over and above all their liabilities, I approved of them as such sureties.

¹ As to appearance by or notice to attorney-general in corporation cases, see p. 127.

IV. That said R. C., C. D. and E. F., thereupon jointly and severally executed a bond in the usual form, to the People of this State, in the penalty of dollars, conditioned for the faithful discharge by said R. C., of his duties as receiver aforesaid. [*If statutory receiver, modify according to bond.*]

V. That I have caused the said bond, with my approval indorsed thereon, and the affidavits of justification of said sureties, to be filed with the clerk of this court.

All of which is respectfully submitted.

[*Date.*]

[*Signature of*]
Referee.

Form No. 658.

Order of reference to nominate a receiver, &c.

[*Title (court order) and recitals, as in Form 655 or Forms 662, 667, &c.*]

ORDERED, that a receiver be appointed of [*specify the property as in other Forms (below)*].

And it is hereby referred to R. F., of , counselor-at-law, to report a suitable person to be appointed such receiver, and to report the names of sureties proposed by him, with the amount for which they should be liable, and their responsibility for the same.

Enter: [*signature of judge by initials of name and title.*]

Form No. 659.

Report by referee nominating receiver.

[*Title of court and action.*]

To the Court of .

In pursuance of an order of this court, made in the above entitled action, dated the day of , 18 , whereby it was referred to the undersigned to report the name of a suitable person to be appointed receiver of [*according to the order*], and the proper security to be required; I, R. F., the referee named in said order, respectfully report:

I. [*As in Form 657.*]

II. That R. B., of , was proposed on the part of the

plaintiff; and R. C., of _____, was proposed on the part of the defendant; and that, upon due examination, it appeared to me that the said R. C. was the one best fitted to execute the trust of such receivership; wherefore I recommend him as a suitable person to be so appointed.

III. That in my opinion the security should be a bond in the penal sum of _____ dollars, conditioned for the faithful discharge of the duties of receiver herein.

IV. That the said R. C. proposed, as his sureties, C. D., of _____, and E. F., of _____, and being satisfied by their affidavits [and other proof] that they were each of them worth the sum of _____ dollars, over and above all their liabilities, I approve and recommend them as such sureties.

V. That said A. B., C. D., and E. F. thereupon jointly and severally executed a bond in the usual form, to the People of this State, in the penalty aforesaid, conditioned for the faithful discharge by said R. C. of his duties as receiver aforesaid [*if statutory receiver modify according to bond*], which bond appears to me sufficient, in form and substance, and is herewith submitted.¹

[*Date.*]

[*Signature of*] Referee.

[*Annex testimony of witnesses signed by them, and file with the report; see Forms in REFERENCES.*]

¹ 659a. *Another Form; reporting several names*—[*Commencement and paragraph 1 as in above Form.*] By A. B., the plaintiff, were proposed M. N., of _____, and O. P., of _____. No sureties were named for M. N., but it was stated that ample and satisfactory security will be given immediately if M. N. be appointed. The sureties proposed for O. P. are C. D. and E. F., and on due inquiry I consider them good security. The Bank of L., who was a creditor of the defendant to the amount of _____ dollars, or thereabouts, proposed as receivers Q. R. and S. T. [*&c., continuing as above.*]*

AND I DO FURTHER REPORT, that of the persons so proposed as receivers as aforesaid, I have ascertained that the following persons will serve whether appointed alone or associated with one or more persons, viz., M. N., O. P., and Q. R., all of whom are fit for the appointment. As to the other persons named, it is not distinctly ascertained whether they will or will not serve alone. [*May add facts as to security.*]

[*Date.*]

[*Signature of*] Referee.

659b. *Another Form; in case of a corporation nominating several stockholders.*—[*Insert in the preceding Form at the *.*] That I have considered of the proposals, and am of opinion that the receivers so to be appointed should consist of five persons; and finding by testimony taken before me, that all of the said persons so proposed as such receivers are stockholders of the said company, and that the first named four of them are also directors of the said company; and that at a special meeting of the directors of the said company (consisting of thirteen out of seventeen, the whole number of present directors thereof), a resolution was duly passed recommending the said persons to be proposed as such receivers, upon the express understanding that if appointed they would accept of such trust, and perform the

Form No. 660.

Order confirming referee's report, and appointing receiver accordingly.

At a special term [*&c., as in Form No. 493, p. 4, of this Volume*].

[*Title of action.*]

On reading and filing the report of R. F., a referee appointed by the court on the day of , 18 , to report the name of a suitable person for receiver in this action, and what security should be required; and on motion of A. T., counsel for plaintiff, after hearing T. Z., counsel for defendant:

ORDERED, that the said report be confirmed, and that R. C., of , be appointed receiver of [*designate the property as in other Forms (below)*]; and that C. D. and E. F., the sureties named in said report, be approved as sureties for the said receiver; and that the bond heretofore approved by the said referee be filed with the clerk of the county of [and the appointment of the said receiver shall date from the time of such filing of the said bond].

IT IS FURTHER ORDERED [*here add powers and directions as in other Forms*].

Enter: [*signature of judge by initials of name and official title.*]

Form No. 661.

Order ex parte appointing temporary receiver of property of absentee who cannot be personally served.¹

At a special term [*&c., as in Form No. 493, pp. 4 and 5, of this Volume*].

[*Title of action.*]

On reading the summons and complaint, and the order for

duties thereof without any compensation, excepting for their actual expenses; and, also, finding by testimony taken before me, as well as from my personal knowledge, that all the said persons are residents of the city of , and of good repute as to pecuniary circumstances, integrity, and capacity for business, I am, therefore, of opinion that the said , &c., are suitable persons to be appointed the receivers of the said company, for the purposes referred to in the said order. [*May add facts as to security.*]

¹ Expressly sanctioned by *N. Y.* corporation cases. See paragraph 16, *Code Civ. Pro.*, § 714, except in cor- p. 125. The court have power to

service by publication¹ made herein and filed the day of , 18 , and on reading and filing the affidavit of A. B., verified the day of , 18 , whereby it satisfactorily appears to the court that plaintiff has an apparent right to or interest in the property therein mentioned; that it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured or destroyed; and on motion of A. T., attorney for plaintiff [*and if preliminary notice has been required by the court to be given by mail or otherwise, add,* and on reading and filing proof by the affidavit of M. N., of due notice of this motion, as directed by the order of this court, dated the day of , 18 , and no one appearing to oppose]:

ORDERED [*&c., as in other cases*].

Form No. 662.

Order appointing receiver, after report, findings, or verdict, on a trial of the issues.

At a special term [*&c., as in Form No. 493, p. 4, of this Volume*].

[*Title of action.*]

Upon the pleadings herein [filed the day of last] and the report of the referee [*or, the findings of the court—or, the verdict of the jury*] before whom the issues herein were tried, and which was filed [*or if a verdict, entered*] the day of , 18 [and the exceptions to said report—*or, findings*], and on reading and filing the affidavit of A. B., verified the day of , 18 , and proof of due notice of this motion by the affidavit of M. N., verified the day of , 18 , and after hearing A. T., of counsel for plaintiff, and T. Z., of counsel [*or, and no one appearing*] for defendant in opposition, and due deliberation having been had, now, on motion of A. T., attorney for plaintiff,

ORDERED [*&c., as in other cases*].

make such an order independent of such statute. See *People v. Norton*, 1 *Paige*, 17; *Sandford v. Sinclair*, 8 *Paige*, 372; *aff'g 3 Edw.*, 393; *Gibson v. Martin*, 8 *Paige*, 480; *High on Recs.*, 2 ed., § 117.

¹ Separate orders are necessary, because this is a court order, and the order for publication is a judge's order.

Volume I, p. 646. But the judge, while holding court, may make the order for publication, and immediately follow it by a court order for temporary receiver. See Volume I, p. 244. Entitling the judge's order as made by the court is not necessarily fatal. *Matter of Knickerbocker Bank*, 19 *Barb.* 602.

Form No. 663.

Order appointing receiver after appointment in another jurisdiction
of a receiver claiming adversely.¹

At [*&c.*].

[*Title of action.*]

Now, on this day of , 18 , upon consideration of this original bill of complaint herein, which was filed on , 18 , and submitted to this court on , 18 , on a motion for a receiver, according to the prayer thereof, and a further consideration of the intervening petition of W. H. R. and other creditors of said P. and D. R. C., it is considered by this court that on the facts stated in said original bill and petition, the said stockholders and creditors are entitled to the relief demanded, and that the jurisdiction of this court attached on the filing of said original bill at o'clock M., on , 18 , as stated in said petition.

But as this court has been advised by said petition and otherwise, that certain action has been taken in the Court of , on a bill filed therein at a later hour, on said , 18 , whereby a receiver has been put into possession of the property and assets of the Company:

It is therefore ORDERED and DECREED, in order to avoid any conflict of jurisdiction, that A. B. P., Esq., of , county, be and he is hereby appointed receiver of the said company, in accordance with the prayer of said bill and petition, and he is directed to give bond in the sum of dollars, with security to be approved by the clerk of this court, and to forthwith take an oath to discharge his duties according to law.

And thereupon said receiver is directed, in a proper and respectful manner, to petition the said Court or the judge thereof (exhibiting with such petition a full transcript of the bill and petition and this order), praying said court or judge to order the delivery unto said P. as receiver of this court, by reason of such bill, petition and order, all and singular the property and assets of the said company, and otherwise than to present such respectful petition, the said receiver is not to exercise any power whatever until the further order of the court; but it is to refrain from doing or attempting to do anything, or exercise any authority in pursuance of this appointment, without the further order of this court or the

¹ From a United States Circuit Court case.

judge thereof, than the presentation of such petition, unless the Court of or the judge thereof shall determine that the said A. B. P. is entitled to receive the property of said company, and in that event the said A. B. P. is hereby ordered and authorized to receive said property and all property and moneys, books and papers of every kind and description belonging to the said company, and to operate the same until the further order of this court in that event.

Form No. 664.

Another Form.

[*Insert in order of appointment direction as thus*] That said receiver R. C. be and he hereby is authorized and empowered to apply to the Court of for leave to take such proper proceedings in said court or otherwise, as he may be advised, for the purpose of establishing and enforcing any and all rights, claims, liens and demands and remedies he may have by virtue of his appointment as receiver herein, to the fund or property or any part thereof in the name of said [*name of adverse receiver*], and on obtaining such leave from said Court of , then to prosecute such remedies and proceedings without further leave from this court.

II. ACTION TO REACH SPECIFIC CHATTELS.

Form No. 665.

Order for receiver of specific personal property.

[*Title (court order), and recitals as in Form 655, or 687 to 694, continuing thus:*]

ORDERED, 1. That R. C., of , be and hereby is appointed receiver of the bales of cotton now on board the ship E., at ; and that said receiver is hereby authorized to expend a sufficient sum of money to insure the safe arrival of the said cotton in E., and is directed to sell such cotton when the same shall arrive in , and to receive the money to arise from the sale thereof, and to apply a sufficient part of such money in repaying what he shall expend in respect of such insurance as aforesaid, and in paying all necessary and

proper expenses attending the receipt and sale of the said cotton [and to pay the surplus of such money into _____, in trust in this cause].

[*For other clauses as may be desired see Forms 670–685.*]

2. [*Bond clause as in 2 at the end of Form 655.*]

Enter: [*signature of judge by initials of name and official title.*]

III. CREDITOR'S ACTION.

Form No. 666.

Order of reference to appoint a receiver in a creditor's suit.¹

[*Commencement and recitals as in other Forms; see Forms to _____, continuing:*]

ORDERED, I. That it be referred to R. F., of _____, counselor-at-law, to appoint a receiver of the estate and property, real and personal, things in action, debts, equitable interests, and other effects of the said defendant Y. Z., and which belonged to or were held in trust for him at the time of commencing this action, or in which he had any beneficial interest, except such property as is by law exempt from execution; and, also, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the said defendant [*and if there be specific property which plaintiff seeks to subject to his execution, or otherwise reach, after removing incumbrance, add*], and of the property hereinafter described, and the rents, issues, income, and profits thereof, to wit [*describing it*].²

* II. That the said referee take from such receiver security for the faithful performance of his trust—to wit, a bond in the sum of _____ dollars, with two or more sufficient sureties approved by said referee—and file the same with the clerk of this court [*or, of the county of _____*].

III. That upon the filing of such security, and of the said referee's report, such receiver shall be vested with the usual rights and powers of receivers under this court.

IV. Said defendant Y. Z. is hereby ordered to appear before the said referee, and assign, convey, transfer, and deliver

¹ The directions to the referee and the receiver, in this Form, are from *Edw. on Rec.*, 494.

² See next Form, and notes.

over to such receiver, on oath under the direction of the said referee, the estate, property, choses in action, and effects as to which such receiver is appointed, as aforesaid, with all books, vouchers and papers relating thereto; and also, from time to time, to produce such books, vouchers and papers, and submit to such examination as the said referee shall direct, in relation to the property or effects which he is directed to assign or deliver.

V. It is further ORDERED, That said plaintiff be at liberty to examine witnesses before the said referee in relation to any of said property, real or personal; and also as to any matter charged in the said complaint and not admitted by the said defendant on such examination, so far as necessary to carry out the object of this order.

VI. That said receiver, when so appointed, shall have general power and authority to sue for and collect, in his own name or in that of the debtor where it is necessary or proper, any of the debts, demands, and rents belonging to the said defendant Y. Z. which may be transferred to him, and to compromise and settle such as are unsafe or of a doubtful character. But said receiver will not be allowed, in his accounts, for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court or by the consent of all persons interested in the funds in his hands.

VII. That the tenants of such real estate of the debtor Y. Z., as may be assigned or transferred to the said receiver, are to attorn to such receiver; or the said receiver may, when necessary, apply for an order that any of such tenants attorn and pay rents to him.

VIII. Said receiver is hereby permitted to make leases from time to time, as may be necessary, of any such real estate, for a term not exceeding [one year].

IX. Said receiver is hereby directed, without unreasonable delay, to convert into money, all the personal estate and effects which may be assigned or delivered to him; but he is not to sell any real estate without the special order of the court, although he may, without further leave, sell desperate debts and all other doubtful claims to personal property by public auction, giving at least ten days' public notice of the time and place of such sale.

X. Before making such appointment, said referee shall ascertain whether a receiver has been previously appointed of

the estate and effects of the said defendant; and if there should be, and if the referee appoints him to be the receiver herein also, then all the rights and powers herein provided shall attach to such previous receiver.

Enter: [*signature of judge by initials of name and official title.*]

Form No. 667.

Order appointing receiver in creditor's action, with usual injunction.¹

[*Title (court order) and recitals, according to the case, see Forms 655 to 685; and reciting also the ground for the injunction and the giving of security. See Forms 516 and 524.*]

ORDERED, I. That R. C., of _____, be and hereby is appointed, with the usual powers and directions, receiver * of the estate and property, real and personal, things in action, debts, equitable interests and other effects of the said defendant Y. Z., and which belonged to him, or were held in trust for him at the time of commencing this action,² or in which he had any beneficial interest, except such property as is by law exempt from execution,³ and also except where such trust has been created by, or the fund so held in trust has proceeded from some person other than the said defendant⁴ [*and if there be specific property which plaintiff seeks to subject to his execution or otherwise reach, after removing incumbrance, add*], and of the property hereinafter described, and the rents, issues, income and profits thereof, to wit [*describing it*].

[*Or if plaintiff sues for himself only,*⁵ *substitute for the*

¹ N. Y. Code Civ. Pro., § 1877; 16 Abb. N. C., 1, and notes, pp. 29, 59; State Bank of Syracuse v. Gill, 23 Hun, 410.

² See Clark v. Brockway, 1 Abb. Ct. App. Dec., 351; Watson v. N. Y. Cent. R. R. Co., 6 Abb. Pr., N. S., 91; s. c., 1 Sheld., 159; aff'd in 47 N. Y., 157; Thorn v. Fellows, 5 Weekly Dig., 473.

³ Omitting these exceptions would not enlarge the legal effect of the order. Finnin v. Malloy, 33 Super. Ct. (J. & S.), 382; Andrews v. Rowan, 28 How. Pr., 126.

⁴ See note in 16 Abb. N. C., p. 20.

⁵ In a creditor's action for the benefit of one suing for himself alone—in this case to set aside a fraudulent con-

veyance of leviable property—a temporary receiver of all the assets transferred in fraud of plaintiff's remedy may be appointed, so as to reach rents and profits if necessary, but the receiver's sale should only extend to enough of the property or such portion capable of separate sale to advantage, as will satisfy plaintiff's demand.

See, on this subject, Kennedy v. Barandon, 67 Barb., 209; s. c., 4 Hun, 642, holding that a sheriff's sale in such case should only be of so much as is necessary to satisfy plaintiff's claim; and the judgment should not direct the sheriff to bring the surplus into court.

above, beginning at the *] of so much and such part of the estate and property, real and personal, choses in action, and effects of the said Y. Z., defendant herein (not exempt by law from execution nor held in trust created by or proceeding from some other person), as will be sufficient to satisfy the judgment of the said plaintiff mentioned in his complaint, with interest and costs, which judgment was docketed in the court of , on the day of , 18 .

II. And said defendant Y. Z. is hereby ordered to appear before R. F., of , who is hereby appointed a referee for that purpose [at upon the day of , 18 , and], at such time and place as said referee shall from time to time fix, and to assign, convey, transfer and deliver over to such receiver, on oath, and under the direction of the said referee, the estate, property, choses in action, and effects as to which such receiver is appointed as aforesaid, with all books, vouchers and papers relating thereto, as well as, from time to time, to produce such books, vouchers and papers, and submit to such examination, as the said referee shall direct, in relation to the property or effects which he is directed to assign or deliver.

III. That said plaintiff be at liberty to examine witnesses before the said referee in relation to any of said property, real or personal; and also as to any matter charged in the said complaint and not admitted by the said defendant, on such examination, so far as necessary to carry out this order.

IV. [*Power to sue and compromise.*¹] That said receiver is hereby authorized to sue for and collect, in his own name or in the name of said defendant if necessary or proper, the debts, rents, demands and rights in action due, or to become due,² belonging to said Y. Z., which may be transferred to him, and to compromise and settle such as are unsafe and of a doubtful character. But said receiver will not be allowed in his accounts for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands.

¹ This clause and the following are not necessary under *N. Y. Gen. Rules*, No. 78, of 1884, for they are implied in the appointment, unless indeed that rule may be construed as applying only to receivers appointed in supplementary proceedings.

² The words "and to become due,"

do not limit the power of the receiver to collecting after they have become due; but cover all debts existing at the time of the transfer, and empower the receiver to accept payment in advance. *Olcott v. Heermans*, 3 *Hun*, 481, 485.

V. [*If there is rented real estate.*] That the tenants and any other persons in possession of any real property of which he is receiver are hereby directed to attorn as such tenant or tenants to said receiver, and until the further order of the court to pay over to such receiver all rents of such property now due and unpaid, or that may hereafter become due¹ [*may add injunction as in parag. 4, of Form 674*] and said receiver may from time to time lease or rent any of said premises as may be necessary, for periods not exceeding one year.

[*Powers to dispossess, if desired, as in Form 674, paragraph VI.*]

VI. [*Selling.*] Said receiver is hereby directed, without unreasonable delay, to convert into money all the personal estate and effects which may be assigned or delivered to him; but he is not to sell any real estate, without the special order of the court, although he may, without further leave,² sell desperate debts and other doubtful claims to personal property, by public auction, giving at least [ten] days' public notice of the time and place of such sale.

[*Other powers if desired as in Form 674, paragraphs 2 to 10.*]

[*Bond clause, as in parag. 2, of Form 655, p. 145.*]

[*Leave to apply for further directions, see Form 674, parag. 12.*]

[*Injunction clauses,³ for instance thus, or see Forms 667, 674.*]

ORDERED, that the injunction contained in said order to show cause be continued, and that said defendants be enjoined and restrained from selling, assigning or transferring to defendant R. P., to defendant F. P., or to any other person, any of the property of which said receiver is appointed; and from in any manner incumbering, disposing of, using or intermeddling with any of said property, except to deliver and transfer the same to said receiver.

And in particular, from receiving, using, and intermeddling with any moneys, and from drawing out of deposit in bank, any moneys by check in said R.'s name or said F.'s name, or otherwise, which moneys are the receipts and proceeds of the business or assets of the property so assigned.

And said F. P. is enjoined from paying any of said moneys

¹ See note on p. 167.

² For a common-law receiver leave is necessary either in the order of ap-

pointment or afterward. *N. Y. Gen. Rules, No. 78, of 1884, last clause.*

³ *N. Y. Code Civ. Pro., § 1876.*

to said R., and from permitting said R. to draw any of said moneys from bank by signing the name of said F.

And said R. is enjoined and restrained from confessing judgment for the purpose of giving preference to any other creditor, and from doing any other act to enable any other creditor to obtain his property; and from receiving, assigning, incumbering, disposing of or intermeddling with his property, whether in his possession or held by any other person in trust for his use or benefit, or in which said R. has any interest whatever, except where such trust has been created by or the fund so held in trust has proceeded from some person other than said judgment-debtor.

And said F. P. is enjoined from in any way assisting said R. or colluding with said R. so as to receive or to dispose of said R.'s property, except to deliver and transfer the same to said R.

Enter: [*signature of judge by initials of name and title.*]

Form No. 668.

Order appointing receiver without prejudice to the rights of prior lienors, and with optional leave to keep down charges.¹

[*Insert clause such as follows :*]

But this appointment is to be without prejudice to the rights of any prior incumbrancers upon the said estates, who may think proper to take possession of the same by virtue of their respective securities, or, if any prior incumbrancer is in possession, then without prejudice to such possession, and the tenants of the said freehold and leasehold estates are subject as aforesaid to attorn and pay their rents in arrears and growing rents to the said R. C. as such receiver, and such receiver is to be at liberty if he shall think proper (but not otherwise), out of the rents and profits to be received by him, to keep down the interest upon the prior incumbrances according to their priorities, and is to be allowed such payments (if any) on passing his accounts.

¹ From *Hewett v. Murray*, 52 *L. T. R.*, *N. S.*, 380, where Vice-Ch. Bacon allowed such receiver to be appointed without security, the plaintiff and the receiver not to act without the leave of the court, and directed the costs to be costs in the action.

IV. ESTATES OF DECEDENTS.

Form No. 669.

Order appointing receiver of the estate of a deceased person; short Form.¹

[*Title (court order) and recitals according to the case.*]

ORDERED, that J. M. S., Esq., of _____, be and he hereby is appointed receiver of all the assets of the estate of N. C. P.,

¹ The court have power to appoint a receiver of the personal estate in an action against the personal representative for an accounting. *Turner v. Crichton*, 53 *N. Y.*, 641. See also *McKaig v. James*, 66 *Md.*, 583; 8 *Atl. Rep.*, 663. But see 4 *Redf.*, 492.

On motion of a creditor of an estate, a receiver was appointed in place of an administratrix, because of her intemperate habits, imprudent management, old age and inability to attend to her duties. *Goodenough v. De Groot*, 3 *Month. L. Bul.*, 35.

The court have power to appoint a receiver of the estate on the death of a sole surviving executor, &c., in an action in which they have acquired jurisdiction for partition or distribution or for the establishment or construction of a will. *N. Y. Code Civ. Pro.*, § 1869.

Such a receiver is a common-law receiver.

The above form was held in *Cooke v. Platt*, 98 *N. Y.*, 35, to give the receiver only the power of an administrator with the will annexed.

Other convenient directions and powers for the receiver of an estate are: That the said executors, &c., deliver over to such receiver all the estate of the said testator, real, personal or mixed, in their possession, and all moneys and securities in their hands belonging to the said estate, together with all books and papers relating thereto. See Forms 668, 670

That the tenants attorn. See Forms 668, 674.

That the said receiver be authorized to lease from time to time and from year to year the lands and tenements whereof he is hereby appointed receiver, upon the best attainable

terms, taking all ordinary, usual and proper precautions to secure the payment of rent. Also to make all usual, proper and necessary repairs on such lands and tenements, and he may apply the rents and income coming to his possession, so far as needful, for that purpose.

To pay the taxes, assessments and other lawful charges to which the premises may be from time to time subject, and also to pay and keep down the interest upon all mortgages or other liens to which the premises may be subject.

To maintain and prosecute in his own name any and all actions and special proceedings which he may be advised it is proper and necessary to prosecute for the recovery and protection of the property whereof he is appointed receiver, and to defend all actions which may be brought against him as such receiver, whether brought by leave of court or not.

If necessary to enable him properly to perform his duties, to employ attorneys and counsel, and to pay for such services out of the rents, incomes and proceeds of the property whereof he is appointed receiver, such sums as may from time to time be taxed and allowed by this court or by a referee on due application.

To deposit in a trust company [named] to his own order, as receiver in the above entitled action, all the moneys from time to time received by him in the execution of the duties of his receivership.

To employ from time to time such agents, clerks and servants as may be found needful to enable him properly to perform the duties of his receivership.

deceased, and that he shall and do succeed to the trust of the administration of said estate, and to all the rights and remedies that would have been possessed by the said executors but for their removal, and that the said receiver be and he hereby is invested with all the rights and powers of receivers according to law, and with all the rights and powers of an administrator with the will annexed of the estate of said N. C. P., deceased [with power to him and to either party to apply from time to time for further directions].

[*Bond clause as 2 in Form 655, p. 145.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 670.

Another Form.—With full directions.¹

[*Title (court order) and recitals according to the case.*]

ORDERED, 1. That E. N. M., of _____, upon his executing [*or appoint with directions to give bond; see Form 655, p. 145*] to the People of the State, and filing with the clerk of this court his bond in the penalty of _____ dollars, with two or more sufficient sureties [jointly and severally bound and] to be approved by a Justice of this court, be and he is hereby appointed receiver with the usual powers:

1st. Of all the outstanding personal estate of D. C., deceased, and of the income thereof, excepting the chattel property of the homestead specifically bequeathed to J. C.

2d. Of all moneys and personal property belonging to the estate of D. C., deceased, or to the executrix thereof as such, or to any of the former executors thereof as such, and of the income of such personal property.

That _____ be and hereby is appointed referee in this action, to take and state from time to time the accounts of the said receiver, and the said receiver is directed, once in each month [*or, quarter*], on a notice of _____ days to the attorneys in the said actions respectively, to pass his accounts before the said referee, who, upon the completion of such said accounting, shall file his report with the clerk of this court, and serve notice of such filing upon the said attorneys respectively, who shall be at liberty to make any application upon the foot-

ing of the said report which they may be advised.

That the said receiver, with all convenient speed, make a true inventory, to be by him verified, of all and singular the premises and property whereof he is appointed receiver, and file the same with the clerk of this court, and give notice of such filing to the said attorneys in the above entitled actions respectively.

¹ Adapted from the order as modified by the general term in *Turner v. Crichton*, 63 N. Y., 641.

3d. Of all moneys, securities and property received by the executrix or of any of the executors of said estate upon the sales made by them, or any of them, of lands of D. C., deceased, or of lands conveyed to said executrix or executors or any of them, and of the income thereof.

4th. Of the mortgage dated September 27, 1867, from W. G. to D. J. C., for dollars, upon lot [*briefly describe same*], and of the income thereof.

5th. Of all the real estate described in the schedule hereto annexed, and of the rents, issues and profits thereof subject to the rights of the persons holding contracts for the purchase of said real estate as in said schedule mentioned.

ORDERED, FURTHER, 2. That the said receiver shall have the possession of all the books, papers, accounts, vouchers and documents of any kind whatsoever pertaining to the estate of D. C., deceased, or in any way relating to the administration thereof, including, among other papers, all land contracts existing at the death of said D. C., , 18 , and all land contracts made by said executrix and executors or any of them.

3. That each and every of the parties to this action who are in the possession and have the control of any of the personal estate, books, papers, accounts, vouchers or documents aforesaid, deliver the same and each and every one of the same to the said receiver upon service of a certified copy of this order, and said receiver's demand therefor, and upon like service and demand that such party or parties pay to the said receiver that part of the moneys aforesaid which such parties have heretofore received ; such property to be delivered and moneys paid on said receiver's demand therefor without particular specification thereof.

4. That in case said parties or any of them fail to deliver said money and property as aforesaid, it be referred to M., of , to examine the defendants J. C., and D. J. C. and such other persons as may be summoned before him, under oath, touching the moneys and property affected by this order, which is or has heretofore been in the possession, power or control of them or any or either of them, and that such defendants each attend and make disclosure under oath before said referee when required by said receiver, as to the nature, amount, situation and present status of said moneys and property, and each and every part thereof. But the parties hereto are not to await proceedings on said reference before delivering to said receiver the property which they are herein ordered to deliver to him.

5. That said receiver collect all debts due and owing to said

D. C. or to his estate with all convenient speed, and recover possession of all said moneys and personal property without delay; and for the purposes aforesaid that he bring all necessary actions or proceedings at law or in equity, upon leave of the court first had and obtained; but not against any party to this action, except upon notice to such party of such application.

6. That said receiver from the funds of said estate pay all outstanding debts of said D. C., if any, in the order required by statute for executors and administrators; and also all legacies, funeral expenses and testamentary charges now due and owing, or which may hereafter become due and owing, and invest the residue of said funds in public securities and hold the same subject to the further order of this court.

7. That from the income of the said personal estate the said receiver pay the taxes and the expenses of insurance upon the real estate and such expenses of reasonable repairs as shall be necessary and proper, and all other necessary expenditures in the due administration of the estate, and also \$10 for the costs of the motion for the appointment of the receiver.

8. That the residue of such income the said receiver pay to J. C., the widow of the said testator, until the decision of the action upon the merits, and until the further order of the court thereon, and subject to such further order as the court may make in relation to the commissions and expenses of the said receiver.

9. That the said receiver cause a printed copy of this order and the schedule hereto annexed to be served upon each of the parties to this action, and upon the persons holding contracts for the several parcels of real estate described in the schedule hereto annexed, and upon the several debtors of said estate.

10. That the said receiver from time to time pass his accounts, file inventories and pay and deliver over effects and balances as the court may direct.

11. That each and every of the parties to this action be and they hereby are enjoined and restrained from interfering in any manner with any of the property affected by this order until the court make other order to the contrary.

12. That in case the said executrix shall neglect to apply the rents, issues and profits of the real estate of said D. C., deceased, to the payment of taxes, insurance, and the making of proper and necessary repairs thereon, the plaintiffs may apply, on the foot of this order, and proof of such neglect, for the extension of said receivership over said real estate and the rents, issues and profits thereof.

13. That in case the said D. J. C. or J. M. C. shall sell or attempt to sell or dispose of any of the real estate standing in

the names of them or either of them, and in controversy in this action, or shall commit or allow any waste therein, that the plaintiffs may apply, on the foot of this order, and proof of such facts, for the extension of this receivership over said real estate and the rents, issues and profits thereof.

Enter : [*signature of judge by initials of name and title.*]

Form No. 671.

Order of reference to appoint receiver of an estate ; in case of executors or administrators.

[*Commencement and recitals as in other Forms, continuing :*]

ORDERED, 1. That it be referred to R. F., of _____, counselor-at-law, to appoint a receiver to receive the rents and profits of the said testator E. F.'s freehold and leasehold estates, and to collect and get in the said testator's outstanding personal estate, and the debts due or owing in respect of the said testator's business or trade of a merchant, carried on by him up to the time of his death, and afterwards by the said defendant Y. Z.

2. That the said referee take from such receiver a bond for the faithful performance of his trust in the sum of _____ dollars, with two or more sufficient sureties, approved by said referee, and file the same with the clerk of this court.

3. That upon the filing of such security, and of the said referee's report, such receiver shall be vested with the usual rights and powers of receivers under this court.

4. That the tenants of the said estates are ordered to attorn and pay their rents in arrear and growing rents to such receiver, who is to be at liberty to lease the said estates from time to time, but not for a further term than [one year] at a time without the special order of the court.

5. That the said referee be at liberty to examine the said defendant Y. Z. as to the estate, stock, debts and effects of the said E. F. in his hands, possession, or power, or under his control ; and that he, the said Y. Z., do, under the direction of the said referee, and on oath, if required, deliver over to such person so to be appointed receiver all and every the said estate, stock, debts and effects, and the muniments, books, vouchers and papers relating thereto. And in case there shall be occasion to put any of the debts in suit for the recovery thereof,

the same is to be done after an order of the court to prosecute has been obtained [and if suit in the name of any person other than said receiver is necessary, such leave shall only be asked on notice to the person whose name is to be used; and such person is to be indemnified therein out of the said estate and effects].¹

6. That the person so to be appointed receiver do pay the debts due from the deceased in the order required by the statutes relating to executors and administrators.

Enter : [*signature of judge by initials of name and title.*]

V. FORECLOSURE.

Form No. 672.

Affidavit to obtain appointment of receiver in foreclosure.*

[*Title of court and action.*]

A. B. being duly sworn, says :

I. That he is the [plaintiff] in the above entitled action.

II. That this action is brought for the foreclosure of a mortgage executed by the defendant Y. Z. and his wife, to secure the payment to the plaintiff of the sum of dollars, with interest, dated the day of , 18 , and duly recorded on the day of , 18 , and covering premises in [*briefly describing them*], which mortgage was given to secure a bond of even date made by said Y. Z., conditioned for the payment of said sum.

III. That there is overdue and still unpaid³ to plaintiff dollars [of] the principal sum, with interest thereon, amounting to over dollars [and dollars insurance premiums paid by plaintiff pursuant to the terms of the mortgage; and that

¹ The clause in brackets is rarely necessary under the present practice, which allows the receiver to sue in his own name as a trustee of an express trust, even when he is not assignee.

² See authorities in support of this application in those jurisdictions where the mortgagor retains a legal estate, collected in *Schreiber v. Carey*, 48 *Wisc.*, 208; s. c., *Reporter*, 526.

So of an action to foreclose a vendor's lien. *Smith v. Kelley*, 31 *Hun.*, 387.

As to the case of a corporation mortgagor, see next two Forms, and Corporation Receivers (*below*).

³ Receiver refused where debt is not clearly in default. *Am. Loan & Trust Co. v. Toledo, &c., Ry. Co.*, 29 *Fed. Rep.*, 416.

the taxes for 18 and 18 , to the amount of dollars, and an assessment for dollars, which was payable on the day of , 18 , all remains unpaid].

[*If the premises have been conveyed.*] IV. That the said Y. Z., subsequent to the execution and delivery of the mortgage, conveyed the premises [*here state mesne conveyances and any assumptions of the mortgage debt*].

V. That the mortgaged premises, upon a sale thereof at public auction, cannot bring sufficient to satisfy the debt due plaintiff, with interest, costs, premiums of insurance, and arrears of taxes, as more fully appears by the affidavits of M. N. and O. P. annexed.¹

VI. That said premises, at the commencement of this action, were, and ever since have been, in the possession² of the defendant [W. X. above named, under the conveyance above stated], and that all persons in possession of said premises, as tenants or otherwise, at the time when this action was commenced, are defendants herein.

VII. That the said W. X., who is now primarily liable for the debt secured by the mortgage, as well as the defendant Y. Z., the mortgagor and obligor in the said bond, are both pecuniarily irresponsible and unable to pay the probable deficiency on the sale of the mortgaged premises, as appears by the affidavit of M. N. annexed.

VIII. That the said premises are occupied for the purpose of ,³ and that the entire rentals and income therefrom,

¹ The affidavit must show that the premises are inadequate security, that the mortgagor is insolvent (*Burlingame v. Parce*, 12 *Hun*, 144; *Gunning v. Bowers*, 1 *Law Bul.*, 11, Daniels, J.), and that the debt is due; or, if not due, that the rents and profits are specifically pledged. *Bk. of Ogdensburgh v. Arnold*, 5 *Paige*, 38; *Howell v. Ripley*, 10 *id.*, 43; *Astor v. Turner*, 11 *id.*, 436; *Smith v. Tiffany*, 13 *Hun*, 671; *Syracuse City Bk. v. Tallman*, 31 *Barb.*, 201.

Or that the premises being doubtful security, have been sold for non-payment of taxes, or that insurance is neglected, &c. *Wall St. F. Ins. Co. v. Loud*, 20 *How.*, 95, Lott, J.

Or that the mortgagor has received insurance moneys on an injury to the

premises, and has neglected to apply them to the mortgage debt. *Hollenbeck v. Donnell*, 94 *N. Y.*, 342, 347; 29 *Hun*, 94.

² An objection that part of the mortgaged premises for which a receiver is sought to be appointed, in foreclosure, are not in possession of the parties to the action, is no reason for refusing to appoint the receiver, where the party objecting does not disclose the names or title of those alleged to be in possession. *Smith v. Tiffany*, 13 *Hun*, 671.

³ The following is another allegation on this point:

That the mortgaged premises consist of a tenement house, with stable in the rear thereof, on a single lot of ground, being leasehold property, and

as your petitioner is informed and believes, amount to the sum of dollars annually and no more.

[*If the mortgage pledges the rents,¹ or contains a receiver clause, or both.*] IX. That the said bond and mortgages contain the following clause [*quoting*].

[*Jurat.*]

[*Signature.*]

Form No. 673.

The same.—Affidavit to the proceedings, to annex.

[*Title of court and action.*]

[*Venue.*]

M. C., being duly sworn, says:

I. That he is the managing clerk for the plaintiff's attorney in the above entitled action for foreclosure.

II. That the summons, complaint and notice of pendency of action herein, were duly filed on the day of , 18 .

III. That the summons herein has been served on all the defendants therein named, either personally or by publication [*or, without the State*], pursuant to an order herein dated the day of , 18 .

IV. That the only parties who have appeared herein, so as to be entitled to notice of this application, are the defendant W. X., who appears by Z. T. [*naming them all, and the attorneys by whom they respectively appear*], and that the time limited for the appearance of all the other defendants has expired.

V. That the time of all the defendants to answer or demur to the complaint herein has expired, and that plaintiff's attorney has been served with no demurrer or answer. [*Or otherwise, according to the condition of the cause.*]

rapidly deteriorating in value, the ground rent of which is unpaid, and the present value of the premises is about dollars; that the tenants of said premises are considerably in arrear of their rents, and do not pay up the same with any degree of promptness, and a portion of said premises is at present unoccupied, and

said premises are scanty and insufficient security for the payment of plaintiff's mortgage debt, interest and costs therein, as plaintiff is informed and verily believes.

¹ In such a case insolvency need not be shown. *Mut. Life Ins. Co. v. Clyne, Barrett, J., N. Y. Daily Reg., Aug. 2, 1886.*

VI. That the schedule hereto annexed contains a statement of the liens on the premises by way of mortgages, judgments, taxes, assessments and other incumbrances.

[*Jurat.*]

[*Signature.*]

[*Annex schedule, and affidavits of persons shown to be qualified, as to market value of premises, and as to actual and possible income from rentals.*]

Form No. 674.

Order appointing receiver of rents and profits¹ in foreclosure or other action affecting real property; with injunction against defendant.

[*Title (court order) and recitals, according to the case, see Forms 655 to 662, and recite also the ground of the injunction, see Forms 516 to 524, for instance, thus :*] and it appearing that the mortgaged premises are an inadequate security for the mortgage debt, and that no one except the defendant Y. Z. is personally liable for the mortgage debt, and that he is insolvent, and that the defendants are about to collect the rents; [*and if the injunction is other than an order to stay waste or other damages, or to protect the receiver, add*] and the plaintiff having given security as required by law [*see note on p. 62 of this Vol.*].

ORDERED, I. That R. C., of _____, be and is appointed, with the usual powers and directions, receiver [for the benefit of the plaintiff]² of all the rents and profits now due³ and un-

¹ Appointment as receiver of rents and profits does not give title to the premises, but only to the income, and, if necessary, a right of possession. *Foster v. Townshend*, 2 *Abb. N. C.*, 29; *s. p.*, *U. S. Trust Co. v. N. Y., West Shore, &c., R. R. Co.*, 101 *N. Y.*, 478, 488.

Emblements, as well as rents, may be intercepted through the aid of a receiver. *Hamilton v. Austin*, 36 *Hun*, 138 (in which case the order restrained defendants from removing the trees, shrubbery and fixtures from the premises).

² Inserting the clause in brackets gives the moving plaintiff priority as against all other incumbrancers who are parties and have been served with

process and who have not appeared, or, having appeared, have had notice of the motion. *Washington Life Ins. Co. v. Fleischauer*, 10 *Hun*, 117.

If the clause is omitted the court may distribute the moneys received according to the equity of the case. *Keogh v. McManus*, 34 *id.*, 521. If such a clause be inserted the court may, nevertheless, subsequently modify it without prejudice to the priority secured as to moneys already received. *Washington Life Ins. Co. v. Fleischauer* (*above*).

³ The appointment gives a lien only upon unpaid rents. *Rider v. Bagley*, 84 *N. Y.*, 461; *aff'd* 12 *Hun*, 299 (foreclosure). If desired to stop rents payable during the pendency of

paid, or to become due pending this action, and issuing out of the [mortgaged] premises mentioned in the complaint,¹ and known and described as follows: [*description.*]

II. [*Direction to collect may be as follows:*] That said receiver be and he hereby is directed to demand, collect and receive from the tenant or tenants in possession of said premises [or other persons liable therefor],² all the rents therefor now due and unpaid or hereafter to become due.

III. [*Direction that tenants attorn and pay.*³] That the tenants in possession of such premises, and such other person or persons as may be in possession thereof, do and they are hereby directed to attorn as such tenant or tenants to said receiver, and until the further order of the court, pay over to such receiver all rents of such premises now due and unpaid or that may hereafter become due.

IV. [*Injunction against paying defendants.*⁴] That all tenants of the premises and other persons liable to such rents are hereby enjoined and restrained from paying any rent for such premises to the defendant, his agents, servants or attorneys.

V. [*Direction to surrender possession.*⁵] That all persons now or hereafter in possession of said premises, or any part thereof, and not holding such possession under valid and existing leases, do forthwith surrender such possession to said receiver.

VI. [*Power to recover and protect possession.*⁶] That the said receiver be, and he hereby is, authorized to institute and carry on all legal proceedings necessary for the protection of

the motion, take an injunction or restraining order, either embodied in an order to show cause why the receiver should not be appointed, or to serve together with ordinary notice of a motion for a receiver.

¹ As to confining receivership to one of several parcels, see *Hollenbeck v. Donnell*, 94 N. Y., 342, 346, 349.

² These words, not in the usual clause for collection of rents, will include lessees out of possession and guarantors.

³ This clause though now usual is not essential; but the receiver may obtain a separate order to this effect if necessary.

If a lessee out of possession or

other third person is to be proceeded against it will be well to include him in this direction to pay.

⁴ This is not an injunction such as requires security; but merely an incident to the appointment of a receiver necessary to the protection of the fund. See *Woerishoffer v. North River Constn. Co.*, 99 N. Y., 398.

⁵ Useful sometimes in partition or other actions affecting numerous tenants.

⁶ The object of these powers is the maintenance of an income pending the receivership; and they are therefore proper for a receiver of rents and profits.

all premises described in the complaint or referred to in this order, including such proceedings as may be necessary to recover possession of the whole or any part of said premises, and to institute and prosecute suits for the collection of rents now due or hereafter to become due on the aforesaid premises or any part thereof, and to institute and prosecute summary proceedings for the removal of any tenant or tenants or other persons therefrom.

VII. [*Power to rent, insure, repair, &c.*] And said receiver is hereby authorized from time to time to rent or lease, as may be necessary, for terms not exceeding one year, any of said premises; to keep the property insured against loss or damage by fire, and in repair, and to pay the taxes, assessments and water rates [*in case of ground-rent*, and the rent reserved by said mortgaged lease] upon said premises.¹

VIII. [*Power to employ agent.*] And said receiver is hereby authorized to employ an agent, if he shall deem proper, to rent and manage said premises, collect the rents and keep the premises insured and in repair, and to pay the reasonable value for his services out of the rent received.

IX. [*Injunction against defendant receiving rent.*] That during the pendency of this action, the defendant and his agents and attorneys be enjoined and restrained from collecting the rents of said premises, and from interfering in any manner with the property or its possession.²

X. [*Direction as to applying rents, &c., in foreclosure.*]³ That the said receiver retain the moneys which may come into his hands by virtue of his said appointment, until the sale of the premises mentioned in the complaint under the judgment

¹ The powers here specified in this paragraph are less likely to be needed in foreclosure than in partition and some other actions.

In *Ranney v. Peyser*, 83 N. Y., 1, where the receivership was only for plaintiff, it was held, reversing 20 Hun, 11, that the power here given to pay ground-rent, taxes, &c., was permissive, and not mandatory, and did not allow a senior lienor, not a party, to insist on such payment. As to ground-rent, &c., see *Washington Market Co. v. Warthen Bros.* (D. C., 1883), 11 Wash. Law Rep., 498. where an order appointing receivers

of market stands was held not to authorize the receiver to keep the leases alive, for want of providing for enforcing payment of rents.

But a receiver in foreclosure is entitled to rents then or thereafter due; and payment by a tenant amounts to an attornment, and the lessor's subsequent acceptance of a surrender of the lease is invalid. *Nealis v. Bus-sing*, 10 Weekly Dig., 289.

² Whether this injunction requires security has been disputed.

³ This clause is not necessary, as it may equally well be provided for in the judgment.

And after hearing H. B. T., Esq., of counsel for the plaintiff, and C. B. A., Esq., on behalf of the defendant, The A. H. and P. Company, in opposition, and on motion of T. L. & McC., attorneys for plaintiffs:

ORDERED, that R. L. E., of the city of New York, be appointed receiver of all the premises and property described in the complaint, with the usual powers of receivers in such cases, and with all the powers provided for in the indentures of mortgage or deed of trust set forth in the complaint, the property described in said indentures of mortgage embracing all the property, both real and personal, and all the goods and chattels, franchises, privileges, rights and liberties to The A. H. and P. Company, in anywise appertaining or belonging, or which it may hereafter acquire or become in any way entitled to,¹ together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said A. H. and P. Company, of, in and to the same, and any and every part thereof, with the appurtenances.

[*Bond clause and authentication as in end of Form No. 655.*]

Form No. 676.

Another Form.—Order for appointment of receiver in railroad foreclosure (including amendment of complaint, and with full general powers.²)

[*Title (court order) and recitals according to the case.*]

ORDERED, 1. That the summons in this action be and the same is hereby amended as prayed for.

2. That leave be granted, and leave is hereby granted to file the proposed amended and supplemental complaint in this action as prayed for.

¹ This clause is too broad unless the mortgage includes after-acquired property. *Whitney v. N. Y. & Atlantic R. R. Co.*, 32 *Hun*, 164; s. c., 9 *Civ. Pro. R.*, 118.

² From the Erie Railway foreclosure, mentioned in *Herring v. N. Y., Lake Erie & W. R. R. Co.*, 19 *Abb. N. C.*, 340; s. c., 7 *Centr. Rep.*, 318. This is a common-law receiver.

And the said summons being so amended, and the said amended and supplemental complaint having been duly filed, it is further

ORDERED, that H. J. J., now President of the E. R. Co., be and he is hereby appointed receiver of all and singular the property and franchise of the said defendant The E. R. Co., mentioned and described in the complaint in this action, and all and singular the appurtenances in anywise thereto appertaining,¹ and of all records, books, papers and accounts of the said company in anywise appertaining to the business thereof, and necessary to enable him properly and efficiently to perform the duties imposed upon him by this order.

That he give a bond for the faithful performance of his duties as receiver in the premises in the sum of dollars, with sureties [jointly and severally bound] to be approved [as to form and sufficiency²] by one of the justices of this court, and that on the filing of such bond he enter forthwith upon the performance of his duties as such receiver.

And it is further ORDERED, 1. As soon as may be after he shall have entered upon the performance of his duties, the said receiver shall make and file with the clerk of this court, a true, full and complete inventory of all and singular the property of the said company, real and personal and mixed, of all which he is appointed receiver.

2. The said receiver shall continue the operation of the said road in the ordinary and usual course as the same is now operated in the common carriage of freight and passengers, having due regard to the public interest and the accommodation of the public, and keeping the premises and property, both real and personal, in good condition and repair, to the end that the said road may be efficiently operated with safety and convenience to the public.³ To the same end he shall from time to time employ and discharge all needful laborers, servants and agents, and

¹ As to the power of the court to determine what is covered by the mortgage, see case last above cited.

² This clause was more usual formerly than now. Compare bond clause (2) in Form 655.

³ Under substantially the same clause in the order in *Union Trust Co. v. Illinois Midland R. Co.*, 117 *U. S.*, 434, 465, it was contended that, while authority was given to carry on the business of the road, and to make repairs and additions essential to its in-

terests and safety, and it was provided, that, out of the moneys he should receive from its operation, he should pay for the expenses of operation;—he was not authorized by that order to contract any debt which the receipts of the road would not pay; that the terms of the order were such as to exclude the payment of any of the expenses out of any fund other than the receipts from the operation of the road. But the court held, on the contrary, that the terms of such

purchase and pay for all such needful material and supplies as may seem to him to be necessary and proper in the exercise of a sound discretion, with leave to apply to the court from time to time as he may be advised for directions in the premises. He shall settle and adjust, according to usage and the usual course of business, all outstanding traffic balances with other railroads, and like balances from time to time as may arise. And he shall have power to make all usual, necessary and proper arrangements for the interchange of business in the way of traffic arrangements, and he shall have power generally to do and perform all things usual and proper according to the rules and usages of good railroad management, to increase the business of the said road, and promote the convenience of the public.

He shall have power to prosecute and defend without the further order of this court, all existing actions by or against said company, and to pay and defray the usual and ordinary expenses incident thereto. He shall have power to commence and prosecute any actions which in the usual course of business he may deem it proper and necessary to commence hereafter, either in the name of the said company or in his own name as such receiver, as he may be advised. He shall have full power to defend any and all suits that may hereafter be brought against the said company, or against himself as such receiver [by the permission of this court], and to defray the necessary and proper expense of such prosecution and defenses. He shall do whatever may be needful to maintain and preserve the corporate organization and franchises of the said company till final judgment in this action, and to defray the necessary and proper expenses incident thereto, and in all and singular the premises he shall be subject to such orders and directions as this court may from time to time make, and he is authorized to apply from time to time for such orders and directions as he may be advised.

3. As soon as may reasonably be done, after he shall have entered upon the performance of his duties, the said receiver shall pay and discharge all debts due from the said company to laborers, servants, agents and employees of all kinds for services rendered in and about the operation of the railroads of the said company, and in and about the conduct and management of its lawful business. Such payments shall not embrace debts

orders do not impair or exclude the ample authority of the court to order such claims to be paid out of the property itself, with priority.

For terms of an order empowering the receiver to lease and to mortgage, see *McLane v. Placerville, &c.*, R. R. Co., 6 *Pacif. R.*, 749.

due for more than four months prior to the entry of this order without the further order of this court in the premises.¹

4. He shall in like manner ascertain the amount due by said company, and unpaid, for current materials and supplies purchased for the use and operation of the railroads of the said company within months prior to the entry of this order, and he shall pay the amount found to be justly due, but he shall not have power to pay any such debts of longer standing without the further order of this court.

5. He shall have power to redeem any and all securities of the company now pledged as security for loans of money, and if needful shall have power to borrow money for this purpose, and he shall also have power to borrow money if needful in his judgment, in order to comply with the directions contained in the third and fourth paragraphs of this order, and so far as may be needful to pay for current necessities for labor, and for no other purpose without the order of this court.

6. The said receiver shall keep a true, full and particular account of all his acts and doings as such, of all the property, rents, revenues and incomes, and of all his payments and disbursements in the performance of the duties imposed by this order. And he shall once in every three months and oftener, if required, render to this court, and file with the clerk thereof, a true, full and particular account of all his receipts and disbursements in the premises. He shall keep all balances of moneys in his hands on deposit in some bank of approved credit subject to his order, and he shall not pay out, but safely keep subject to the further order of this court, all such moneys, except in so far as payment and disbursements are authorized by the terms of this order. The premises considered, it is further ordered, that the said defendant, The E. R. Co., be and the said company is hereby commanded and strictly enjoined not to pay or cause or permit to be paid any interest upon any of the mortgage bonds of the said company until the further order of this court in the premises.

And the said company and each and all the officers and agents thereof are also strictly commanded and enjoined to deliver up and render to the said receiver, when he shall have become qualified according to the terms of this order to enter upon his duties as receiver, all and singular the premises whereof he is hereby appointed receiver; and it is further ordered, that each of the said defendants, trustees respectively of the mortgages referred to in the complaint in this action, be and

¹ This and the next clause are supported by *Union Trust Co. v. Souther*, 107 U. S., 591. Compare *Raht v. At-* rill, 19 *Abb. N. C.*, and note; also 58 *N. Y.*, 446; 19 *How. Pr.*, 84.

they hereby are severally and respectively restrained and enjoined, from commencing or prosecuting or causing or permitting to be commenced or prosecuted any action against the said company, or in anywise affecting the property thereof, and from in anywise interfering with the said company or the property thereof as such trustees without the further order of this court.

VI. PARTNERSHIP.

Form No. 677.

Order appointing receiver of partnership assets, short Form;¹ by consent.

At a special term [*&c.*, as in Form No. 493, p. 4, of this Volume].

[*Title of action.*]

On reading [and filing] the complaint and answer herein, and the notice of motion, dated _____, 18 [and the consent of _____, dated _____, 18 _____], and the affidavit of A. B., verified _____, 18 _____, and after hearing A. T., Esq., attorney for the plaintiff, and the defendants appearing by [names], their attorneys and consenting hereto, it is on motion of A. T., attorney for the plaintiff:

ORDERED, that R. C., of _____, is hereby appointed, with the usual powers and duties, receiver of the copartnership property, assets and effects of the firm of A. B. & Co. [*or*, of the late firm of F. & E., of _____, and of the defendant A. D. F., as survivor of said firm], and that said receiver, after he shall have duly qualified, shall proceed forthwith to take possession of said copartnership property,² and the parties hereto and each of them are hereby directed to deliver and transfer the same and all the partnership books, papers and effects to him;³ and he shall sell the same [subject to the order of the

¹ A receiver in a partnership cause is a common-law receiver.

² An order for receiver in a partnership case should be of all the partnership estate. If it is of property in a particular place only, and does not describe that or distinguish it from the individual property of the partner who is assumed to be in possession and to

have property there, it is erroneous. *Morey v. Grant* (*Mich.*, 1882), 13 *Northwestern Rep.*, 202, Cooley, J.

As to property without the State, see *O'Callaghan v. Fraser*, 37 *Hun.*, 483.

³ An order appointing a receiver of partnership should direct delivery of the property to the receiver, otherwise

court¹] at public or private sale as he shall deem most for the interest of the parties; and recover and collect and reduce to money the property, claims, demands, bills, accounts and all rights in action of said partnership [or said A. D. F., as survivor thereof], and shall retain such proceeds subject to the further order of this court.

[Where conveyance is necessary direct it, for instance, thus] And it further appearing that the title to the said vessels, or some of them, or portions of them, stands in the name of the individual partners of the said firm, it is ordered that the plaintiff and the defendants and each of them forthwith convey to the said receiver by good and sufficient bills of sale and conveyances all vessels or interests in vessels or any other property of the copartnership standing in their joint or individual names.

[For other Forms, see 679, 680.]

[Directions as to carrying on business, if desired, may be thus²] It is further ORDERED, that the said receiver may complete the unfinished contracts of said copartnership if he in his discretion shall deem it advisable so to do.

[Or, that the said receiver shall not enter upon any new business, but shall put the unfinished stock of said partnership now on hand into marketable condition as speedily as possible]

[Or, that the said receiver be and he hereby is authorized to carry on the said shipping business as heretofore carried on to such an extent only that he may charter the vessels of said copartnership to other persons or parties for hire until such times as the said vessels can be sold to advantage, and with full power and authority to the said receiver to sell the same upon such terms as he may deem proper and as are approved by this court.]

[Bond clause, if security be required, as in end of Form 655, p. 145.]

[Where order is made in anticipation of dissolution, may direct, that said receiver shall not enter upon his duties until the day of next.³]

Enter: [signature of judge, by initials of name and title.]

a party refusing to deliver cannot be punished as for a contempt. *McKelsey v. Lewis*, 3 *Abb. N. C.*, 61.

¹ This clause will require an order of leave, or of confirmation after sale. It is not usual except in case of real estate or of important property or business sold in mass.

² See 5 *Abb. N. Y. Dig.*, new ed., 353, 357; *Heatherton v. Hastings*, 5 *Hun*, 459, and *cas. cit.*; and the following Forms.

³ *Cuddeford v. Smith*, *Ch. Div.*, 1883, 76 *Law Times*, 61.

Form No. 678.

A fuller Form, with special powers and saving clause as to consent.

[*Title (court order) and recitals according to the case.*]

ORDERED, 1. That the defendant F. G. S. be and he is hereby appointed receiver of all the copartnership property, assets and effects of the late firm of M. & C., or held by them.

2. That such receiver need not file any security [*or insert bond clause as in end of Form 655, p. 145*].

3. That the defendants M. & C. do assign, transfer and deliver over to such receiver all their rights, title and interest in and to such copartnership property, assets and effects ¹

4. That said receiver be empowered, at his discretion, to make any sale or sales of said copartnership property, assets and effects, or any part thereof, keeping, however, separate accounts of the sales of such portion as may have been originally the property of D. E. & Co., and such as may have been originally the property of M. & H. and M. & C., as far as it is practicable to distinguish the same; and wherever impracticable, and whenever said property shall be encumbered in any way, he shall keep a separate account and report the facts.

5. That until such sale or sales, and for the purpose of making such sale or sales more advantageously, said receiver may continue the business of the late firm, or such part thereof as he may deem advisable; and that said receiver may reimburse himself out of the proceeds of such property for such advances and engagements as he may from time to time make in the carrying on of said business.

This order to be without prejudice to the right of said defendants M., C. and S., to apply at any time for a dissolution of such portion of the injunction herein as is not affected by the present order; and inasmuch as the defendants M., C. & S. have not, by reason of the appointment of the said S. to be receiver as aforesaid, filed affidavits in opposition to the matter set forth in the said complaints, it is ordered that the consenting to this order should not be taken or construed as the admission by them, or either of them, of the said matters, nor in any wise prejudice or affect any defense of this action which they may have, to be interposed, by demurrer or answer, as they may be advised; this order not to affect the ultimate rights of any of the parties or any other person to any of the property of which said S. is appointed receiver.

Enter: [*signature of judge by initials of name and title.*]

¹ See *Fincke v. Funke*, 25 *Hun*, 616.

Form No. 679.

Order appointing a partner receiver, with a reference to appoint some other person if he fail to qualify.¹

[*Title (court order) and recitals according to the case.*]

ORDERED, 1. That the defendants be and they are hereby appointed receivers of the copartnership business mentioned in the complaint, and of The New York Express newspaper, and the business thereof, and of all the assets thereof, and of the said copartnership, on executing within ten days from the entry of this order, and of the service of a copy thereof on defendants' attorneys, a bond in the sum of \$50,000, with sufficient sureties, to be approved by a justice of this court, for the due and faithful performance of their trust; and that upon such execution and approval they be and they are hereby vested with the usual powers of receivers, and with power to collect, sue for and recover the debts and demands that may be due to, and the property that may belong to said copartnership; and that, as such receivers, the said defendants are authorized to edit and publish the same newspaper and carry on the same copartnership business as heretofore,² until the further order of this court.

2. That in case the defendants shall fail to complete their appointment by the filing and approval of the said bond within the time aforesaid, that it be referred to R. C., a counselor-at-law, residing in the city of New York, to examine and ascertain and report a suitable person or persons to be appointed receiver or receivers of said business, newspaper, assets and copartnership, to be vested with all the powers aforesaid; and that said person or persons to be so appointed receiver or receivers give a bond in the sum of \$50,000, with sureties; and that said referee report as to the fitness and sufficiency of said sureties. And it is ordered, that on the confirmation of such report, said defendants, under the direction of the said referee, and, if required, under oath, deliver to said person or persons so appointed receiver or receivers all and every the copartnership property, assets, premises, outstanding debts and effects, together with all books and papers relating thereto.³

3. That either plaintiff or defendants, and such person or

¹ This was the order settled in *Clarke v. Brooks*, *N. Y. Com. Pl.*, 1863.

² See *Marten v. Van Schaick*, 4 *Paige*, 479.

³ Another clause in lieu of above

may be "that in the event of defendant's failure to file said bond with approved sureties, a motion for the appointment of any other receiver may be brought on upon a notice of twenty-four hours."

persons, if any, so appointed receiver or receivers, be at liberty to apply to the court for a sale of the said newspaper, its good will, and the property and assets of said copartnership, or to apply from time to time to this court for further directions.

4. That the plaintiff have \$10 costs of this motion, to abide the event.

Form No. 680.

Another Form.—Referring it to a referee to appoint and superintend assignment.¹

[Title (court order) and recitals as in other Forms, continuing thus:]

ORDERED, that it be referred to R. F., of _____, counselor-at-law, to appoint a receiver of the partnership stock, premises, outstanding debts and effects of the partnership [*or*, late partnership] of the said plaintiff and defendant, carried on in the city of _____, under the style of _____, and in the pleadings in this action mentioned; and that the said referee take from such receiver security for the faithful performance of his trust, to wit, a bond in the sum of _____ dollars, with two or more sufficient sureties approved by said referee, and file the same with the clerk of this court [*or*, of the county of _____].

AND IT IS FURTHER ORDERED, that upon the filing of such security, and of the said referee's report, such receiver shall be vested with the usual rights and powers of receivers under this court:

AND IT IS FURTHER ORDERED, that the said referee be at liberty to examine the said plaintiff and defendant A. B. and Y. Z. as to the copartnership stock, premises, outstanding debts, and effects in their hands, and in their possession or power, or under their control; and that they do, under the direction of the said referee, and on oath, if required, [assign, convey, transfer and] deliver over to such receiver all and every the said copartnership stock, premises, outstanding debts and effects, together with all books and papers relating

¹ The directions to the receiver in this Form are from *Edw. on Rec.*, 342, 355.

For a petition and order for the appointment of two receivers in a part-

nership cause after injunction and answer, the house having two branches at a distance from each other, see *Gould v. Banks*, *Edw. on Rec.*, 317.

thereto. And in case there should be occasion to put any of the debts in suit for the recovery thereof, the same is to be done after an order of the court to prosecute has been obtained [and, if the receiver do not sue in his own name, then on notice to the person whose name is to be used, and such receiver is to make use of the names of the plaintiff and defendant, or either of them for that purpose, who is or are to be indemnified therein out of the said estate and effects].¹

AND IT IS FURTHER ORDERED, that the person so to be appointed receiver do, without delay, sell and turn into money such parts of the copartnership estate and effects as shall not consist of money. And that he do pay the debts due and to become due from the said partnership [and existing on or before the day of].

Form No. 681.

The same.—Made pending a reference for an accounting.

[Title (court order) and recitals as in other cases, continuing:]

ORDERED, that it be referred to R. F., of , counselor-at-law [to whom it has already been referred to take an account herein], to appoint [*or*, to nominate and report to the court a suitable and proper person to be appointed] a receiver [*&c.* —*designate the property and the security to be given by the receiver as in other cases*].

IT IS FURTHER ORDERED, that said receiver, after he shall be duly qualified, proceed forthwith to take possession of such personal [and real] property referred to in said affidavit [*or*, report], as remains unsold, and to sell the same at public or private sale, as he shall deem most for the interest of the parties; and to collect and reduce to money such debts, accounts and choses in action referred to as aforesaid as remain uncollected; and that he may compromise or sell by public auction on due notice such as are doubtful or uncollectible. And that said receiver do, from time to time, and as he shall be required thereto by said referee, account before said referee for such property, debts, demands, and choses in action, and the proceeds thereof; and that he hold in his hands and retain

¹ The clause in brackets is usually unnecessary under the present practice, which allows the receiver to sue in his own name.

such proceeds, subject to the further order and direction of the court in the premises.¹

Form No. 682.

Order appointing, as receiver of partnership,² their assignee for benefit of creditors, with full directions.

At a special term [*dec.*].

[*Title of the action.*]

Upon reading and filing the verified complaint in this cause, and upon hearing Mr. F. N. B. for the plaintiff, upon his application for this order, and Mr. A. G. appearing for the defendants J. T. D. and F. W., and Mr. H. J. C. for the defendant J. D. F., and making no opposition, it is

ORDERED, that J. T. D., Esq., of the city of _____, one of the defendants in this action, be and he is hereby appointed to be, pending this action and until the further order of the court, the receiver in this cause of all the partnership property, assets and effects of the late firm of G. & W., mentioned in the said complaint, and of all property in their possession which they claim to be joint property, or in which they claim to have an interest, including property in their possession as bailees, pledgees and trustees, and including all property now in the possession of the said J. T. D., under and by virtue of the assignment to him mentioned in the complaint, or which by virtue of such assignment he claims, as assignee, to be entitled to the possession and control of [and the parties to this action and each of them are hereby directed to deliver and transfer all such property to him]; that before entering upon the discharge of his duties as such receiver, the said J. T. D. file with the clerk of this court a bond in the penalty of _____ dollars, conditioned for the faithful performance of his duties as such receiver and for his obedience to the orders and judgment of the court, such bond to be approved by one of the justices of this court.

IT IS FURTHER ORDERED, that upon the filing of the said

¹ If the referee has proceeded far enough with the accounting to ascertain the condition of the partnership debts and liabilities, the necessary directions to the receiver to pay the debts, either in full or *pro rata*, as the

state of the assets will admit, and even, if the case will allow of it, for a full distribution of the assets, may be inserted in this order.

² From the Grant & Ward Case.

bond the said J. T. D. do proceed to make and file with the clerk of this court an inventory of the property in his possession as such receiver, and (the plaintiff having given the security required by law) it is further ordered that otherwise than as specified by this order, the defendants and those claiming under them or by their authority or agency be, and they are hereby restrained and enjoined until the further order of the court, from in any manner interfering with the property, assets and effects of the said partnership.

IT IS FURTHER ORDERED, that it be, and it is hereby referred to H. C., Esq., counselor-at-law of the city of _____, to take an account of all the assets, property and effects of the said partnership existing at the time of the commencement of this action, in whosoever hands the same then were,¹ and of the property as to which a receivership is hereby created, and of all other property which has come or shall hereafter come into the hands of the said receiver under this order, and to ascertain and report to the court the names and residences of the creditors of the said firm, and of the parties claiming an interest in or right to the possession of any property in the hands or possession of said firm, or the said receiver, or the said D. as assignee, or to which either is entitled, and the amounts and particulars of the respective claims of such claimants against said partnership or its property; and that the parties to this action and the said receiver do attend from time to time before the said referee as required by the order or summons of the said referee, with all the books, papers and documents in their possession relating to the affairs, business or property of the said partnership, and submit to examination under oath touching the same at the request of either party or at the request of the said receiver, or of any creditor or claimant.

IT IS FURTHER ORDERED, that the said referee give notice by publication, according to the course, rules and practice of this court in such cases, to all the creditors of the said partnership and to all parties having specific claims upon the property of the said firm, or upon any property which has or shall come into the keeping or control of the said J. T. D. as assignee or receiver, to exhibit their claims to him in such manner and form as he, the said referee, may direct and approve at or before such time, and at such place, as said referee may designate for that purpose; and that all creditors and claimants failing to exhibit

¹ Compare *Herring v. N. Y., Lake Erie & W. R. R. Co.*, 19 *Abb. N. C.*, 340, and cases there cited.

their claims to him in such manner and form within the time limited by him for that purpose, shall be excluded from the benefit of the said reference under this order.

IT IS FURTHER ORDERED, that the said referee pass the accounts of the said receiver and fix the amount and items of property with which he, the said receiver, is or shall become chargeable, and that on the proceedings before the said referee any creditor or claimant who shall have filed a claim be allowed to except to the claim of any other claimant or creditor, and the same liberty of exception is given to either of the parties to this cause and to the said receiver, and that thereupon the said referee proceed to hear and determine, without any special order, the matter of such exception, and embrace his conclusions therein in his report to this court; and he is hereby authorized, at the request of either party to any claim, to make a separate report to the court upon such claim, and to continue to make such separate reports from time to time whenever so requested and as the exigencies of the case may require.

AND IT IS FURTHER ORDERED, that either party or the said receiver may from time to time apply to the court for further directions at the foot of this order, or on any report of the referee, and that the costs, fees and expenses of said reference, including the fees of the receiver's counsel, may be charged upon and paid out of the fund in the hands of the said receiver, unless otherwise directed by the referee, who may award such or any costs, fees and expenses in his discretion, subject to review by the court, to or against any claimant.

Nothing in this order contained will be construed as precluding any creditor of said G. & W., or any claimant of any specific property in the possession of the receiver from applying directly to the court upon motion or petition for such relief as he may desire, upon due notice to parties having or representing other or conflicting interests.

And this order is without prejudice to any claim to any of the property therein mentioned which may be hereafter made by the said J. T. D. as assignee, claiming under the aforesaid assignment to him by answer in this cause, and the said referee is not to consider himself authorized by virtue of this order to determine the question raised by the complaint of the validity, operation or effect of the said assignment to said J. T. D., or any question of the rights of the parties mentioned in said assignment as preferred creditors to be so preferred.

[*Clause allowing receiver to release hypothecated securities.*¹] This order is without prejudice to the right and power of the receiver to surrender any of the securities now in his possession which had been hypothecated or pledged with the said firm of G. & W. prior to their failure, and which had not been rehypothecated by the said firm of G. & W., but which remained in the possession of G. & W. at the time of their general assignment, upon receiving from the rightful claimants of such securities the full amount due to the said firm of G. & W. for the moneys loaned upon the said securities.

[*Clause authorizing receiver to consent to pledgee's transferring securities.*] IT IS FURTHER ORDERED, that the said receiver be and he hereby is authorized to consent that any creditor of the said firm of G. & W. holding the note of the said firm, secured by a pledge of collateral securities, may transfer such note of the said firm with the securities collateral thereto, to any person who shall pay to such creditor as upon a purchase of such note, the amount due upon such note of the firm, provided that such person shall be approved by the said receiver and by the person or corporation from whom the said firm received such collateral securities.

[*Clause authorizing clerk hire, &c.*] IT IS FURTHER ORDERED, that the said receiver be and he hereby is authorized to pay out of any funds which may come into his possession, such reasonable sums as he may deem proper for clerk hire and compensation of assistants in the management of his affairs as receiver.²

Enter: [*signature of judge by initials of name and title.*]

Form No. 683.

Order authorizing partner to continue business.³

[*Title (court order) and recitals according to the case.*]

ORDERED, that the partnership business of the parties to this action, composing the firm of A. & Z., may, during the pendency of this action, be continued by the above-named plaintiff, who is hereby appointed manager thereof, upon his

¹ This and the next clause was added, upon consent, to the order appointing receiver in the Grant & Ward Case.

² As to continuance of former clerks, &c., see *Bird v. Austin*, 40 *Super. Ct. (J. & S.)*, 109.

³ *N. Y. Code Civ. Pro.*, § 1947.

executing and filing with the clerk of this court an undertaking to _____, in the sum of _____ dollars, with sufficient sureties, freeholders or householders of the State of New York; that said plaintiff will obey all orders of this court in this action, and perform all things which the judgment herein may require him to perform.

AND IT IS FURTHER ORDERED, that upon filing said undertaking, said plaintiff proceed to take possession of all the copartnership property, assets and effects of said firm of A. & Z., or held by them, and it is ordered that the defendant Y. Z. do surrender and deliver over to said plaintiff all such property, assets and effects now in his possession or under his control [and all the books, vouchers and papers relating thereto].

[*If necessary to lay foundation for proceedings of contempt, add direction to parties to deliver. See p. 153, Form 666, paragraph IV; also p. 161.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 684.

Order appointing managing receiver of a joint business.¹

[*Title (court order) and recitals according to the case.*]

ORDERED, that the said A. S. be and he is hereby appointed manager of the closing up of the said business of the N. Y. U. A., and receiver of the property, assets, moneys and matters pertaining to the closing up the said business, upon executing and filing a proper bond in the penal sum of _____ dollars, with

¹ Sustained by Hanover F. Ins. Co. v. Germania Fire Ins. Co., 33 Hun, 539, 542. The court say: "As the parties themselves had agreed that the defendant Stoddard should manage and close the affairs of this agency, it was entirely regular, so long as he had been interfered with on the part of one of them, that he should be appointed managing receiver by the court, and placed under its special control and protection. This was no more than carrying into effect the agreement the parties themselves had voluntarily made; and it was alike beneficial to both of them that this appointment should take place. It

would not seem to require authority to sustain this part of the order, it was so obviously and entirely proper. But other cases similar in their controlling features have previously arisen in which the court has interposed in the same manner, and they fully justify what was directed by this portion of the order." [Citing *Waters v. Taylor*, 15 Ves., 10; *Lawson v. Morgan*, 1 Price, 303; *Lindley on Partnership* (3d ed.), 618; *Id* (2d ed.), 1069.]

Compare *Willis v. Corlies*, 2 Edw., 281.

For another Form see *Truman v. Redgrave*, Ch. Div., 45, L. T. R., N. S., 605.

leave to either party to move to increase if any reason exist therefor at any time, conditioned for the due faithful performance of the trusts reposed in him by this order, to be approved by a justice of this court, and that upon such execution, filing and approval, the said A. S. be and he is¹ hereby vested with the usual powers of managers and receivers in such cases, and with power to collect, get in, sue for and recover the moneys and property that may pertain or belong to the closing up of the said business, including all funds in the hands of the defendant, J. E. K., as acting treasurer of the said N. Y. U. A., and all funds now in the hands of, or from time to time becoming due from the plaintiff, or the said G. F. I. C., under the said agreement, and which may be necessary for the payment of the expenses of such closing up, and of the losses and other debts and liabilities of the said N. Y. U. A., or otherwise, necessary to be paid from time to time in the closing up of the said business, and that as such manager and receiver, said A. S. is authorized to carry on the closing up of the said business by collection of premiums, cancellation of policies, adjustment, payment and settlement of losses and otherwise, conformably with the said agreement dated , 18 , until the further order of this court. [*Add direction to parties to deliver to him if necessary.*]

AND IT IS FURTHER ORDERED, that the said receiver, as soon as may be, shall make and file with the clerk of this court a proper inventory of all the property and assets now belonging or pertaining to the said N. Y. U. A.

Form No. 685.

Order appointing manager of a mine.

[*Title (court order) and recitals according to the case.*]

ORDERED, that H. G. B., Esq., be and he is hereby appointed manager of all mining operations to be carried on in and by the use of the adit or tunnel mentioned in the pleadings in this cause, and of the use of the said adit or tunnel, and of the railroad therein, and of the use of the railroad connecting the mine with the public railroad, or used in connection therewith, and of the use of the ore dock, and the other implements,

¹ See p. 138, paragr. 39.

tools, and property used in opening and working said mine by said [names], and said manager shall have power to control and manage the conduct of all persons who shall conduct or may be employed in said mining operations in conformity with the principles declared by the order made in this cause between [names], bearing date the , 18 , and with the directions of this order.

And each of the parties having given notice in writing, as specified in the above-mentioned order, that is to say, the said defendants, T. & D., having served upon G. & G., attorneys for J. S., and also for the M. Iron Company, notice in writing that they intend at once to work and operate said mine to the full extent of its capacity, and the said S. and the said M. Iron Company having served upon said T. and D. notices in writing that he and they are able, and elect to furnish the said defendants with the zinc ores to which they are entitled by the terms of the contract mentioned in said pleadings, made by said F. Company with said T., and dated , 18 ; direction is hereby given to said manager that said plaintiffs shall forthwith be permitted to have the exclusive use and possession of said adit or tunnel, and the other tools, implements, and property used in opening and working said mine, for the purpose of mining and making delivery to said defendants of such part of the minerals and ores as they are now entitled to under said contract, bearing date , 18 , but such use and possession shall only continue for such period of time as in the judgment of the manager shall be reasonably necessary for the purpose of mining and making delivery of said minerals and ores, and after such period has expired, the use and possession of the parties of said adit or tunnel, and the other implements, tools and property used in opening and working of said mines, shall be regulated and controlled by the said manager in conformity to the respective rights of the parties therein and there-to as defined and settled by the order of this court. made , 18 , in the cause wherein J. S. was plaintiff, and T. and D. were defendants.

AND IT IS FURTHER ORDERED, that either party have liberty, or reasonable notice to the attorneys of the opposite party, to apply for further directions to said manager, and to apply for relief pending the suit, until the determination of the cause on final hearing. And it is further ordered, that the compensation of such manager shall be paid by the parties equally while they jointly occupy the adit or tunnel, and in case of exclusive occupation by either, then such party shall pay the whole.

VII. CORPORATION CASES.

A. MISCONDUCT OF OFFICERS.

Form No. 686.

**Notice of motion for receiver of assets of corporation and injunction
against officers for their misconduct.¹**

[*As in Form 488, p. 1, of this Vol., adding recitals of personal service, &c., see p. 127, paragraphs 17, 18, and substituting for the italic clause between the ‡ and the ¶ :*] 1. Enjoining and restraining the defendants [*names*], and each of them and their agents and servants and attorneys, from receiving any of the money or funds of the _____ company, or in any manner interfering with the affairs of the said company.

2. That said [*names*], be suspended from exercising their offices, as trustees, and the office of president and secretary respectively.

3. That the said defendants [*names*], be ordered and directed to deliver up all the books and papers of said company to the plaintiff herein, or to a receiver to be appointed. [*See also next Form.*]

4. That a receiver of the money, funds, property and assets of said corporation be appointed.

Form No. 687.

**Order to show cause why a receiver should not be appointed at suit
of the People or a stockholder, officer or creditor, for misconduct
of directors, &c.²**

[*Title (court order) and recitals, as in Form 491, p. 3, of this Vol.; substituting for the clause between the ‡ and the ¶ :*] to show cause why the said individual defendants should not be compelled to account for their official conduct, in the management and disposition of the funds and property of

¹ As to the restrictions on such relief under the present N. Y. statute, see pp. 126, 127, and notes to next Form.

For the doctrine that the directors of an insolvent corporation may resign, and thus make a case for the ap-

pointment of a receiver in an action by a stockholder on the ground that no officer remains to hold or preserve the property, see *Smith v. Danzig*, 64 *How. Pr.*, §20.

² See note on corporate litigation in 9 *Abb. N. C.*, 162.

the defendant, the Brooklyn Elevated Railway Company, committed to their charge as officers thereof:

And why the defendants above-named, and each of them, should not be enjoined and restrained from collecting or receiving any debt or demand, and from paying out or in any way transferring or delivering to any person, or in any manner interfering with any money, property, or effects of the defendant The Brooklyn Elevated Railway Company, during the pendency of this action:

And why a receiver or receivers of the property of the defendant, The Brooklyn Elevated Railway Company, should not be forthwith appointed by this court, with the usual powers of receivers in like cases.

Form No. 688.

Order granting injunction and appointing receiver of property because of misconduct of officers (with suspension).

[*Title (court order¹) and recitals, as in Form 493, pp. 4, 5, of this Vol., adding:*] and it appearing by the affidavit of M. N., verified the day of , 18 , that due notice of this motion was served upon the defendants ,² [*and if the object is to dissolve the corporation or to distribute assets, add*] and upon the attorney-general:³

[*And if an injunction is sought, add—and it appearing—reciting ground of injunction, see p. 50, and adding*]—and the plaintiff having given the undertaking required by law, in the sum of dollars:⁴

ORDERED, 1. That R. C., of , be and hereby is appointed receiver of [*specify particular property to be reached; or if dissolution, or distribution of all assets is sought:* of the defendant the company, its stock, bonds, property,

¹ Under *N. Y. L.* 1883, c. 378, § 1, when the action seeks distribution of assets, the motion must be made in the judicial district in which the principal business office of the corporation was at the commencement of the action, or in a county adjoining that district.

The statute is regarded as superseding the provisions on the same subject. in *N. Y. Gen. Rules*, No. 81, of 1884, which, however, had been

held invalid in *People v. Bruff*, 9 *Abb. N. C.*, 153.

² Name the corporation, and the officer, &c., enjoined. *N. Y. Code Civ. Pro.*, §§ 1809, 1810.

³ *N. Y. L.* 1883, p. 559, c. 378, § 8. Not applicable to a motion for ancillary receiver of a foreign corporation. *Woerishoffer v. North River Const. Co.*, 6 *Civ. Pro. R.*, 113.

⁴ See Form 527, p. 61, of this Vol.

franchises, contracts, claims, demands, things in action and effects, of every kind and nature], with the usual powers and duties according to law and the practice of this court.

2. That before entering on the duties of his trust, said receiver execute to the People of this State, and file with the clerk of this court, a bond with at least two sufficient sureties, to be approved by a justice of this court, conditioned for the faithful discharge of his duties as receiver [*if dissolution or distribution of assets is sought, add*, and for the due accounting for all moneys and property received by him.¹]

[*For special directions, see other Forms.*]

[*Suspension of directors, when allowable, &c., as follows:*] That the defendants [*naming them*], be and each of them is, hereby suspended from his office, and enjoined, and restrained from doing or performing any act or thing² as directors [*or, trustees*], officers, agents or servants of The Company, until the further order of this court in the premises.³

Enter: [*signature of judge by initials of name and title.*]

B. SEQUESTRATION AT SUIT OF JUDGMENT-CREDITOR.

Form No. 689.

Affidavit to obtain appointment of receiver in a judgment-creditor's action to sequester corporate property.⁴

[*Title of court and action.*]

[*Venue.*]

F. S. being duly sworn, says:

I. That he is the plaintiff's attorney herein.

II. [*State grounds as thus:*] That judgments have been entered against the defendant in various actions brought against it in this and other courts; that in some of said actions execution has been issued; that other suits are pending on simple contract debts, and on claims for damages to a large amount, and also an action for the foreclosure of a mortgage made by the defendant to the Company, in trust.

¹ *N. Y. Code Civ. Pro.*, § 1788; *L.* 1860, p. 595, c. 348, § 3.

² For other more special clauses, see p. 64, &c.

³ This will end with judgment, Vol. I, pp. 261, 440.

⁴ See *Sage v. Memphis, &c.*, R. R. Co., *U. S.*, *Mar.*, 1888.

III. That the defendant is insolvent and unable to pay its debts, and that if a receiver is not appointed at a very early date there is danger that some of the creditors of the defendant may obtain an undue preference.

IV. That for these reasons an order to show cause is desired, and that no previous application has been made for such an order.

[*Jurat.*]

[*Signature.*]

Form No. 690.

Complaint in such action.

[*Title of court, and, if in Supreme court, name of county.*]

[*Names of all the plaintiffs*]

against

[*Names of all the defendants*].

The plaintiff complains and alleges:

I. That the defendant, the _____ Company, is, and for more than _____ before the recovery of the judgment hereinafter mentioned was, a corporation duly organized and existing under the laws of this State, and its general business is transacted and its principal office is and was, at the time of the commencement of this action, located in the [city and] county of _____.

II. That on the _____ day of _____, 18____, this plaintiff recovered a judgment against the said defendant in the court of _____, for the sum of _____ dollars and cents, which judgment was duly filed and docketed in the office of the clerk of the [city and] county of _____, on the day of _____, 18____.

III. That execution against the said defendant was duly issued to the sheriff of the [city and] county of _____, on the _____ day of _____, 18____, and that said execution has been returned wholly unsatisfied.

IV. That the said judgment and the claim therefor remain wholly unpaid.

V. That the said defendant is, as the plaintiff is informed and believes, insolvent, and owes a large amount of indebtedness and claims, which it is unable to pay.¹

WHEREFORE, plaintiff demands judgment:

1. That the property of the said defendant corporation be sequestered and distributed.

2. That the same proceeds thereof be justly and fairly distributed among the fair and honest creditors of the defendant, including the plaintiff, in the order and in the proportions prescribed by law in the case of a voluntary dissolution of a corporation.

3. That a receiver of the property and effects of the said defendant corporation may be appointed, pursuant to law, with the usual powers and authority conferred upon receivers in such cases.

4. And that the plaintiff have such other and further relief in the premises as may be just.

[*Signature and address of*],
Plaintiff's attorney.

[*Verification as in Chapter on PRACTICE IN PLEADING.*]
[*Summons prefixed to complaint, see Vol. I, pp. 610, 617.*]

Form No. 691.

Order to show cause thereon.²

[*As in Form 491, p. 3, of this Vol., substituting for the italic clause between the ¶ and the ¶:]* why a receiver of all the property of the defendant the _____ company should not be appointed.³

[*Under N. Y. Code Civ. Pro., § 1809, serve on proper officer of corporation; and—under N. Y. L. 1883, c. 378, § 8, serve on the attorney general, with the motion papers, a draft order for receiver, with notice that it is the order to be proposed to the court.*]

¹ If likely to be contested this allegation should be supported by facts, and affidavits to the details.

² This must ask for a court order. As to county, see note to Form 688, p. 189.

³ Under *N. Y. Code Civ. Pro.*, § 1809, an order enjoining meanwhile without notice, is not allowable, and if granted is void.

Form No. 692.

The same.—A fuller Form.

[*Substitute*] why a receiver should not be appointed of the real and personal property, stock, franchises, things in action and effects of the defendant corporation during the pendency of this action, and an order be made restraining and enjoining the defendant, its directors [*or*, trustees], officers, agents and servants, and all other persons, from in any manner interfering with such receiver in the discharge of his duties and from collecting or receiving any of the debts or demands of said corporation, and from paying out and disposing of or in any way transferring or delivering to any person except to such receiver any of the money, real or personal property, things in action or other effects of said corporation during the pendency of this action.

Form No. 693.

Admission by attorney-general of service of motion papers, &c.¹

[*Entitle unless indorsed.*]

I admit due and timely service of copies of the within [*or*, annexed] motion papers, to wit, summons, complaint and affidavit, and notice of application for the appointment of receiver and copy proposed order therefor.

[*Date.*]

[*Signature of*],
Attorney-general.

Form No. 694.

Order appointing receiver in judgment-creditor's action to sequester, &c.—Short Form.

[*Title (court order)*],² and recitals as in Form 493, p. 4, including recital of service on corporation, and also on attorney-general as above, or of his appearance, and, if injunction

¹ Such service is required by *N. Y. L.* 1883, c. 378, § 8. in any action for dissolution of corporation or distribution of its property.

² See note 2 to last Form.

be granted, recite ground and add] and plaintiff having given security, as required by law, in the sum of dollars:

ORDERED, 1. That R. C., of , be and he hereby is appointed receiver of all the property¹ of the defendant, with the usual powers and duties of receivers in such cases.

2. That before entering upon the duties of his trust, the said receiver execute to the People of the State of New York, and file with the clerk of this court, his bond with two sufficient sureties to be approved by a justice of this court, in the penal sum of dollars, conditioned for the faithful performance of his duties as such receiver, and for the due accounting for all moneys and property received by him.²

3. That said receiver deposit all funds of the corporation not needed for immediate disbursement in the Trust Company,³ of [subject to the order of this court].

Enter: [*signature of judge by initials of name and title.*]

C. DISSOLUTION AT SUIT OF ATTORNEY-GENERAL.

Form No. 695.

Complaint in action by people to dissolve insolvent corporation.⁴

[*Title of court and action.*]

The plaintiffs herein, by D. O'B., attorney-general, complain of the defendant, and upon information and belief allege:

I. That at the several times hereinafter mentioned, the defendant was and still is a domestic corporation organized on or about the day of , 18 , under the laws of the State of New York, having their principal place of business at No. , New York city.⁵

¹ As to excepting mortgaged property, see *Whitney v. N. Y. & Atl. R. Co.*, 32 *Hun*, 164 (overruled on another point in 101 *N. Y.*, 478).

² See Form 701.

³ Required by *L. 1883, c. 378, § 3*, in every order appointing a receiver of a corporation, *i. e.*, a receiver for the purposes of dissolution or for sequestration and distribution, of all its property; but not required in a mere foreclosure. See *U. S. Trust Co. v.*

N. Y., West Shore, &c., Ry. Co., 101 *N. Y.*, 478.

⁴ May be easily adapted to other grounds of dissolution. On application to the attorney-general's office instructions as to the cases and extent in which counsel for creditors or stockholders may act, can be had, and the form of bond for costs, &c.

⁵ The fact of incorporation, as well as insolvency or other ground of dissolution, must be alleged in the mov-

II. That the said defendant is now and has been for upwards of one year last past wholly insolvent and unable to pay its debts, and has neglected and refused for at least one year to pay or discharge its notes or other evidences of debt [that a large amount of the existing indebtedness of said company contracted during several years past exists in the form of notes and obligations of said company, which are held by various persons, some of which are not due and some of which are already due, and in some instances have been protested].

III. That some of the creditors of said defendant are non-residents of the State of New York, and actions are threatened against said defendant upon the outstanding obligations against it.

IV. That the assets of the said defendant are about the sum of dollars, and the liabilities of said defendant are about dollars, together with contingent liability on customers' notes indorsed by said defendant to the extent of about dollars.

WHEREFORE, plaintiffs demand judgment that the said defendant M. V. & Co. be dissolved, and its corporate rights, privileges and franchises forfeited, and that the said corporation, its trustees, directors, managers and other officers may be restrained from exercising any of its corporate rights, privileges or franchises, or collecting or receiving any debt or demand, or from paying out or in any way transferring or delivering to any person any money, property or effects of the corporation, and that a receiver of the property and effects of said corporation may be appointed, and for such other further and different relief in the premises as may seem to the court proper to grant, with costs of this action.

[Signature.]

Form No. 696.

Injunction on the foregoing complaint.¹

On reading and filing the summons and complaint in this action brought to procure a dissolution of the franchise of the

ing papers. *Attrill v. Rockaway Beach Improvement Co.*, 25 *Hun*, 509. as to selection of receiver. For another Form see No. 697.

¹ Convenient where there is delay

defendant corporation, and the appearance of the defendant therein, and on motion of D. O'B., attorney-general [Mr. F. G. A., attorney for defendant, consenting thereto in open court],

ORDERED, that all persons whomsoever, and especially creditors of defendant herein, are enjoined and restrained from commencing any suit or proceeding or taking any proceedings or steps in any suit already commenced against the defendant herein, M. V. & Company, or from in any manner interfering with or creating any lien upon the property of the defendant herein until the further order of the court duly made on notice to the attorney-general and the defendant.

Enter: [*signature of judge by initials of name and title.*]

Form No. 697.

Another Form.—Order granting injunction against corporation, and appointing receiver of all its property.¹

At a special term [*etc., as in Form No. 393, p. 4, of this Volume.*]

[*Title of action.*]

It appearing satisfactorily to the court by the complaint herein and the affidavit of M. N., verified on the day of , 18 , that the defendant is a [manufacturing] corporation created by [or, under] the laws of this State, and that it has [*state briefly ground of complaint, as, remained insolvent for at least one year*²].

[*If action is by judgment-creditor, and is brought under § 1784, insert instead of last clause,* and it appearing also that the plaintiff is a judgment-creditor of said corporation, and an execution, issued upon his judgment to the sheriff of the county of , being the county where said corporation then transacted [and still does] its general business—*or*, where its principal office was [and still is] located—has been returned wholly—*or*, partly—unsatisfied.]

[*If brought by creditor or stockholder under § 1785, add, after clause stating ground of complaint,* and it appearing that

¹ As to when this order will be granted, see *People v. Atlantic Mut. Life Ins. Co.*, 74 *N. Y.*, 177; *Haight v. N. Y. Elev. Ry. Co.*, 49 *How. Pr.*, 20. As to where to apply, see note 1 to Form 688, p. 189.

² If the order contains an injunction it must briefly recite the grounds for the injunction. *N. Y. Code Civ. Pro.*, §§ 610, 1787. As to the Form generally, see Forms 595-607 in this Volume, pp. 77-79.

the plaintiff—if not a creditor, insert—is a stockholder of said defendant corporation, and has submitted to the attorney-general, a written statement of facts, verified by oath, showing grounds for an action, under the provisions of § 1785 of the Code of Civil Procedure, and that the attorney-general has omitted for sixty days after such submission to commence an action specified in said section, and that said plaintiff has applied to this court for leave to commence such an action, and has obtained such leave:]

And it appearing that this action has been commenced by the service of a copy of the summons and complaint herein; now, on reading and filing the summons and complaint herein, and said affidavit of M. N., and proof of due service of notice of this motion,¹ and copies of all of said papers on [all of] the defendant[s], and also upon the attorney-general with a copy of this order as proposed;² and an undertaking having been given by the plaintiff and approved by the court; and after hearing A. T., of counsel for the plaintiff, in support of this motion, and T. Z., of counsel for the defendant, in opposition thereto: on motion of A. T., attorney for plaintiff,

ORDERED, 1. That the defendant, the Company, and its trustees, directors, managers, officers, agents and servants be and they are hereby enjoined and restrained from collecting or receiving any debt or demand, and from paying out, or in any way transferring or delivering to any person any money, property or effects of the defendant, during the pendency of this action; except by express permission of this court.

[If the action is brought to procure the dissolution of the corporation, continue thus: 2. That the said defendant the

Company and its trustees, directors, managers, officers, agents and servants be and they are hereby enjoined and restrained from exercising any of the corporate rights, privileges or franchises of said corporation during the pendency of this action, except by express permission of this court.]

3. That R. C., Esq., of, be and he hereby is appointed receiver of the defendant the Company, its stock,³ bonds, real and personal property, franchises, contracts, things in action and effects of every kind and nature, with the usual powers and duties according to law and the practice of this court.

4. [Bond clause and deposit clause as 2 and 3 in Form 694.]

¹ This order can only be granted upon notice, otherwise it is void. *N. Y. Code Civ. Pro.*, § 1809.

² *N. Y. L.* 1883, c. 378, § 8.

³ See *Whitney v. N. Y. & Atl. R. Co.*, 32 *Hun*, 165.

5. Said receiver is hereby directed to take possession of said stock, bonds, property, franchises, contracts, claims, demands, accounts, things in action and effects of every kind and nature, to collect and receive, and hold, preserve and protect the same and the proceeds thereof, and manage and conduct the affairs of the defendant the _____ Company until the further order of this court in the premises [with full power to maintain any action, suit or special proceeding for either or all of the said purposes without further leave].¹

[For other special powers, see Forms 670, 674, 676.]

6. That the defendant the _____ Company, its directors [or, trustees], officers, agents and servants, and all persons whomsoever having notice of this order, be and they are hereby enjoined from in any manner interfering with said receiver in the discharge of his duties as such, and from collecting any of its debts or demands, and from paying out, disposing of, or in any way transferring or delivering to any person any of the money, property or effects of the said defendant the _____ Company, except to deliver the same to said receiver.

7. That said receiver deposit all funds of the said _____ Company, not needed for immediate disbursement, in the _____ Trust Company of _____ [subject to the order of this court].

Enter : [signature of judge by initials of name and title.]

D. DISSOLUTION AT SUIT OF STOCKHOLDER OR CREDITOR.

Form No. 698.

Petition of stockholder or creditor for leave to sue.¹

To the _____ Court of _____

The petition of A. B., appearing by A. T., his attorney, respectfully shows :

I. That he is and ever since the _____ day of _____, 18 _____, has been a stockholder in the _____ Company of _____ [or, a creditor of the _____ Company of—&c., alleging facts.² See Form 690].

¹ This clause is not necessary if the receiver be a statutory receiver; but if leave to institute any specific action or proceeding is desired it may be stated here or a separate application made.

² The preliminary request to the attorney-general may be easily adapted from Form 289, Volume I, p. 575.

³ Insolvency or dissolution of corporation makes no exception to the rule requiring a creditor to have judg-

II. That the said Company is a corporation organized by and under the laws of the State of New York, and has its principal office for the transaction of business in the [city and] county of , in the State of .

III. That on the day of , 18 , your petitioner submitted to the attorney-general of this State a duly verified statement of facts, of which a copy is hereto annexed, showing grounds for an action against said corporation under § 1785 of the Code of Civil Procedure, and that the said attorney-general has omitted for sixty days thereafter to commence an action as there requested.

WHEREFORE, your petitioner asks leave to commence an action for the purpose on the grounds indicated in said request.

[*Signature.*]

[*Verification as in Form 494, p. 5, of this Volume.*]

Form No. 699.

Order granting leave to stockholder or creditor to commence action for dissolution.

At a special term [*&c., as in Form No. 493, p. 4, of this Volume.*]

In the Matter of the Application of A. B., For Leave to Commence an Action for the Dissolution of the Company.

It appearing from the annexed petition of A. B., a creditor [*or, stockholder*] of the Company, verified the day of , 18 , that on the day of , 18 , the said petitioner submitted to the attorney-general of this State a written statement of facts, verified by oath, showing grounds for an action under § 1785 of the Code of Civil Procedure,

ment. *Herring v. N. Y., L. E. & W. R. Co., 63 How. Pr., 497.* action by "any creditor." *Matter of Pontius, 26 Hun, 232.*
Otherwise of a statute authorizing

against the Company, a corporation created by and under the laws of this State, and having its principal office in the [city and] county of ; and it further appearing that the said attorney-general has omitted for sixty days after the said submission to commence an action specified in said § 1785 of said Code for a dissolution of said corporation ; and that the aforesaid grounds constitute a *prima facie* case for the dissolution of said corporation.

Now, on motion of N., Y. & C., attorneys for said petitioner :

ORDERED, that A. B., the said petitioner, be and he is hereby granted leave to commence an action in this court against the said Company, and such other persons as he may be advised are proper parties to such action, for a dissolution of said corporation upon the grounds specified in said petition.

Enter : [*signature of judge by initials of name and title.*]

Form No. 700.

Order enjoining creditors from suing corporation pending action for sequestration or dissolution, &c.¹

[*May be inserted in order appointing receiver,² Form 697.*]

[*If made as a separate order, title (court order) and recitals will be as in other cases ; see Form 493, p. 4, of this Volume ; adding recital of service of motion papers and form of proposed order on attorney-general, or his appearance,³ unless the action is by him ; and, if the court require security,⁴ adding : and the plaintiff having given security as required by the court in the sum of dollars] :⁵*

¹ Sustained in *Hutchinson v. N. Y. Central Mills*, 2 *Abb. Pr.*, 394.

² Or it may be made at any stage of the action. *N. Y. Code Civ. Pro.*, § 1806.

The Supreme Court having acquired jurisdiction of proceedings for winding up the affairs of the corporation, and having appointed a receiver, has jurisdiction to stay the suit of a creditor brought to recover assets to which the receiver is entitled, in whatever court such suit may be pending. *In re Att'y-Gen'l v. Guard. Mut. Life Ins. Co.*, 77 *N. Y.*, 272 ; s. f., Rankine

v. Elliott, 16 *N. Y.*, 377 ; aff'g 14 *How. Pr.*, 339 ; *Woerishoffer v. North River Constr. Co.*, 99 *N. Y.*, 398 ; s. c., 2 *Northeastern Rep.*, 47. This will be done if the actions will hamper the receiver and increase expenses. *Att'y-Gen'l v. N. A. L. Ins. Co.*, 6 *Abb. N. C.*, 293, 303.

³ See p. 127.

⁴ The statute as to security on enjoining proceedings at law does not apply. *Hutchinson v. N. Y. Central Mills*, 2 *Abb. Pr.*, 394.

⁵ See p. 62, and note.

ORDERED, that all the creditors of the defendant the Company [and other persons making claims against it] be and they are hereby enjoined and restrained from commencing, continuing or carrying on any suits or proceedings [in the nature of actions at law¹] against the said corporation [or, against the defendants herein, or any of them²], or issuing any execution, process or proceeding upon any judgment or order now obtained or hereafter to be obtained against such corporation [or, any of such defendants], or levying upon, seizing, selling, or advertising, or taking any steps to levy upon, seize, sell or advertise, or in any other way proceeding in any such actions or judgments until the further order of this court [except that—*names*—may proceed to judgment in the action already brought by them, such judgment to stand as security merely, until the further order of the court, and subject to its judgment on the validity and effect thereof in this action³] [and except that—*name*—may proceed to judgment in the action already brought by him against the said Company, and may enforce such judgment by execution against any property attached by him in said action before the making of this order].⁴

SECTION II.

SECURITY AND OATH.

- | | |
|--------------------------|--|
| 1. Security. | (702.) Petition to cancel receiver's bond. |
| 2. — renewing. | |
| 3. Oath. | (703.) Order canceling receiver's bond. |
| FORMS. | (704.) Oath of statutory receiver. |
| (701.) Bond of receiver. | |

1. *Security*.]—The N. Y. statute,⁵ embodying the former practice, requires a receiver (unless a trust company),⁶ to give bond with at least two sufficient sureties, in a sum fixed by the court, judge, or referee making the appointment. A fidelity or surety company is equivalent to two sureties.⁷

¹ This clause is no longer appropriate. If there are exceptional actions they better be expressly excepted.

² See *N. Y. Code Civ. Pro.*, § 1806.

³ See *Galwey v. U. S. Steam Sug.*

Ref. Co., 13 *Abb. Pr.*, 211; s. c., 21 *How. Pr.*, 313, aff'd in 36 *Barb.*, 256.

⁴ See *Woerishoffer v. North River Constr. Co.*, 101 *N. Y.*, 398; s. c., 2 *Northeastern Rep.*, 47.

⁵ *N. Y. Code Civ. Pro.*, § 715; s. p., *Mechanics' Fire Ins. Co. case*, 5 *Abb. Pr.*, 444.

⁶ *N. Y. L.* 1885, p. 735, c. 425.

⁷ Vol. I, p. 468, n. 4.

The condition of the bond of a statutory receiver,¹ and of a temporary receiver in corporation cases, should regularly extend also to duly accounting for all moneys received by him;² a matter which, however, is doubtless implied in the ordinary common-law receiver's bond.

2. — *renewing.*—When security has once been given, it is in the discretion of the court, or the judge making the order out of court, or of his successor, to direct the receiver to give a new bond with new sureties.³ The fact that a surety dies or becomes insolvent does not entitle a party to a new security, as matter of right.⁴

3. *Oath.*—An oath is not required of a receiver, unless by some statute, or rule of court; as in the case of statutory receivers in New York, including a temporary receiver in corporation cases.⁵

IV. SECURITY AND OATH.

Form No. 701.

Bond of Receiver.*

KNOW ALL MEN BY THESE PRESENTS, that we, R. C., of _____, principal, and E. F., of _____ [state vocation], and G. H.,¹ of _____ [state vocation], sureties, are held and firmly bound unto the

¹ See paragraph 5, p. 119.

² A receiver in an action to sequester and distribute the property of a corporation or in an action by the attorney-general in equity, or by a stockholder or creditor, to dissolve it or forfeit its franchises (library companies, religious corporations, select schools and academies incorporated by the regents or by statute and municipal and political corporations excepted), whether permanent or temporary, must qualify as prescribed by law for the qualification of a receiver on voluntary dissolution. *N. Y. Code Civ. Pro.*, § 1788.

³ *N. Y. Code Civ. Pro.*, § 715 (excepting, however, cases where other special provision is made by law, as in the case of a statutory receiver). *s. r.*, Vol. I, p. 490.

⁴ *Haulenbeck v. Heacock*, 47 *Supr. Ct. (J. & S.)*, 533.

As to the proper Form for drawing such bonds, see *Walton v. Williams* (*Va.*, 1886); 10 *Va. Law Journ.*, 280, and *cas. cit.*

⁵ See note 2 (*above*).

⁶ See as to bonds generally, Vol. I, *N. Y. Code Civ. Pro.*, § 715, unless a p. 62. A trust company may act guaranty or fidelity company signs without giving bond. *N. Y. L.* 1885, Vol. I, p. 468. A bond with only one p. 735, c. 425. surety is amendable. *Holmes v. McDowell*, 15 *Hun.*, 585; *aff'd* on this

⁷ The receiver must himself sign, and two sureties are necessary, under opinion in 76 *N. Y.*, 596.

People of the State of New York, in the sum of dollars,¹ lawful money of the United States of America, to be paid to the said the People of the State of New York; for which payment well and truly to be made, we and each of us bind ourselves respectively, and our respective heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the day of , 18 .

WHEREAS, by an order of the court of , bearing date the day of , 18 , made at a special term thereof, held on said day at , in an action wherein A. B. is plaintiff, and Y. Z. and others are defendants, [*here briefly state object of the order, e. g., thus:*] the above-bounden R. C. was appointed receiver of the partnership property and assets of said plaintiff and defendants [*or thus, it was referred to R. F. to appoint a receiver of , and to take due security from such receiver; and whereas, said referee has appointed the above-bounden R. C.*]:

Now the condition of this obligation is such that if the above-bounden R. C. shall, according to the rules and practice of the court, duly file his inventory, and, annually or oftener if thereunto required, duly account for what he shall receive or have in charge as receiver in the said cause, and pay and apply what he shall receive or have in charge as he may, from time to time, be directed by the court; and do and perform his office of receiver in all things according to the true intent and meaning of the aforesaid order:

[*Or, under N. Y. Code Civ. Pro., § 715, the following short condition is valid, unless the court require more:*] that if the above-bounden R. C. shall faithfully discharge his duties as such receiver [*adding, in case of a statutory receiver,² or temporary receiver in corporation cases (paragraph 1, p. 201)*], and shall duly account for all moneys received by him:³

Then this obligation shall be void, otherwise to remain in full force. [*Signatures and seals.*]

Sealed and delivered in

the presence of

[*Witness*].

[*Acknowledgment, affidavit of sufficiency, and approval, as in Forms 496 to 499, p. 6, &c. File and record.*⁴]

¹ The amount is usually double the value of the property or if the property be real estate, then double the yearly value.

² See paragraph 1 (*above*).

³ *Smart v. Flood & Co.*, Chan. Div.,

1883; 49 *L. T. R.* N. S., 467; Commonwealth *v. Gould*, 118 *Mass.*, 300; Thomson *v. McGregor*, 81 *N. Y.*, 592; s. c., 9 *Abb. N. C.*, 138; rev'g 45 *Super. Ct. (J. & S.)*, 197.

⁴ *N. Y. L.*, 1887, c. 372, p. 107.

Form No. 702.

Petition¹ to cancel receiver's bond.

[Title of court and action.]

To the Court² of

The petition of R. C. shows:

I. That by order made in this cause, dated on the day of last, your petitioner was duly appointed receiver of [*briefly indicating what; or if appointment was by referee, say:.*] it was referred to R. F., of , to appoint a receiver of [*briefly indicating what*], and pursuant thereto the said R. F. appointed your petitioner receiver thereof.

II. That on the day of , 18 , your petitioner, together with E. F. and G. H., entered into a bond to , in the sum of dollars, conditioned for [*state conditions as in bond.—If a statutory receiver, or temporary receiver in corporation case, add, and took the oath prescribed by law.*].*

III. That your petitioner has passed his accounts, down to the day of , 18 , before R. F., the referee appointed for the purpose, who has certified that there then remained in your petitioner's hands, on the balance of his account, the sum of dollars, which belonged to [the defendant Y. Z.].

IV. That by an order made in this cause, dated on the day of last, it was ordered that your petitioner should deliver to [the defendant Y. Z.] possession of so much of testator's real estate as then remained unsold, and that he should pay to [said Y. Z.] the said sum of dollars, the balance remaining in your petitioner's hands as aforesaid; and thereupon he was to be discharged from the said receivership, and might apply to the court to have the aforesaid bond cancelled.

V. That possession of said real estate then remaining unsold has been accordingly delivered to [said Y. Z.], and said balance of dollars reported to be in the hands of your petitioner has also been paid to [said Y. Z.], pursuant to said order, and his receipt, duly acknowledged, is hereto annexed.

¹ Or may apply on affidavits See As to notice to attorney-general, Vol. I, p. 332. see p. 127.

² As to the place for applying in corporation cases, see p. 123.

WHEREFORE, your petitioner prays that the aforesaid bond may be cancelled.

[*Date.*]

[*Signature.*]

[*Verification as in Form 494, p. 5, of this Vol.*]

[*Notice of presentation, see Vol. I, pp. 347, 348.*]

Form No. 703.

Order cancelling receiver's bond.

At a special term [*&c., as in Form No. 493, p. 4, of this Volume.*]

[*Title of action.*]

On reading [a certified copy of] the order [*or, judgment*] of this court, made and entered herein on day of , 18 , and on reading and filing the affidavit [*or, petition*] of W. J. B., the receiver herein [and the certificates of the Trust Company of , and the vouchers annexed to and forming a part of said affidavit], and it appearing to the court by said affidavit, [certificates and vouchers] that the receiver has in all respects complied with the provisions of the aforesaid order or judgment of this court [*if on default, add, and on proof of due notice of this motion to Y. Z., and include attorney-general in corporation action if required by paragr. 18, p. 127*], and after hearing A. T., of counsel for , and T. Z. [*or, no one appearing*] for in opposition; now, on motion of A. T., attorney for said receiver,

ORDERED, that the bond of said W. J. B., the receiver herein, given pursuant to the order of this court on the day of , 18 , which was filed with the clerk of this court on the day of , 18 , be cancelled and delivered up to the said W. J. B., by the said clerk [*and if the bond has been recorded, add: and that the said clerk note upon the margin of the record of said bond that it has been cancelled, with a reference to this order.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 704.

Oath of statutory receiver.

[*Title of court and case.*]

I, the undersigned, R. C., do solemnly swear that I will well and faithfully execute the trust by my appointment as receiver herein reposed in me, according to the best of my skill and understanding.¹

SECTION III.

THE RECEIVER'S TITLE, POSSESSION, AND CONTROL.

1. Form and effect of assignment.
2. Compelling assignment.
3. Power of court to dispense with assignment.

FORMS.

- (705.) Order of reference to effect transfer to receiver.
- (706.) Notice to debtor to appear to be examined.
- (707.) Another Form.—Summons by referee.
- (708.) Order by referee that defendant deliver and convey to receiver.
- (709.) Assignment (general) to receiver of partnership assets.
- (710.) Approval by referee of assignment to receiver.

- (711.) Deed conveying real estate to receiver.
- (712.) Petition by receiver to compel the payment and delivery of specific assets.
- (713.) Affidavit on behalf of receiver to obtain delivery of books and papers.
- (714.) — for motion to compel tenants to pay.
- (715.) — to obtain order staying other actions affecting assets.
- (716.) Order forbidding any interference by suit against receiver, &c., except to enforce pre-existing liens.

1. *Form and effect of assignment.*—In the assignment by a debtor under a creditor's bill, it is proper to insert an exception of property exempt by law from execution, even if the debtor has made a sale of all his furniture, and it has been set aside as against creditors.²

An exception of property held for the defendant under a

¹ Required by 2 R. S., 39, § 5.

² *Sheldon v. Weeks*, 7 N. Y. Leg. Obs., 57. The sixty days' earning exemption depends on evidence before the court or referee. N. Y. Code Civ. Pro., § 1879.

trust created by another person should be in the language of the statute, and not an exception of particular property as within the statute,¹ unless the particular property has been ascertained by the court or a reference.

An assignment by the debtor to the receiver of all his real property leaves no residuary interest in the debtor. Under the final judgment, a purchaser acquires all the interest which a debtor had in the lands at the time of his conveyance to the receiver; so that a judgment recovered against the debtor after the conveyance does not create a lien upon the lands.²

2. *Compelling assignment.*—The grounds of a receiver's title have already been indicated.³

The party cannot, by denying the ownership of property, escape the obligation to make a formal general assignment.⁴

3. *Power of court to dispense with assignment.*—It is not to be inferred, from what has been previously said,⁵ that an assignment is indispensable. The court are not dependent on the presence and signature of the defendant, and their power cannot be nullified by his absence or refusal. In a substantial sense the dominion and disposing power over property under receivership is in the court itself. The court can transplant the title without the aid of a recalcitrant defendant. In some cases relating to specific property, this may be appropriately done by the judgment itself declaring the defendant to hold merely in trust for plaintiff, and enjoining defendant and all claiming under him from asserting title. In other cases the

¹ 2 R. S., 173, 38; N. Y. Code Civ. Pro., § 1879. Otherwise, in the injunction. *Rider v. Mason*, 4 Sandf. Chan., 351.

² *Chautauque Co. Bank v. White*, 6 N. Y., 236; s. p., 99 N. Y., 275.

As to whether the assignment can be sustained independent of the validity of the order to make it, see *Rockwell v. McGovern*, 69 N. Y., 294, aff'g 40 Super. Ct. (J. & S.), 118, and modifying *Rockwell v. Brown*, 54 N. Y., 210, which rev'd 33 Super. Ct. (J. & S.), 380; s. c., 11 Abb. Pr., N. S., 400.

³ Page 132.

⁴ *Booth v. Clark*, 17 How. U. S., 322, 339, and cas. cit.

And one who is not a party to a creditor's suit cannot object to the receiver's title, that the debtor's tenant was not served with a copy of the order appointing the receiver, or that he did not attorn to the receiver. *Albany City Bank v. Schermerhorn*, *Clarke*. 297; reversed, on the question of contempt, in 10 Paige, 263.

⁵ Paragr. 28, &c., p. 132.

form of record title is preserved by the court's appointing a commissioner to convey in the name of the defendant.¹

In accordance with these principles, it has recently been held that when a receiver of real and personal property dies, after having taken an assignment, the title vests in the court, and the court can confer it on a new receiver, by appointing him as the successor of the deceased.²

Form No. 705.

Order³ of reference to effect transfer to receiver.

At a special term [*&c.*, as in Form No. 493, p. 4, of this Volume].

[*Title of action.*]

[*Recite briefly the state of the cause, or refer to the motion papers—e. g., thus:*] The issues of the fact in this cause having been tried, and it having been found by verdict [*or*, the decision of the judge], duly entered, that [*&c.*, indicating the decision].

[*Or thus:*] On the complaint in this action, and on reading and filing the annexed proof of due service thereof, with the complaint, more than twenty days since, [and of notice of this motion] and that no answer or demurrer [*or* appearance] has been put in, and after hearing A. T., of counsel for the plaintiff, and T. Z., of counsel [*or*, and no one appearing] for the defendant, in opposition; now, on motion of A. T., attorney for the plaintiff:

ORDERED, that it be referred to R. F., of _____, to examine the defendant and such witnesses as shall be produced before him, concerning the property and assets of said defendant, and report the same to the court without delay, and [*here continue with direction as to transfer of assets to receiver; see Form 680*].

Enter: [*signature of judge by initials of name and title.*]

¹ See p. 134, note 2.

² Nicoll v. Boyd, 90 N. Y., 516.

³ Direction to deliver may be included in the original order. As to notice to Attorney-General, see p. 127.

As to place of applying in corporation cases, see p. 123.

Form No. 706.

Notice to debtor to appear to be examined.

[*Entitle, unless indorsed on order.*]

Take notice, that you are required to appear, pursuant to the within order,¹ before R. F., the referee therein named, at his office, * No. , street, in the city of , on the day of , 18 , at o'clock in the noon, to be examined, under oath, concerning your property [*or, the property of*]; and that you are required to produce, then and there, before said referee, your [*stating what books and papers*].

[*Date.*]

[*Signature and office address of*],

[*Address.*]

Plaintiff's attorney.

Form No. 707.

Another Form.—Summons by referee.

[*Title of court and action.*]

[*Address to defendant or witness.*]

You are hereby required to attend before the undersigned, a referee appointed by the court to examine the defendant and witnesses [as to his property], and direct a transfer to the receiver in this action, at the office of said referee [*continue as in preceding Form, from the **].

[*Date.*]

[*Signature of*],

Referee.²

[*Signature and office address of*],

Attorney for [plaintiff].³

Form No. 708.

Order by referee that defendant deliver and convey to receiver.*

[*Title of court and action.*]

It appearing to my satisfaction, by the examination of the defendant Y. Z. [and of O. P. and Q. R., produced, sworn and

¹ To lay foundation for proceedings for contempt, the notice should refer definitely to the order. *Holcomb v. Jackson*, 2 *Edw.*, 620.

If the order does not fix the time, but leaves it to be fixed by the referee, take an order from the referee fixing

the time, indorse or underwrite it with signature and address of attorney, and serve it, instead of this notice.

² Should be signed by the referee personally.

³ Vol. I, p. 96.

⁴ As to the cases in which the ap-

examined before me as witnesses], on the reference before me held pursuant to the order appointing me referee herein, bearing date on the day of , 18 , that said defendant has certain goods and chattels, as of his own property, and now in his possession, to wit [*describing them generally*]; also certain bills, notes and evidences of debt, that is to say [*specifying them*], in his possession; also certain accounts, the books of original entries of which are in possession or under the control of said defendant Y. Z. [*&c., stating as particularly as may be the kind and description of property discovered upon such examination*]:

I, the undersigned referee, do hereby order and direct that the said defendant do, within days from the date hereof, deliver over to R. C., the receiver in this action, the said personal property, bills, notes and evidences of debt, and books of account [each of said defendants delivering to said receiver so much of said property, bills, notes, evidences of debt and books of account as may be in his separate possession]; and also all other property (not exempt from execution¹), evidences of debt, books of account [*&c.*], owned by said defendant [*or, either of them*] at the time of the commencement of this action, and which are susceptible of delivery, in the possession of, or under the control of such defendant.

And I further order and direct that said defendant Y. Z. execute and deliver [a general assignment to said receiver, to be approved by me; and also execute, acknowledge and deliver to said receiver] under my direction, a conveyance and assignment of the real estate mentioned in said complaint, and of the rents, issues and profits thereof.

[*Date.*]

[*Signature of*],
Referee.

Form No. 709.

Assignment (general) to receiver of partnership assets.

This indenture, made the day of , 18 , between W. X. and Y. Z., heretofore partners in trade, doing business in the city of , under the style of , of the first part; and R. C., of , receiver of the estate and effects hereinafter referred to, appointed by the Court of , of the second part.

pointment operates as an assignment, sixty days' earnings (in creditor's see p. 132. action), see *N. Y. Code Civ. Pro.*,

¹ See p. 206, paragraph 1. As to § 1879.

WHEREAS, by an order of the said court, made at [a special term held at , on the day of , 18], in an action wherein the said W. X. was plaintiff and the said Y. Z. was defendant, it was ordered that it be referred [*&c., here recite the provision of the order*]; and whereas the said party of the second part has been duly appointed such receiver, and has given and filed the requisite security, pursuant to law and to said order :

NOW THIS INDENTURE WITNESSETH, that the said parties of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar to each of them in hand paid by the said party of the second part at or before the execution hereof, the receipt whereof is hereby acknowledged, have, and each of them has conveyed, assigned, transferred and delivered over, and by these presents do, and each of them does convey, assign, transfer and deliver over unto the said party of the second part, under the direction of the said referee, testified by his approval indorsed hereon, all and every the stock in trade, good will, estate, real and personal, chattels-real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever of or belonging or due to the said firm or to the said parties of the first part as partners therein, or in which the said firm, or they or either of them as such partners, had any estate, right, title or interest at the time of the commencement of said action, to wit, on the day of last; and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers and other evidences whatsoever relating or appertaining thereto :

TO HAVE AND TO HOLD the same unto him the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the order, direction and control of the said Court. And for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive any part of the stock, estate, book-debts, property, choses in action and effects hereby conveyed, assigned and transferred, they, the said W. X. and Y. Z., have made and appointed, and by these presents do make and appoint the said R. C., party of the second part, his successors and assigns, the attorney and attorneys of them, the said parties of the first part, in their names or in his own name, to commence, continue, discontinue and again bring, perfect and carry out actions and suits and special proceedings against any persons or corporations for or on account of all or any part of the said estate, stock, property, book-debts, choses in action or effects.

IN WITNESS whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[*Signatures and seals.*]

Sealed and delivered
in the presence of
[*Witness*].

[*Acknowledgment as in Form 495, p. 6, of this Volume.*]

Form No. 710.

Approval by referee of assignment to receiver.

[*Title of court and action.*]

I hereby approve the within assignment.

[*Signature of*]

[*Date.*]

Referee.

Form No. 711.

Deed conveying real estate to receiver.

This indenture, made the day of , 18 , between Y. Z., of , of the first part, and R. C., receiver appointed by the Court of , of the second part :

WHEREAS [*insert recitals as in Form 709*].

NOW, THIS INDENTURE WITNESSETH, that the said party of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar to him in hand paid by the said party of the second part before the execution hereof, the receipt whereof is hereby acknowledged, has bargained, sold, aliened, released and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said party of the second part all and every the right, title, estate and interest of the said Y. Z., party of the first part, of and in all that certain lot [*describing the premises*], together with the appurtenances, rents, issues and profits thereof, and all deeds, evidences, leases and papers relating thereto.

TO HAVE AND TO HOLD, all and every the same unto and to the use of the said R. C., party of the second part, as such receiver, his successors and assigns.

IN WITNESS whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[*Signature and seal.*]

Sealed and delivered in
the presence of

[*Signature of witness.*]

[*Acknowledgment and referee's approval as under Form 709.*]

[*For notice to quit given by receiver, see Volume I, p. 534, Form 250.*]

Form No. 712.

Petition¹ by receiver to compel the payment and delivery of specific assets.

[*As in Form 702, to the *.*]

III. That [within the week preceding the commencement of this action] the plaintiff collected the following sums of money due and payable to said firm from the following named creditors:

[*Here give particulars.*]

IV. That said plaintiff omitted to place said money with the other moneys of said firm, and still retains the same in his possession and control.

V. That said plaintiff also has in his possession and under his control other assets of said firm, namely [*describing them*].

VI. That said plaintiff refuses to place said sum of dollars in the hands of your petitioner, and also refuses to deliver said assets to him.

WHEREFORE [*&c., demand relief such as is given by an order to pay² or deliver;³ see Forms 667, 683*].

[*Date.*]

[*Signature.*]

[*Verification as in Form 494, p. 5, of this Volume.*]

[*Notice of presentation; see Volume I, pp. 347, 348.*]

¹ If preferred, may apply on affidavit. See Volume I, p. 332. As to the notice to be given to the attorney-general in corporation cases, see p. 127 of this Vol.

² It must appear that the plaintiff

has the power to obey. If he states positively that he has paid away the money, the order should not be granted. *Sheldon v. Weeks*, 7 N. Y. Leg. Obs., 57.

³ A similar motion was granted in

Form No. 713.

Affidavit on behalf of receiver to obtain delivery of books and papers.¹

[*Title of court and cause.*]

R. C., being duly sworn, says:

[*I and II as in Form 702, but substituting "deponent" for "your petitioner."*]

III. That in and by said order the said defendant corporation, its directors, officers, agents and servants are enjoined from interfering in any manner with said receiver in the discharge of his duty, and from hindering and impeding him in any wise, and from retaining any of the property of the defendant corporation, or disposing of the same, except to deliver it to deponent as such receiver.

IV. That he has received a portion of the books and property of the defendant from its president R. C. D., in whose charge and possession said property was; but in addition to the property delivered to deponent, said B. still holds [*here describe books and papers sued for*].

V. That deponent has been a director and the treasurer of defendant, and has frequently inspected said books, letters and papers, as has also said W. M., the secretary of said defendant, as appears from his affidavit hereto annexed; and that deponent knows that all said books and papers are the property of and necessary to the conduct of the business of defendant, and necessary for deponent as receiver, to thoroughly inform him as to his rights, duties and authority as receiver as aforesaid, and to the conduct of his duties in preparing his statements and collecting the property and assets of the defendant. That deponent has made repeated demands for said books and papers from said D., president of defendant, but that said D. has refused and still refuses to deliver the same, or to allow deponent to inspect or examine them.

VI. That, as he is informed and believes, the said R. C. D. has been and is representing himself to the fertilizer trade and to the debtors and creditors of and those doing business with the defendant as its "successor" in business; and that such

Murphy v. Duberg, 11 Abb. N. C., 112.

¹ Notice of motion, or order to show cause, may be adapted from

Forms 488, 491. As to place of application in corporation case, see p. 123.

As to notice to attorney-general, see p. 127.

statements and representations are calculated materially to hinder and impede deponent in transacting the business of the receivership of defendant, and are contrary to the terms of said order of appointment and to the existing facts.

VII. That deponent desires an order to show cause herein for the reason that any delay suffered by him in winding up the business of said defendant and collecting its property and assets is attended with a further depreciation of the same, defendant being hopelessly insolvent, and with a greater loss to its creditors. That defendant has failed to answer the complaint herein and is in default therefor. That no other application has been made to any court or judge for this or a like order.

[*Jurat.*]

[*Signature.*]

Form No. 714.

Affidavit¹ for motion to compel tenants to pay.

[*Title of court and cause.*]

R. C., being duly sworn, says:

I. That by an order made in this cause, bearing date the day of , 18 , it was ordered that the several tenants of the lands and premises in the pleadings mentioned should pay their rents and arrears of rents to this deponent as receiver in this cause, as also their rents accruing therewith from time to time as the same should become due and payable.

II. That the several persons whose names are set forth in the schedule annexed to this affidavit, and who are respectively tenants of said lands and premises, as deponent believes, have paid rent to deponent [*or*, to , the late receiver in this cause after his appointment, as deponent believes—*or*, as appears by the said late receiver's account, filed the day of , in the office of] since his appointment as receiver in this cause.

III. That the several tenants in said schedule named owe respectively according to this deponent's knowledge, calculation and belief, up to the respective rent days specified in the said schedule, the several sums as set forth in said schedule, for rent

¹ May proceed by petition if preferred. As to place of application in corporation cases, see p. 123. As to notice to attorney-general, see p. 127.

and arrears of rent of their respective holdings, which sums, or any part thereof, the said tenants so respectively owing the same or any of them, have not paid to deponent, although repeatedly applied to for that purpose.

[*Jurat.*]

[*Signature.*]

[*Annex schedule.*]

Form No. 715.

Affidavit to obtain order staying other actions affecting assets.

[*Title of action in which receiver was appointed.*]

[*Venue.*]

A. T., being duly sworn, says :

I. That he is the plaintiff's attorney herein.

II. That this action was brought for the appointment of a receiver of all the property and assets of the N. R. C. Co in this State of [ancillary to the appointment of a receiver of said company in the State of].

III. That on the day of , 18 , this court duly made an order at a special term thereof, appointing A. G. receiver of all the property and assets of the said company, within this State [with all the powers vested in him as receiver by the Court of of the State of], and that in and by said order the officers and directors of the defendant were enjoined from exercising within this State of any of the privileges or franchises granted to the said corporation.

IV. That thereafter the said receiver duly qualified as required by law, and duly entered into possession of all the property of the said company, including its books, papers and vouchers, and is still in possession thereof.

V. That a number of actions have been commenced against the said N. R. C. Co. in various parts of this State since the appointment of said receiver, and attachments in some cases have been levied upon its property.

VI. That the said company is unable to defend said actions or any actions for the following reasons :

First. That all the books, papers and vouchers of the said company are in the hands of the receiver, and are being actually used in making up the statement of said receiver.

Second. Its officers and agents are restrained and enjoined by said order from exercising privileges or franchises granted to the said corporation, and they are therefore restrained and enjoined from carrying on their defense to any of said actions.

[VII. Deponent further says, that in a proceeding under the Insolvent Act of the State of _____, a receiver has been duly appointed by the Court of _____ of the State of _____, of the property of the N. R. C. Co., being the same receiver appointed in this State, and to which receivership the appointment in this State is ancillary.]

VIII. Deponent further says, that great embarrassment is likely to ensue to the receivership and to the trust property by reason of the pendency of said actions. That the plaintiffs in said actions threaten to enter judgments with costs, and that the expenses will thereby be increased; that all the property of the N. R. C. Co. being in the hands of the court, it is just and equitable that all persons having claims against said company should be required to file their claims in court according to the practice in such case made and provided.

[*If an order to show cause is asked*] IX. That no previous application for an order restraining such actions has been made herein [except, &c. See Volume I, p. 149].

[*Jurat.*]

[*Signature.*]

[*Notice of motion, or order to show cause, see pp. 1 and 3 of this Volume.*¹]

Form No. 716.

Order forbidding any interference by suit against receiver, &c., except to enforce pre-existing liens.²

At a special term [*&c., as in Form No. 493, p. 4, of this Volume.*]

[*Title of action in which receiver was appointed.*]

[*After recitals according to the circumstances:*]

ORDERED, that all persons be and they hereby are enjoined and restrained from bringing or prosecuting any suits or proceedings against the defendant the N. R. C. Co., or in any

¹ Or may proceed by petition if cases, see p. 123. As to notice to attorney-general, p. 127.
² Sustained by *Woerishoffer v.*

manner interfering with the assets of said defendant until the further order of this court, except that nothing herein contained shall prevent, enjoin or affect the prosecution of the action heretofore brought in this court by the said A. and R. I. and S. Co. to judgment, or the said A. and R. I. and S. Co. from collecting or enforcing any judgment obtained in the aforesaid action against any property of the said N. R. C. Co. which may have been levied upon by virtue of an attachment before the appointment of the said A. G., as receiver, by the order of this court in this action dated _____, 18 .

Enter: [*signature of judge, by initials of name and title.*]

SECTION IV.

THE RECEIVER'S DUTIES; INSTRUCTIONS; AND EXAMINATION OF ADVERSE CLAIMS (INTERESSE SUO).

1. Power of the court.
2. Applying for instructions.
3. Examination of third person, *interesse suo*.

FORMS.

- (717.) Notice by receiver to creditors and debtors of the corporation, announcing appointment, and requiring presentation of claims, &c.
- (718.) Order that creditors of corporation exhibit claims.
- (719.) Receiver's petition for leave to sell.
- (720.) Order giving receiver leave to sell.
- (721.) — confirming receiver's sale.
- (722.) Petition of receiver to compel purchaser to complete.
- (723.) Order that purchaser from receiver complete his purchase.
- (724.) Petition of receiver for authority to pay counsel fees, &c.
- (725.) Order sanctioning receiver's employment of counsel.
- (726.) Petition by receiver for leave to pay claims, &c.
- (727.) Notice of motion by a party to

the cause, for instructions to the receiver.

- (728.) Petition that receiver be instructed to pay over a deposit or other fund belonging to the petitioner.
- (729.) — — receiver be instructed to pay for services, goods sold, &c., rent, &c.
- (730.) — — receiver surrender possession, pay, &c., or that petitioner have leave to be examined *interesse suo*. (Old practice.)
- (731.) Another Form.—By asking reference. (Under Code practice.)
- (732.) Order to show cause why receiver should not pay or deliver, &c., with stay meanwhile.
- (733.) — on petition or motion that receiver pay, deliver, sell, &c.
- (734.) Notice of receiver's petition for directions as to distribution.
- (735.) Order that receiver in foreclosure, pay over surplus to himself as mortgagee.

North River Constr. Co., 99 *N. Y.*, 398; s. c., 2 *Northeastern Rep.*, 47. See also *Phoenix Foundry v. The Same*, 33 *Hun*, 156, and *N. Y. Code Civ. Proc.*, § 1810.

This is not an injunction within

the provisions of law restricting the granting of injunctions. As to place of moving in corporation cases, see p. 123. As to notice to attorney-general, p. 127.

1. *Power of the court.*—The court has power to protect the receiver in his possession and title, and to require all adverse claims to be submitted to its own determination, and to enjoin all proceedings against the fund, or against him in such form that the result could affect the fund, if brought without its leave.¹

2. *Applying for instructions.*—Under the new procedure, application to the court to instruct the receiver in reference to his duties may be made, at any time, by the receiver, or by a party to the action, or by any third person interested in the property or aggrieved by the course of the receiver. The court have power to hear such applications when made by notice of motion or order to show cause founded on affidavits ; but it is the better practice, when any substantial question collateral to the cause is involved, to apply by petition, and take a reference, if the application is contested, for in this mode full proofs can be had, and the resulting decision may be deemed *res judicata*, while an order made on affidavits is not.² But the court have power, in their discretion, to refer a motion made on affidavits,³ and where they do so, the same result as to conclusiveness may be reached.

3. *Examination of third person, interesse suo.*—Under the old practice, although any person getting leave to sue the receiver could bring ejectment or replevin to try the title, or an action for damages, yet, as long as parties were incompetent as witnesses, it was still often necessary to come into chancery again to discover evidence. In order to give a more convenient and direct remedy, and at the same time better preserve the protection due to the receiver, the Court of Chancery adopted the method of allowing, or in some cases requiring, an adverse claimant to come in and be examined, on his own behalf, before a Master in Chancery in support of his claim against the receiver, and he was thus allowed at once to use his own

¹ Receivers in United States Courts are an exception under the Act of March 3, 1887; see Vol. I, p. 750.

² See Vol. I, pp. 181, 332.

³ Vol. I, p. 187.

testimony on the examination *interesse suo*, and to afford a basis for further examination upon interrogatories drawn up on behalf of the receiver. Whether this course should be taken, or leave be given to sue, rested in the discretion of the court.

Under the new procedure, since parties are now competent as witnesses, there is no reason why they should not be left to sue, except the greater simplicity and directness of proceeding by petition, or motion and a reference if necessary. Hence, instead of asking leave to be examined *interesse suo*, the present practice is to ask that the receiver be instructed to deliver the property or pay the claim, or, if this be refused, that the applicant have leave to sue, and take a reference on the petition.

Form No. 717.

Notice by receiver to creditors and debtors of the corporation, announcing appointment, and requiring presentation of claims, &c.¹

[*Title of court and cause.*]

TO ALL WHOM IT MAY CONCERN.

Notice is hereby given, that I have been appointed by the Supreme Court of the State of New York, in this action, receiver of the _____ Company, and of all the property and effects of said corporation, and that I have duly qualified as such receiver; and I do require—

1. All persons indebted to said corporation to render an account to me, at my office, No. _____, _____ street, in the city of _____, and county of _____, in said State, by the day of _____, 18____, of all debts and sums of money owing by them respectively, and to pay the same to me.

2. All persons having in their possession any property or effects of such corporation, to deliver the same to me by the said _____ day of _____, 18____.

3. All the creditors of said corporation to deliver their respective accounts and demands to me by the said _____ day of _____, 18____.²

¹ Necessary only for a statutory receiver of corporation assets. see *L.* 1884, p. 136, c. 133; 1885, p. 459, c. 262.

Under 2 *N. Y. R. S.*, 472, § 70, ² The foregoing clauses of this notice are required by 2 *N. Y. R. S.*, 42, publish three weeks. As to papers,

4. All persons holding any open or subsisting contract of said corporation, to present the same, in writing and in detail, to me, at the place aforesaid, on or before the said day of _____, 18 ____.¹

[Date.]

[Name and office address of],
Attorney for Receiver.

[Signature of],
Receiver.

Form No. 718.

Order that creditors of corporation exhibit claims.²

At a special term [dec., as in Form
No. 493, p. 4, of this Volume].

[Title of the cause.]

On reading and filing the [affidavits of A. B., plaintiff in the above entitled action, and R. C., receiver of the _____ Company], verified the _____ day of _____, 18 ____; and on motion of _____, of counsel for said _____,

ORDERED, 1. That a notice be published, as hereinafter directed, requiring all the creditors of said _____ Company, and all persons having claims of any kind against said Company, to exhibit their claims to said receiver, at a place to be specified in such notice, and become parties to the above entitled suit [or, proceeding] within six months³ from the first publication of this order, and that in default thereof they be precluded from all benefit of the order or judgment which may be made in such suit [or, proceeding], and from any distribution which shall be made under such order or judgment.⁴

§ 8, made applicable to receivers in actions for dissolution or distribution, or to forfeit charter, &c., by *N. Y. Code Civ. Pro.*, § 1788.

But a mere temporary receiver is not required to give such a notice. *Herring v. N. Y., Lake Erie & W. R. R. Co.*, 19 *Abb. N. C.*, aff'g 63 *How. Pr.*, 497, 513; unless specially directed to, or vested with powers of a statutory receiver. *N. Y. Code Civ. Pro.*, § 1788.

¹ This clause is required by 2 *N. Y. R. S.*, 472, § 70.

² See last Form and notes. As to

the rule in creditors' actions generally, see *Kerr v. Blodgett*, 48 *N. Y.*, 62.

³ Or more. *N. Y. Code Civ. Pro.*, § 1807.

⁴ If the statute is peremptory, claims delayed are wholly barred. *Matter of Harmony F. Ins. Co.*, 45 *N. Y.*, 310, aff'g 9 *Abb. N. S.*, 347; *People v. Security L. Ins. & Ann. Co.*, 78 *N. Y.*, 114. But under *N. Y. Code Civ. Pro.*, § 1807, as am'd by *L. 1886*, p. 598, c. 372, they may be presented before order for final distribution, with excuse.

2. That this order be published once a week for three weeks, and said notice be published once a week for six months, in a newspaper published in _____, to wit: the _____, and the New York Daily Register, and also in a paper published in the city of Albany, to wit: the _____.¹

Enter: [*signature of judge by initials of name and title.*]

Form No. 719.

Receiver's petition for leave to sell.²

[*As in Form 702, to the *.*]

III. That it appears that the defendant is owner of certain real property known and described as follows: [*description of the premises, and state also what interest the defendant has in it, what incumbrances there are upon it, and its value.*]

IV. [*State reasons for asking a sale, for example, in creditor's suit, thus:*] That your petitioner has found no goods, or chattels, or choses in action of the said Y. Z., out of which any money can be made by collection, suit, or sale; and the said land is the only available property.

WHEREFORE, your petitioner asks an order, allowing him as such receiver, to sell by public auction, and convey, all the right, title, and interest of the said Y. Z. [which he had on the _____ day of _____, 18____] in and to said premises; and that the said Y. Z. join in such deed if the purchaser require it, and for such other or further order as may be just [and for the costs of this application].

[*Signature of*],
Receiver.

[*Jurat.*]

[*Verification as in Form 494, p. 5, of this Vol. Notice of motion or order to show cause,³ see Vol. I, pp. 347, 348, and Form 727 (below).*]

[*Order; see Form 720.*]

In the absence of statutes, the court has a discretion to let in before actual distribution. *Atty.-Gen. v. Atlantic Mut. Life Ins. Co.*, 11 *Abb. N. C.*, 139, rev'd in 96 *N. Y.*, 49; *Matter of Howard*, 9 *Wall.*, 175. See, also, *People v. Security Life Ins. Co.*, 79 *N. Y.*, 267.

¹ Compare *N. Y. L.*, 1884, c. 133, § 2, and 1885, p. 459, c. 262.

As to publication, see Vol. I, p. 368, &c.

² For a petition for leave to sell desperate debts and doubtful claims, see *Edw. on Rec.*, 152.

³ As to place of moving, see *Rinn*

Form No. 720.

Order giving receiver leave to sell.¹

[*Title (court order) and recitals, as in other cases; see Form 493, p. 4, inserting facts according to circumstances, as thus:*] by which it satisfactorily appears to this court that it will be for the benefit of the assigned property [remaining unsold and undisposed of] in the custody of said receiver, and the advantage of all parties in interest, that [*designating articles*²] should be sold at private sale at and for the price offered therefor in cash, as particularly set forth in said petition of said R. C. [and that out of the proceeds of such sale the said chattel mortgage and incumbrances upon the said should be paid off and discharged]; and further, that it is also for the benefit of said assigned property, and the advantage of all parties in interest, that the remaining stock and property in said receiver's custody should be sold at public auction, upon the usual notice, at some time or time previous to the day of next:

Now, on motion of A. T., Esq., counsel for said receiver, it is

ORDERED, 1. That said R. C., as receiver as aforesaid, be and he is hereby authorized and empowered to sell and dispose of the said stereotype plates hereinbefore referred to, and fully described and specified in the said petition, at private sale at the best price he can obtain therefor in cash, not less than the sum of dollars.

2. That out of the proceeds of such sale he be, and he is, authorized and empowered to pay the principal and interest due and unpaid upon the said chattel mortgage upon said articles in the said petition specified, and to cause the same to be satisfied and discharged, retaining any balance of the proceeds of such sale in his hands as receiver, to be accounted for, and to abide the further order and decision of this court.

3. That said receiver be, and he hereby is, authorized and

v. Astor Fire Ins. Co., 59 N. Y., 143, and p. 127 (*above*). As to notice to attorney-general in corporation cases, p. 127 (*above*).

¹ Sustained in *Sullivan v. Miller*, 40 Hun, 516. As to the discretionary power of the court, see *Smith v. Danzig*, 3 Civ. Pro. R., 127; *Syracuse Sav. Bk. v. Syracuse, &c., R. R.*, 88 N. Y., 110.

As to effect of order to sell, see *Boon v. Moss*, 70 N. Y., 465.

² An order to sell any particular part of the property should specifically describe it. *High on Rec.*, 2 ed., 159, citing *Dixon v. Rutherford*, 26 Ga., 149.

empowered to sell and dispose of the remaining property and assets now in his custody undisposed of, or which, at the time of sale, shall be in his custody and control undisposed of, at public auction, to the highest bidder, on due public notice thereof, and at such time or times as he shall deem most convenient and proper between now and the day of next.

Enter : [*signature of judge by initials of name and title.*]

Form No. 721.

Order confirming receiver's sale.¹

[*Title (court order) and recitals according to the case.*]

ORDERED, that the aforesaid sale be and the same is hereby confirmed, and the said receiver is hereby authorized to convey to the said purchaser the following described property [*insert description*], and upon receiving from said purchaser the sum of dollars, the balance of said purchase-money, the said receiver is hereby authorized to deliver to said purchaser a deed of said property in the usual form.

Enter : [*signature of judge by initials of name and title.*]

Form No. 722.

Petition of receiver to compel purchaser to complete.²

[*As in Form 702, to the *.*]

III. That among the assets of said G. B. which came to your petitioner's knowledge and possession was a judgment re-

¹ See *Simmons v. Wood*, 45 *How. Pr.*, 262.

² This and the next Form are supported by an unreported case in which it was held by the N. Y. Supreme Court at General Term, reversing the contrary decision below, that as a receiver is simply an agent in possession for the court, his sales are judicial sales, and may be enforced by order. Such sales are made solely by reason of the power conferred upon him by his appointment. He does not act by authority of any statute or of law in-

dependently of the court, but because the court has taken possession of the property through its receiver as its agent or servant. *Matter of Denison*.

A receiver asking leave to sell pursuant to a contract negotiated, should submit a copy of the contract, which may be executed in advance, being expressed to be subject to approval of the event; and thereupon the order of approval will be a confirmation of the contract and a protection for both parties.

covered by said G. B. against one J. H. M., in an action in the court for the city and county of , on the day of , 18 , for the sum of \$.

IV. [*Here state circumstances of negotiation and contract of sale of such assets and order of court obtained granting leave to sell. See Form 720.*]

V. That thereafter, as your petitioner is informed and believes, a copy of said order was delivered to said [*purchaser*], with a notice that your petitioner was ready to complete said transaction, and to assign said to said [*purchaser*] upon the payment of the stipulated price.

VI. That thereafter, as your petitioner is informed and believes, said [*purchaser*] submitted to your petitioner's said counsel such papers as he desired executed for a complete transfer of said [*naming them*], and your petitioner duly executed and acknowledged the said assignment [and procured the said to be duly executed and acknowledged by M. N.], and thereupon tendered all of the same to said [*purchaser*], and demanded the performance of said agreement on his part, but he has hitherto failed [and refused] to perform the same.

VII. [*If application is ex parte, for an order to show cause, add*] That no previous application for has been made herein [*except, &c.*¹].

WHEREFORE, your petitioner prays for an order requiring the said [*purchaser*] to perform said contract on his part, and to pay to your petitioner, upon receipt of said assignment and other papers for the transfer of , the said sum of \$, besides the costs of this application.

[*Directions as under Form 719, and note.*]

Form No. 723.

Order that purchaser from receiver complete his purchase.

[*Title (court order) and recitals, according to circumstances: see Form 493, p. 4.*]

ORDERED, that the said [*purchaser*], within days from the service of a copy of this order upon him [*or, on Z. T., Esq., his attorney*], perform the contract in the said petition of said

¹ See pp. 2 and 3, of this Vol.

- * receiver mentioned, and, upon receiving the assignment [*if of a judgment or cause of action in suit, may add—proposed order of substitution and consent to the entry thereof*], and the notice tendered to them by said receiver, on or about the day of , 18 , pay to said receiver, or to his attorneys, in performance of the said contract, the sum of dollars, besides dollars costs of this motion.

Enter: [*signature of judge by initials of name and title.*]

Form No. 724.

Petition of receiver for authority to pay counsel fees, &c.

[*As in Form 702, to the *.*]

III. That he has employed as his attorney and counsel in the above matter A. T., a counselor of this court, and that in the course of his business, as receiver, he finds it necessary to frequently, and, indeed, almost constantly consult with said counsel.

IV. That your petitioner believes it will be necessary to require much of the time of said counsel until the estate in his hands is wound-up, and that in view thereof he believes it for the interest of the estate that such employment of said attorney and counsel should be continued, and that a proper fee as retainer and on account of his said service, should be now paid him.

V. That your petitioner is informed that this court has, in several cases of similar character, directed the payment of a fee at the commencement of proceedings of dollars.

WHEREFORE, your petitioner prays direction: 1st. As to the employment of legal assistance. 2d. As to the amount which shall be now paid on account of such assistance.

[*Directions as under Form 719, and note.*]

Form No. 725.

Order sanctioning receiver's employment of counsel.

[*Title (court order) and recitals, according to the case; see Form 493, p. 4, of this Vol.*]

ORDERED, 1. That the acts of said receiver in respect to the employment of attorney and counsel is hereby confirmed, and he is hereby directed to continue the same.

2. That the said receiver is hereby directed now to pay said counsel as retainer the sum of dollars, and on account of services to be rendered by him the sum of dollars, out of the moneys in said receiver's hands to the credit of the above entitled cause.

Enter: [*signature of judge by initials of name and title.*]

Form No. 726.

Petition by receiver for leave to pay claims, &c.

[*As in Form 702, to the *.*]

III. That before his appointment as receiver, a judgment was obtained against the defendant company, by E. R. S., which was docketed in the court of , and that an execution was issued, and levy made thereunder by the sheriff, before his said appointment. That the sheriff threatens to enforce his levy, unless the amount therefor, with poundage and costs, amounting in all to dollars, be forthwith paid, and petitioner is advised to settle the same at once.

IV. [*If application is ex parte:*] That no application [*&c., as in Form 489 or 490, p. 2.*]

WHEREFORE, your petitioner prays that he may be authorized to pay said judgment.

[*Directions as under Form 719, and note.*]

Form No. 727.

Notice of motion by a party to the cause, for instructions to the receiver.¹

[*As in Form 488, p. 1, of this Vol., to the ‡, concluding with statement of relief, for instance, in a partnership cause, thus:—for other cases, see Forms below,*] directing the receiver

¹ May proceed by petition if preferred. See Vol. I, p. 333. Application by a party to the cause, founded on legal rights or equities of the case, and incidental to the ordinary course

of the cause, is usually made on affidavits rather than on petition.

As to the place of moving in corporation cases. see p. 123 (*above*); as to notice to the attorney-general, p. 127.

II. That on said last mentioned day having theretofore become insolvent, it suspended its business.

III. That on the day of , 18 , R. C. was duly appointed receiver thereof in this court, and thereupon duly qualified as such, and entered on the discharge of his duties, and is now such receiver.

IV. That after said bank had become insolvent and was known to its officers so to be, and immediately before such suspension, your petitioner who was then a depositor in said bank, but was ignorant of such insolvency, deposited with it to be credited in his account [*describing the fund*].

[*Or*, That prior to the time of the failure of the said C. bank, your petitioner had sent notes belonging to your petitioner to it, for collection, which were duly received by said bank, and for the collection of which said bank was to receive as compensation. That said bank, as your petitioner is informed and believes, prior to said , 18 , had collected a large amount of said notes so sent to it for collection, and had placed the amount so collected on its books as a fund belonging to your petitioner, separate and apart from other funds in said bank.

V. That the said deposit [*or*, the fund so collected, and so set apart on the books of said C. bank as belonging to your petitioner] remained there at the time of the appointment of said R. C. as receiver, and is now in the possession and under the control of said receiver.

VI. That prior to the making of this petition, your petitioner has duly demanded of said receiver that he pay said amount to your petitioner, but said receiver has failed so to do.

WHEREFORE, your petitioner asks that said receiver be directed to deliver to your petitioner the said check, and pay him the costs of this motion [*or*, to pay over to your petitioner the said sum of dollars—with interest from the day of , 18 —with the costs of this motion, and that the trust company pay to said receiver, out of funds belonging to said trust in its hands, the sum necessary to enable him to make such payment], or for such other or further order as to the court may seem just.

[*Directions as under Form 719, and note.*]

Form No. 729.

Petition that receiver be instructed to pay for services, goods sold, &c., rent, &c.¹

[*As in last Form, to the *.*]

I. That on or about the day of , 18 , R. C. was duly appointed in this court, receiver of , and thereupon duly qualified and entered on the discharge of his duties, and still continues such receiver.

II. That [*here allege grounds of claim as in a well drawn complaint*].²

WHEREFORE [*&c., see last Form, for demand; and Form 719, and note for directions*].

Form No. 730.

Petition that receiver surrender possession, pay, &c., or that petitioner have leave to be examined interesse suo. (Old practice.)³

[*Entitle, and state claim, in same manner as in last two Forms.*]

WHEREFORE, your petitioner asks that said receiver be directed to pay [*&c., or, deliver, &c., according to the case*], or that your petitioner be allowed to come in and be examined *pro interesse suo* as to whether his rights in and to said , are not superior to the rights of said receiver and those whom he represents, and that at the close of said examination the court make such order as to the disposition of said as to the court may seem just.

And your petitioner further asks that he may have such other or further relief as may be just [together with the costs of this motion].

[*Directions as under Form 719, and note.*]

¹ Application by a third person is appropriately made by petition. As to services, see *Davis v. Stover*, 16 *Abb. N. S.*, 225. Goods sold, *Matter of U. S. Rolling Stock*, 57 *How. Pr.*, 16; *Rent, People v. National Trust Co.*, 82 *N. Y.*, 283; *Moore v. Higgins*, *N. Y. Daily Reg.*, Jan. 9, 1885, *abst.*; *s. c.*, 20 *Weekly Dig.*, 123; *Contracts*

generally, *Kain v. Smith*, 80 *N. Y.*, 458. As to enforcing contracts of the receiver's predecessor, see *Lehigh Coal & Nav. Co. v. Central R. R. Co.* (*N. J.*, 1886), 3 *Atl. Rep.*, 134.

² The claim and the demand for relief should be stated as against him as receiver.

³ See next Form.

Form No. 731.

Another Form.—By asking reference. (Under Code practice.)

[*Entitle, and state claim, as in last Form.*]

WHEREFORE, your petitioner asks that said receiver be directed to pay [*&c., or, to deliver, &c., according to the case; see Forms 728, 733*], and, if necessary that a referee be appointed to take proof of the facts alleged in this petition, and that upon the coming in of his report, that said receiver be directed as aforesaid; and that your petitioner have such other or further relief as may be just [together with the costs of this motion].

[*Directions as under Form 719, and note; or order to show cause as below.*]

Form No. 732.

Order to show cause why receiver should not pay or deliver, &c., with stay meanwhile.¹

[*Name of*] Court [*or if a court order*]

At a special term [*&c., as in Form No. 493, p. 4, of this Volume.*]

*Title of cause in which receiver
was appointed.*

In the Matter of The Petition
of M. N. that the Receiver pay
[a judgment].²

On reading [and filing] the petition of M. N., verified the day of , and the papers and exhibits therein referred

¹ As to notice to attorney-general and is not used unless the applicant in corporation cases, see page 127. proceeds by petition, nor then commonly, if he be a party to the action.

² This double title is not essential,

to, hereto annexed, and on motion of M. T., attorney for said M. N.,

ORDERED, that R. C., the receiver appointed in this action [and A. B. and Y. Z.], show cause at a special term of this court to be held [at the chambers thereof] at the county courthouse, in the city of _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon of that day, or as soon thereafter as counsel can be heard, why the prayer of said petition should not be granted.

And until the hearing and decision of such application the proceedings of said receiver, touching sale advertised for the instant [or, the reference upon the passing of his accounts, now pending before R. F., referee], be and the same are hereby stayed.¹

[*Authentication, see Form 491, p. 3 of this Vol.*]

Form No. 733.

Order on petition or motion that receiver pay, deliver, sell, &c.

At a special term [*&c., as in Form No. 493, p. 4, of this Volume*].

[*Title of cause.*]

On reading [*if not already filed, add—and filing*] the [petition] of M. N., verified the _____ day of _____, 18____ [and heretofore filed], and [*mention other papers; and, if any party does not appear, add,* and proof of service of due notice of this motion upon _____], and after hearing T. M., of counsel for said M. N. and _____, of counsel for _____ [and no one appearing for _____] in opposition, and due deliberation being had, now, on motion of T. M., counsel for M. N.,

ORDERED [*here direct according to the decision, for instance, thus:*²]

[*Payment of fees; money to be drawn from trust company*] 1. That R. C., Esq., receiver of the _____, be and he is hereby authorized and directed to pay to Messrs. W. & C. the sum of _____ dollars, on account of the disbursements and

¹ As to the 20 days' limit, see Vol. I, p. 487.

² When necessary for the receiver's protection, deduction of his com-

missions and expenses should be provided for in the order. *Galster v. Syracuse Sav. Bk.*, 29 *Hun*, 594.

services heretofore made and rendered by them on behalf of the receiver of the

2. That said receiver be also further authorized and directed to pay to _____, of _____, the sum of _____ dollars, as the amount due to him for his services in trying the case of D. against O.

3. That the U. S. T. C. is hereby authorized and directed, out of the funds on deposit in its hands to the credit of said A. B. H., as receiver of the _____, to deliver to him the moneys necessary to make the aforesaid payments, on receipt of a certified copy of this order.

[*Releasing and transferring securities at a discount.*] ORDERED, that said R. C., Esq., as such receiver, be authorized, and he has the leave and permission of this court, to assign and transfer, or satisfy said bond and mortgage, and to surrender said promissory notes upon the receipt by him, of the sum of _____ dollars in cash.

[*Repairing, and paying coupons.*] ORDERED, that the said receiver be and he hereby is directed, out of any funds in his hands which may remain after paying the necessary expenses for operating, and the repairs of the railway of which he has charge, to use enough of the same to put the S. Division completely, and as speedily as possible, in a safe condition for the transit of freight and passengers, making such reparation as may be necessary to accomplish that object; subject to this order in relation to the S. Division as soon as the same can be done, to pay the coupons which fell due on _____ instant, on the bonds of the first mortgage on the Main Line [*and so on*].

[*Sale of good will and depreciating property.*] And it appearing by the moving affidavit [*or, petition*], there is danger of the _____ deteriorating, said receiver is hereby instructed and ordered, in order to prevent the destruction and deterioration of the good will, business and property. of which he is the receiver, to sell the same in the manner directed by Rule 78,¹ respecting receivers of judgment-debtors, so soon as he shall have possessed himself of the same sufficiently to enable him in his judgment to make a beneficial sale thereof [giving to the purchaser on said sale the same right which said receiver possesses to the possession, under lease, of the premises where said business is located].

[*Authentication; see Form 491.*]

¹ N. Y. Gen. Rules, No. 78, of 1888.

Form No. 734.

Notice of receiver's petition for directions as to distribution.

[*Address to the attorneys of
each party in interest.*¹]

Upon the petition, of which the within is a copy, and upon the statement of facts, and the schedules thereto annexed, therein referred to, I shall apply to this court, at a special term to be held at _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, for an order directing what course I am to take in reference to the uncollected notes and accounts, and the furniture in my possession, and also for an order directing a reference to take my accounts as receiver, and discharging me from further liability, and also for an order determining your respective priorities, and my duties as to paying your various claims out of the surplus that may remain in my hands, or out of any other moneys that I may collect.

[*Date.*]

[*Signature of*]

Receiver, &c.

Form No. 735.

Order that receiver in foreclosure pay over surplus to himself as mortgagee.²

[*After title and recitals according to the case:*]

ORDERED, 1. That the report of R. F., Esq., to whom it was referred to pass and state the accounts of the receiver appointed by this court to collect the rents, issues and profits of the premises described in the complaint in this action, be and the same is hereby in all things confirmed, and the said accounts are hereby passed and stated as therein reported, showing that the sum of _____ dollars is now in the hands of said receiver to the credit of this action.

¹ As to notice to attorney-general in corporation cases, see p. 127.

² From *Ranney v. Peyser*, 83 N. Y., 1; rev'g 20 Hun, 11.

Compare *Platt v. Platt*, 66 N. Y., 360 (paying over to plaintiff after interlocutory judgment setting aside conveyance as fraudulent). Ver-

planck v. Verplanck, 22 Hun, 104 (refusing payment *pendente lite*, in partition); *Schenck v. Ingraham*, 5 Hun, 397 (distribution of partnership funds); *Weeks v. Cornwell*, 38 Hun, 577 (costs in partition not payable before final judgment).

2. That out of said sum the said receiver deduct and retain the sum of per cent. for his commissions herein, that he pay to R. F., Esq., the sum of dollars, for his charges as referee¹ upon the accounting had herein, that he pay to said receiver for R. G., the sum of dollars for his charges and allowances as proctor and counsel for said receiver upon said accounting.

3. That, after making the aforesaid deductions and payments, the said receiver pay to the plaintiff in this action the balance remaining in his hands as such receiver to the credit of this action, and that he take said plaintiff's receipt therefor on account of the moneys due him upon the bond and mortgage set forth in the complaint herein.

4. That upon complying with the provisions of this order, the said receiver may be forever released and discharged from any and all manner of liability by reason of his said trust.

SECTION V.

ACCOUNTS.

FORMS.

- | | |
|---|---|
| (736.) Petition of receiver to be allowed to account and be discharged. | (739.) Order of reference to pass receiver's account. |
| (737.) Account rendered by receiver. | (740.) Objections to receiver's accounts. |
| (738.) Affidavit of receiver to his account. | (741.) Report of referee passing accounts. |

Form No. 736.

Petition of receiver to be allowed to account and be discharged.²

[*As in Form 702, to the *.*]

III. That your petitioner has since then performed the duties of this office and executed all the trusts of the same so far as he has been able to do so, and has collected all the assets known to him of said corporation; duly advertised for all claims against the same, and discharged all claims presented; and there are no creditors of said corporation to the knowledge

¹ See, however, *Atty.-Genl. v. Continental Life Ins. Co.*, 15 *Weekly Dig.*, 239.

² Or may apply on affidavits. See

Volume I, p. 332. As to place in corporation cases, p. 123 of this Volume. As to notice to attorney-general, p. 127.

of your petitioner [*or state exceptions, if any, so that the order may reserve them*].

IV. That according to the accounts of your petitioner annexed¹ [*or, ready to be produced and filed*], there remain, after paying the necessary expenses and charges of said trust, together with a proper compensation to the receiver, no assets of value for distribution among the [stockholders] [*or state what, if any*].

V. That no suits or legal proceedings in respect to said [corporation or] receivership are now pending to the knowledge of your petitioner; nor does any duty remain to be performed by said receiver except to have his accounts finally settled [*or state exceptions, if any, so that the order may reserve them*].

WHEREFORE, your petitioner prays that this court may finally settle and allow his accounts as such receiver, and award him suitable compensation for the performance of his said duties, and for an order relieving and discharging your petitioner as said receiver, and ordering his bond to be cancelled, and for such other and further order as may be just.

[*Directions as under Form 719 and note.*]

Form No. 737.

Account rendered by receiver.²

[*Title of court and cause.*]

To the Court of

I, the undersigned R. C., of , render the following account of my proceedings as receiver of [the rents, issues and profits of the premises described in the complaint herein, which are known and designated as Nos. avenue, in the city of].

I was appointed as such receiver by an order made and entered in the above entitled action, on , 18 .

¹ *People v. Columbia Car Spring Co.*, 12 *Hun*, 585.

² As to periodical accounts required in corporation cases, see *N. Y. L.*, 1883, c. 378, as am'd by *L.* 1885, c. 40, § 4; *People v. Knickerbocker*

Life Ins. Co., 18 *Weekly Dig.*, 492; *Att'y-Gen. v. Continental Life Ins. Co.*, 31 *Hun*, 623. Rule of N. Y. Supreme Court in fourth department, *Hun's Rules*, p. 268.

[*State facts as to administration of the trust, so far as material to explain and justify the account, as thus:*]

[*Agency for collection.*] I thereupon proceeded to appoint an agent for the collection of said rents, under the power vested in me by said order, and in the following statement of my account I have credited myself with the payment to said agent of per cent. commission upon all the moneys collected by him during the continuance of my said trust.

[*Sale of uncollectible assets.*] After having collected all the collectible assets except a disputed claim on a guaranty, which by leave of this court I compromised on receiving the sum of dollars, the remainder of the assets, pursuant to leave of this court first obtained, I sold at public auction at , on the day of , 18 , first giving due notice as is required by law in the case of execution sales [of personal property] by the sheriff [*or, as was required by said leave of court*], a copy of which notice, with proof of posting and service, is hereto annexed and marked Schedule . At such sale all of said property was sold to the highest bidder for sums aggregating dollars.

[*And so on with other transactions.*]

Schedule A hereto annexed contains a statement of all the moneys received or collected by me or my said agent.

Schedule B hereto annexed contained a detailed statement of all moneys expended by me in the execution of my said trust, together with the object of such expenditure.

All the receipts, statements and vouchers hereto annexed form part of this account.

I charge myself as follows :

Gross receipts as shown by Schedule A. \$

I credit myself as follows :

Total expenditures as shown by Schedule B. . . \$

Leaving a balance of. \$

which consists of [*stating items, as cash in a designated trust company, or unrealized assets, &c.*], to be distributed, subject, however, to the deduction of the amount of my commissions and the expenses of this accounting.

The said schedules, which are severally signed by me, are part of this account.

[*Signature of*]

Receiver.

Form No. 738.

Affidavit of receiver to his account.

[*Title of the cause.*]

R. C., of _____, the receiver of [the rents and profits of the estate in question] in this cause, being duly sworn, says:

I. That the foregoing account contains, according to the best of this deponent's knowledge and belief, a full and true account of all the [rents and profits of the said estates for one year, ending on the _____ day of _____, 18____, being from the foot of his former account, and of the former rents returned by his said former account to be in arrear and unreceived at the time of the making up the same], which have been received by this deponent, or any other person by his order, or for his use, down to the _____ day of _____, 18____; that he has been charged therein for all moneys received by him and embraced in said account, for which he is legally accountable; and that the moneys stated in said account as collected were all that were collectible, according to the best of his knowledge, information and belief.

II. That the several sums of money mentioned in the said foregoing account to have been paid or allowed, were actually paid or allowed by this deponent for or on account of the said estates, and for the several purposes therein mentioned, according to the best of his knowledge and belief.

III. That he does not know of any error or omission in the said foregoing account to the prejudice of any of the parties interested in the funds or in the cause.

IV. That the sums charged in the said account, for which no vouchers or other evidence of payment are produced, or for which he may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged.

[*Jurat.*]

[*Signature.*]

Form No. 739.

Order of reference to pass receiver's account.¹

[*The object of motion, or of the order, may be stated thus:*] to take and state the accounts of R. C., the said receiver in this

¹ The order should be by the court.

action, and to ascertain and report to the court what, if any, of the property and assets in question in this action remain undisposed of; and what are just allowances to said receiver for the costs and expenses of said receivership and his commissions, as well as for other disbursements and payments properly made by him, on account of said trust fund;¹ and what is the balance in his hands after making such allowances² [*where the receiver is in fault, and the motion is against him, add, with costs of this motion to be paid by said receiver personally*].

Form No. 740.

Objections to receiver's accounts.³

[*Title of court and cause.*]

M. N., a [judgment-creditor] of _____, for himself and others similarly situated, makes the following objections to the accounts of R. C., receiver herein, filed the _____ day of _____, 18 _____.

[*State them in detail.*]

[*Date.*]

[*Signature and office address of*]

Attorney for

Form No. 741.

Report of referee passing accounts.

[*Title of court and cause.*]

To the _____ Court of _____.

I, the undersigned R. F., to whom, under an order of this court, bearing date _____, 18 _____, made herein, it was re-

¹ See *McLane v. Placerville, &c.*, R. R. Co. (Cal., 1885), 6 *Pacif. Rep.*, 749, 759, and cases cited.

² Other directions, convenient in various cases according to circumstances, may be given, for instance:

[*Where receiver has not yet filed his account*] That the said R. C. make and state his accounts as such in this action, before the said referee herein appointed, on [five] days' notice of hearing to the judgment-creditors and others, named in this application.

That said _____ and all stockholders or other persons interested in said company, or in the due execution of

said trust, be at liberty to appear by counsel before said referee, and object to and contest said accounts, or any part thereof, and to surcharge and to falsify the same, and to offer proof in respect thereto, if they be so advised.

That such notice of said proceedings be given to all parties interested as to said referee may direct.

³ In case of ignorance the objections may be as general as necessary, and the referee may allow the objector to examine the receiver, in order to enable him to make them more specific.

ferred, as sole referee, among other things, to take and state the account of W. J. B., Esq., the receiver of the property of the N. T. Co. of _____, the defendant in this action, and also the condition of the trust property, and to hear and examine the proofs, vouchers and documents for and against the said account, do hereby report :

I. That before proceeding with the hearing of the matter so referred to me, I duly took and subscribed the annexed oath.

II. That I was attended on such hearing by [a deputy of the attorney-general of this State] the attorney for said receiver, and by said receiver in person, and by _____ [or, and that proof was produced by affidavit of M. N., hereto annexed, that due notice of the hearing before me was given to _____]; and that I thereupon heard the proofs of the respective parties and examined the accounts and the vouchers and documents relating thereto; and also examined said receiver personally, under oath, and such witnesses as were produced before me, touching the matter so referred, and their testimony is hereto annexed; and that, from the proofs before me, I do find and report as follows :

CONCLUSIONS OF FACT [*stating them*].

CONCLUSIONS OF LAW [*stating them*].

All of which, together with the evidence taken and vouchers produced, is respectfully submitted.

[*Date.*]

[*Signature of*]

Referee.

[*Annex testimony signed.*]

SECTION VI.

REMOVAL OR DISCHARGE.

FORMS.

(742.) Notice of motion to revoke appointment.

(743.) Order for appointment of a different receiver.

(744.) Notice of motion to remove receiver.

(745.) Order removing receiver and appointing substitute.

(746.) Notice of motion to discharge receiver.

(747.) Order removing receiver with his consent and substituting new receiver.

(748.) Order to show cause why receivership should not be discharged.

(749.) — discharging receivership.

(750.) Notice of motion or petition to discharge receivership as to specific property.

(751.) Order that receiver pay over to his successor.

(752.) Affidavit to obtain order to show cause why removed receiver should not be punished for contempt for failing to pay over.

Form No. 742.

Notice of motion to revoke appointment.¹

[*Object of motion may be stated thus:*] that the said appointment of R. C. as receiver may be revoked; and that the court appoint or refer it back to R. F. as referee [*or, to a referee*] to appoint a new receiver in this action, and take the requisite security.

Form No. 743.

Order for appointment of a different receiver.

[*Title (court order) and recitals according to the case.*]

ORDERED, that it be referred [back] to R. F. [the referee heretofore appointed] to review the appointment of R. C. as receiver in this cause; and that the same may be supported and opposed by further evidence; and that upon such review, and upon due hearing of the parties, the said referee proceed to appoint a receiver in this action, pursuant, in all respects, to said order.

[*Or, that the order of reference to R. F. to appoint a receiver in this action, dated the day of , 18 , be revoked and set aside, and that—here proceed as in an original order.*]

Form No. 744.

Notice of motion to remove receiver.²

[*The object of motion may be stated thus:*] that R. C. appointed receiver in this action be removed [and that it be referred to a referee to—*or, that the court—appoint a substi-*

¹ *Siney v. N. Y. Consol. Stage Co.*, 18 *Abb. Pr.*, 435; s. c., 28 *How. Pr.*, 481; *Connolly v. Kretz*, 78 *N. Y.*, 620.

See note 3 to Form 746.

If application is made to vacate the order or revoke appointment for irregularity, the irregularity must be

specified in the notice of motion or order to show cause. Volume I, pp. 154, 156.

As to applying at a term held by same judge, see Volume I, p. 126.

² See above notes and note to next Form.

tute in his place, and take the requisite security], and for such other and further relief as may be just; and for the costs of this motion [to be paid by said R. C. personally].

Form No. 745.

Order removing receiver and appointing substitute.¹

[*Title (court order) and recitals according to the case.*]

ORDERED, 1. That R. C. be and he hereby is removed from the office of receiver herein [*may state ground if desired*²], and that of is hereby appointed receiver of , with the powers and duties conferred by the order entered herein the day of , 18 [*or may specify them*].

2. [*Bond clauses as in Form 655, p. 145.*]

3. That upon the filing of said bond so approved, in the office of the clerk of this court, said R. C. do forthwith deliver over unto said , receiver herein, all books, papers, evidences of debt, accounts, notes, bills, bonds and property of all and every description belonging to said corporation, which may have theretofore come into his hands as receiver herein, and that he forthwith execute, acknowledge and deliver to said proper deeds of conveyance of all real estate of said corporation standing in his name as such receiver, conveying such real estate to said as receiver herein, his successors and assigns and their heirs, which deed or deeds shall contain a covenant against the acts of the said R. C., and shall be approved as to form by one of the judges of this court.

4. That it be referred to R. F. of , as referee, to take an account of all property with which the said R. C. is properly chargeable as receiver herein, and report the same to this court with all convenient speed.

Enter: [*signature of judge by initials of name and title.*]

Form No. 746.

Notice of motion to discharge receiver.³

[*The object of motion may be stated thus:*] that R. C., the receiver appointed in this action, be discharged; and that on

¹ Compare Form 742.

² See *Bruns v. Stewart Mfg. Co.*, 81 Hun, 195.

³ Discharge on the receiver's appli-

cation before he has completed his duties is not matter of cause. *Beers v. Chelsea Bank*, 4 Edw., 277.

As to who may apply, see First

an accounting by him, and a delivery of all property and other things held by him as such receiver, to be made as the court may direct, the bond entered into by him, the said receiver, and his sureties, may be vacated [and that the plaintiff may pay him, the said receiver, the sum of dollars, reported due to him by the report of , dated the day of , 18 , pursuant to an order made in this cause the day of , 18]; and for the costs of this motion.

Form No. 747.

Order removing receiver with his consent and substituting new receiver.¹

[*Title (court order) and recitals, according to the case; see Form 493, p. 4, of this Volume.*]

1. That R. C. be and he hereby is, at his own request, removed from the office of receiver, to which he was appointed by the order of this court, made in the above entitled actions on , 18 [upon the successor hereinafter appointed duly qualifying, and upon accounting fully and transferring to such successor all the assets of the receivership].

2. That the said R. C. pass his accounts as receiver in these actions before R. F., Esq., a counselor-at-law, who is hereby appointed sole referee to examine the said receiver and his agent or agents, under oath, touching all matters therein contained, and relating to his acts as such receiver [since the last account], and to report thereon to this court, with the evidence.

And the said referee is directed to ascertain, determine and report to this court what, in his opinion, is a suitable and proper sum to be allowed to said receiver as and for his compensation; also what is a proper sum to be allowed to the bookkeeper and accountant employed by said receiver as and for his compensation, and what is a reasonable sum to be allowed to the attorneys of said receiver as and for their compensation for services rendered since the of , 18 .

Natl. Bank v. E. T. Barnum Iron Works (*Mich.*, 1886), 27 *Northwestern Rep.*, 657.

As to who should have notice, see *Bruns v. Stewart Mfg. Co.*, 31 *Hun*, 195; *Miller v. Loeb*, 64 *Barb.*, 454; and *Hoyt v. Continental Ins. Co.*, 21 *Week. Dig.*, 145.

As to notice to attorney-general in

corporation cases, see p. 127 of this Volume.

As to the place for moving, see *N. Y. Gen. Rules*, No. 81, of 1884; *Attrill v. Rockaway Beach Impr. Co.*, 25 *Hun*, 376, 509, and note to Form 688.

¹ Compare Form 744.

3. That on the coming in of the said report and the confirmation thereof, and upon compliance by said R. C. with such further order as may be made herein by this court, the said R. C. be discharged from all the duties and responsibilities of his aforesaid receivership, and the bond given for the faithful discharge of his duties as such receiver vacated and cancelled, and the sureties thereon fully exonerated and discharged.

4. That the said R. C. transfer and deliver to _____, hereinafter named, all the books and papers, money, property and effects of every kind which may have come into his hands, and are now held by him as such receiver, on or before the day of _____, 18____, if said _____ shall then have duly qualified and entered upon the duties of the trust.

5. And it appearing to the court that _____, Esq., of _____, is a fit and proper person to be appointed receiver in these actions in the place and stead of said R. C., it is hereby ORDERED [*if after judgment, add, adjudged and decreed*], that said _____ be and he hereby is appointed receiver in the place and stead of the said R. C., to [*here state functions as on an original appointment; see Forms 655-697, adding*], and to receive and take from said R. C. all the property and assets of the aforesaid receivership [*direct assignment if necessary; see Forms 667, 680*].

6. AND IT IS FURTHER ORDERED, that the said _____, as receiver, have and possess the same powers and be subject to the same duties and obligations conferred or devolved upon the said R. C. by the order of this court, made _____, 18____ [*save that the said _____, as receiver, shall pass his accounts as therein provided, once in each _____ months, and not once in each month, as therein directed*].

7. [*Bond clause as in Form 655.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 748.

Order to show cause why receivership should not be discharged.

[*As in Form 491, p. 3, stating relief, for instance, thus:*] why R. C., the receiver herein, should not be discharged and turn over the possession of all the property of which he is receiver, and all which has come to his possession as such, to said defendants, together with all papers, leases and documents relating to such property, or to the tenants and terms of occupation thereof.

Form No. 749.

Order discharging receivership.

[*Title (court order) and recitals, according to the case. See Forms 493, p. 4, and 688, p. 189.*]

ORDERED, 1. That R. C., receiver in this action, be and he hereby is discharged from any further duty and office as such receiver, except as hereinafter set forth.

2. That the said receiver immediately turn over the possession of the lands and premises described in the complaint in this action [*or otherwise designate property*] to the defendants¹, together with all papers, leases and documents relating to such property or to the tenants and terms of occupation thereof now or hereafter in his possession, or in any manner under his control [*if necessary, direct account as in Form 745 or 747, or otherwise may proceed thus*], and that he pay to such defendants or the guardian *ad litem* of such defendants as are infants, respectively, all moneys by him collected as the rents of such premises, and which have been by him collected since , 18 , first deducting therefrom his commissions and other charges (if any) to him by law allowed, and paying two-thirds of the sum so by him to be paid to said H. C. F., and the remaining one third to the defendant W. B. F.

ORDERED, that he file with the clerk of this court, with all convenient speed, a report of all his proceedings as such receiver.

[*Reservation of liability of company for unsettled claims.*]
IT IS FURTHER ORDERED AND DECREED, that all said claims pending in this court, whether debts or other liabilities, shall be presented to said Company for adjustment and settlement, and said company is ordered to pay the said debts, with the costs and expenses allowed by law; and for the purpose of enforcing the payment therefor, if need be, this court will and does retain jurisdiction and full power to enforce such payment and the lien heretofore existing, without other action or independent proceedings.²

¹ In *Anderson v. Treadwell*, 1 *Edw. Sel. Cas.*, 201, it was held that an assignment to a receiver becomes void so soon as the object of the suit is accomplished, and when the purpose is fulfilled the property reverts to the grantor without a reassignment. Compare 99 *N. Y.*, 275.

² Under this a claimant can proceed against the company on the foot of this order. *Farmers' Loan & Trust Co. v. Central Rw. of Iowa*, *U. S. Dist. Ct.*, 1881; 8 *Fed. Rep.*, 60; *s. c.*, *Chic. Leg. N.*, July 9, 1881.

Form No. 750.

Notice of motion or petition to discharge receivership as to specific property.

[*Demand of relief may be thus:*] to vacate so much of the order made the day of , 18 , for the appointment of a receiver herein, as directs the said receiver to take possession of or administer [any property belonging to the said

Company, or to in any manner take possession of or operate the said line of railroad built by the said last named railroad corporation under the charter thereof, or the equipments or assets thereof], and for such other or further order as may be just [and as will give your petitioners the full benefit of their rights as creditors of said Company].

Form No. 751.

Order that receiver pay over to his successor.

[*Title (court order) and recitals, according to the case; see Form 493, p. 4.*]

ORDERED, that the said R. C., within days from the service upon him of a copy of this order, pay over to , as receiver of , the sum of dollars [as reported by the said referee], together with the further sum of dollars, the costs of this motion, amounting in all to the sum of dollars,

Enter: [*signature of judge by initials of name and title.*]

Form No. 752.

Affidavit to obtain order to show cause why removed receiver should not be punished for contempt for failing to pay over.¹

[*Title of court and cause.*]

R. C. being duly sworn, says:

[*Allege appointment and qualification as in I and II of Form 702, unless already shown in previous proceedings to direct payment, &c.*]

¹ See *Clark v. Bininger*, 75 N. Y., 344, aff'd 43 Super. Ct. (J. & S.), 126, 344.

III. [*Allege personal service of order to pay; see Form 637, p. 99.*]

IV. That on the day of , 18 , deponent demanded of said payment to deponent as receiver of the said , the sum of ; that said has not paid to deponent the said sum or any part thereof, although the time limited in said order within which to pay the same has expired, and that said has failed to comply in any respect with said order of the day of .

V. That no other application for this order has been made, except [*&c.* See *Forms 489, 490, p. 2*].

[*Jurat.*]

[*Signature.*]

[*For further proceedings see CONTEMPT.*]

ARTICLE V.

DEPOSIT OR DELIVERY OF MONEY OR OTHER PERSONAL PROPERTY.

- | | | |
|---|--------|--|
| 1. Power of the court. | | property admitted to be due (or for judgment on the admission). |
| 2. Distinction between cases for motion and cases for trial. | | |
| 3. — — for order and for judgment. | (755) | — for payment of admitted claim, on security being given for counter-claim. |
| FORMS. | | |
| (753.) Notice of motion that party deliver or deposit money or other property admitted to be due. | (756.) | — that sheriff take and deposit or deliver, when party ordered fails to do so. |
| (754.) Order that a party deliver or pay into court money or | (757.) | — for receiver, unless defendant delivers or deposits. |

1. *Power of the court.*]—The inherent power of a court of equity¹ to make an order that a defendant who admits that he possesses money or other property and ought to pay it over to plaintiff, must do so, without awaiting final judgment; and to enforce the order by proceedings for contempt, is preserved by the Code,² and extended (in respect at least to personal property) to actions of a common-law nature.

2. *Distinction between cases for motion and cases for trial.*]—If the admission is of a sum uncertain in amount, and which cannot be ascertained definitely by mere computation, or if the sum or other property is not admitted to be of right demandable by the plaintiff or at least to be held under such circumstances that the court can say that as matter of law it is so demandable, the defendant should not be proceeded against by motion for delivery or payment nor by motion for judgment; but is usually entitled to trial of the issues or assessment of damages.

3. *Distinction between cases for order and for judgment.*]—If it does not appear that defendant is in possession in such sense that he has power to make delivery or transfer, he should not be proceeded against by order enforceable in contempt, but by judgment which is usually enforceable only by execution.

¹ See *Dusenberry v. Woodward*, 1 *Abb. Pr.*, 443.

² *N. Y. Code Civ. Pro.*, § 244; *Code Civ. Pro.*, § 717.

Judgment may, however, often be had by motion on the pleadings.¹

Under settled principles applicable to motions, the plaintiff may move in the alternative² for an order or for judgment, and the better opinion is that under a notice of motion for an order and for general relief, a money-judgment might be granted, although it might be objectionable under a motion for judgment and for general relief, to grant, upon default, an order under which defendant could be imprisoned.³

Form No. 753.

Notice of motion that party deliver or deposit money or other property admitted to be due.

[*Title of court and cause.*]

Please take notice, that on the pleadings in this action [and on the examination of the defendant filed on the day of , 18], the undersigned will move the court, at a special term to be held [at chambers] at the city hall [*or*, county court house], in the of , on the day of , 18 , at the opening of the court on that day [*or*, at o'clock in the noon], or as soon thereafter as counsel can be heard, for an order that [*state object, as in either following Forms*], and for such other or further relief as may be just, and for the costs of this motion].

[*Signature and office address of*]

[*Date.*]

Attorney for [*moving party*].

[*Address*] To

Attorney for [*adverse party*].

Form No. 754.

Order that a party deliver or pay into court money or property admitted to be due (or for judgment on the admission.)

[*Title of cause.*]

At a special term [*&c., as in Form No. 493, p. 4, of this Volume*].

On the pleadings in this action, and the examination of the

¹ See chapter on PRACTICE AS TO THE PLEADINGS.

² Vol. I, p. 117.

³ Vol. I, p. 183. Compare *Eureka Steam-Heating Co. v. Sloteman*, 67 Wis., 118; s. c., 30 *Northwestern Rep.*, 244.

defendant filed herein on the day of , 18 , where-
by it appears that the [defendant Y. Z.] admits that he has in
his possession [or, under his control] the sum of dollars
[or, property hereinafter mentioned], the subject of this action,
and that it belongs [or, is due] to the plaintiff [or, is held by
defendant as trustee for plaintiff; and on reading and filing
proof of due notice of this motion], after hearing A. T., of coun-
sel for plaintiff, and T. Z., counsel for defendant [or, and no
one appearing] in opposition: now, on motion of A. T., attorney
for plaintiff:

ORDERED, that the defendant Y. Z., within days after
the service of this order, deposit in court [or, deliver to the
plaintiff] [*specifying the property*], subject to the further direc-
tion of the court [and pay to plaintiff dollars costs of
motion].¹

Enter: [*signature of judge by initials of name and title.*]

[*Serve personally, as well as on attorney.*]

[*Affidavit to disobedience, and proceedings to punish for
contempt. See CONTEMPT.*]

Form No. 755.

Order for payment of admitted claims, on security being given for counter-claim.²

[*Title (court order) and recitals, according to the case.*]

ORDERED, that the defendant, G. L., do within days
from the service of this order, pay to the plaintiffs [as adminis-
trators] the sum of dollars, being the sum admitted to be
in his hands, received for the plaintiffs less the sum of ,
which he is allowed to retain until the decision in this suit shall
determine the amount of the bad debts and the liability of the
plaintiffs as administrators therefor. And the plaintiffs must
give, simultaneously with the payment of the money, a joint
and several bond or undertaking with two sureties, to be ap-
proved by one of the justices of this court, as to its form,
amount, and sufficiency of the sureties, to pay one-fourth part
of all such outstanding claims against the late firm of L. R. &
M., as the defendants, or either of them, shall be called upon

¹ As to clause requiring security as a condition of making the order, see Vol. I, p. 258, and Form 527, p. 61, of this Vol.

² Sustained by *Roberts v. Law*, 4 Sandf., 642.

and obliged to pay, and also one-fourth part of the moneys paid by them or either of them, or for which they, or either of them, may be liable, for the expenses of prosecuting the demand against the corporation mentioned in the answer in this cause, and also whatever sum, if any, may be adjudged by the court to be justly due to L. for his time and services in prosecuting such demand.

Enter : [*signature of judge by initials of name and title.*]

Form No. 756.

Order that sheriff take and deposit or deliver, when party ordered fails to do so.

[*Title (court order) and recitals, according to the case. See Form 493, p. 4; and reciting that it appears that defendant has disobeyed the order of the court.*]

ORDERED, 1. That the sheriff of the [city and] county of , take from the defendant Y. Z. and deliver to the plaintiff [or, deposit in court—*specify the sum or property; and give directions in conformity with the direction of the order which has been disobeyed*].

2. That the defendant Y. Z. [forthwith] pay to plaintiff dollars costs of this motion.

Enter : [*signature of judge by initials of name and title.*]

Form No. 757.

Order for receiver unless defendant delivers or deposits.

[*Title (court order) and recitals, according to the case, as on a motion for a receiver. See pp. 145 to 196.*]

ORDERED, that defendant may within days after service of this order on him personally [or, on his attorney], deliver to plaintiff [or, deposit in court] the sum of [or otherwise describe the property], in satisfaction of plaintiff's claim to , and that in default thereof [*proceed with appointment of receiver or reference to appoint, as in Forms 655, &c., to 697*].

ARTICLE VI.

REPLEVIN (CLAIM AND DELIVERY).

I. GENERAL PRINCIPLES.

1. Outline of the remedy.
2. Value.

II. REPLEVING BY PLAINTIFF.

3. The practice; affidavit.
4. — plaintiff's title.
5. — describing the articles.
6. — denying legal custody.

III. DEFENDANT'S COURSE.

7. Election.
8. Re-surrender.

IV. INTERVENTION OF THIRD PERSON.

9. Statutory right of claim.

FORMS.

I. PLAINTIFF'S PROCEEDINGS TO REPLEVIN.

- (758.) Affidavit in replevin (claim and delivery).
- (759.) — where exempt property has been seized on execution.
- (760.) Requisition to replevy.
- (761.) Undertaking in claim and delivery (replevin).
- (762.) Approval of undertaking, by sheriff.
- (763.) Notice of exception to sureties in replevin.
- (764.) — justification of sureties in replevin.

(765.) Notice of abandonment of part of claim in replevin.

(766.) — by defendant that he demands judgment for return or value of chattel replevied.

(767.) — of motion; or order; for setting aside replevin (claim and delivery).

II. DEFENDANT'S PROCEEDINGS FOR A RETURN.

(768.) Notice requiring return of chattels replevied.

(769.) Affidavit on part of defendant to reclaim chattels replevied.

(770.) Undertaking for defendant to reclaim chattels replevied.

III. INTERVENTION OF THIRD CLAIMANT.

(771.) Affidavit of third claimant in replevin.

(772.) Notice to be endorsed on above.

(773.) — by sheriff to plaintiff in replevin, of third claimant.

(774.) Undertaking of indemnity by third claimant on replevin.

(775.) Notice of justification of the foregoing.

IV. PROCEEDINGS AGAINST SHERIFF.

(776.) Notice to sheriff to make return in replevin.

I. GENERAL PRINCIPLES.

1. *Outline of the remedy.*—The use of these forms is best understood by noticing that the scheme of replevin is to take the property into the custody of the law for a few days, while the security which plaintiff offers to insure its return in case judgment goes against him, can be examined by defendant. The defendant on having this opportunity takes one of several courses.¹ He can, tacitly, or by requiring a justification of sureties, treat the security as standing for him in place of the

¹ See p. 256, of this Vol.

property;¹ in which case plaintiff can receive the property free of the rule of *lis pendens*, and if his alleged interest is full title, may, as against defendant, lawfully sell the thing if he choose;² or: (2) defendant may demand a return of the property from the sheriff, offering in turn security on his part.

In either case the sheriff is protected against third persons; but, as between the parties, is liable until sureties, if duly excepted to, justify.³

But a third person claiming as against defendant may interpose, and then the sheriff may require indemnity.

2. *Value.*—In some States the adequacy of the security to be given is secured by directing the sheriff to have an appraisal made which shall fix the amount of the bond. The New York statute provides for it by allowing the plaintiff to swear to his own valuation, in his affidavit. He may state the value of each of several articles or the aggregate value of all, or the aggregate value of a part and the separate values of the others.

The defendant can act on this valuation by compelling a return of the goods, or of the part taken by the sheriff, on giving security at the same rate.

If the plaintiff's affidavit names only an aggregate value, and the sheriff seizes only part of the goods, the defendant may tender an undertaking in a sum duly proportioned. If the description of the goods affords the means—as where so many bushels of grain or pieces of cloth are stated to be of a specified aggregate value—the security to be given for a part is a mere matter of arithmetical computation. In other cases the sufficiency of the sum can be determined by the court on exceptions to the undertaking.

¹ S. P., Second Natl. Bk. of Oswego v. Dunn, 63 How. Pr., 434; s. c., 2 Civ. Pro. (Browne), 259; Eastman v. Barnes (Vt., 1885), 1 New Engl. Rep., 347.

² Stewart v. Wolfe (Pa., 1886), 5 Centr. Rep., 681; s. c., 7 Atl. Rep., 165, holding that a replevin bond given by plaintiff suing as absolute owner is a substitute for the property delivered to him upon it, and a purchaser from him acquires a good title to the property replevied.

For contrary authorities in other States, see *id.*; and Wells on Rep., 259, § 470.

³ An officer is not required, before serving a writ of replevin, to have the sureties approved. He is, however, bound to exercise a reasonable discretion in deciding upon their sufficiency. Stone v. Jenks, 142 Mass., 519; s. c., 7 Eastern Rep., 642, and cas. cit.

The plaintiff cannot, by merely stating the aggregate instead of the separate value of the articles named, compel the giving of an undertaking conditioned for the delivery to him of all such articles, no matter how small a portion thereof may have been actually taken by the sheriff.¹

II. REPLEVYING BY PLAINTIFF.

3. *The practice; affidavit.*—After a demand has been made (if demand be necessary to sustain the action), and at the time of issuing the summons, or at any time thereafter, and before defendant has answered, or, in case of default for want of appearance or answer, before entry of final judgment, an affidavit of the facts which entitle plaintiff to possession, must be made by plaintiff or one of several plaintiffs, or by plaintiff's agent or attorney. If not made by plaintiff, the affidavit must, under the New York statute, indicate what allegations are made on information and belief, and set forth the grounds of belief as to matters not alleged upon his knowledge, and the reason why the affidavit is not made by the plaintiff.² In the absence of such a statute an affidavit by an agent, "to the best of his knowledge, information and belief," is enough.³ But it is the better practice in all cases where the plaintiff does not make the affidavit, to state the reason, and indicate what is alleged on knowledge, and the grounds of belief as to the other allegations.

The affidavit is a proceeding in the action, and to be so entitled.⁴

4. — *plaintiff's title.*—If plaintiff claims as owner, a general allegation that he is the owner is sufficient without alleging evidence of ownership.⁵

If he claims by a special title, not as owner, or shows by his allegations a right of possession in another, the affidavit should

¹ Weber v. Manne, 11 Civ. Pro. R. (Browne), 64.

² N. Y. Code Civ. Pro., § 1712.

³ U. S. v. Bryant, 111 U. S., 499. (So holding of a public officer.)

⁴ Otherwise at common law. Volume I of this work, p. 44.

⁵ Depew v. Leal, 2 Abb. Pr., 131; Burns v. Robbins, 1 Code R., 62; Roberts v. Willard, *id.*, 100.

go on to state the facts entitling the plaintiff to immediate possession.¹

If he relies on a writing as evidence of his special property or right of possession, a copy of the writing should be given in or annexed to the affidavit;² or if not practicable, excuse must be stated.

5. — *describing the articles.*—The description of the articles should be sufficient to enable the officer to identify them.³ For this purpose it is usual, after particularly designating them, to add particulars as to where they are situated, when this is necessary to enable the officer to act. An allegation which would be sufficient in a pleading is not necessarily enough in an affidavit for replevin.⁴

If the proper article is taken under a misdescription the court have power to amend the description.⁵

6. — *denying legal custody.*—The denial required, of the property having been taken for tax or on execution, &c., must be direct and full. The plaintiff cannot evade the restrictions of the statute by alleging that the property was not taken for any "legal tax,"⁶ or on any "valid judgment."⁷

¹ *Depew v. Leal*, 2 *Abb. Pr.*, 131; *Donald v. Rockwell*, 19 *Weekly Dig.*, 192 (holding that a legatee suing a stranger for the thing bequeathed, and alleging that it had been in the executor's possession, must allege a delivery by the executor; saying that he had absconded was not enough).

² *Depew v. Leal*, 2 *Abb. Pr.*, 131.

³ See *Waldron v. Leach*, 9 *R. I.*, 588; *Fordice v. Rinehart*, 11 *Oreg.*, 208; s. c., 8 *Pacif. Rep.*, 285.

⁴ Thus an allegation that defendant took and detains "a bay horse, worth," &c., might be enough in pleading, but in this affidavit there should be added description of marks, or of place where to be found, or both, otherwise the sheriff might not be liable for refusing to act.

So if the form of the property has been changed since the wrongful taking—as where corn was made into whiskey—the pleading may allege the wrongful taking of corn, but the affidavit must describe and identify the whiskey which is the thing the sheriff is to look for. *Silsbury v. McCoon*, 3 *N. Y.*, 379; *Wingate v. Smith*, 20 *Me.*, 287.

For numerous authorities on the sufficiency of the description, see *Wells on Replev.*, 94, &c., § 168, &c.

⁵ *McCourt v. Bond*, 64 *Wisc.*, 596; s. c., 25 *Northwestern Rep.*, 532, holding thus of the description in a writ of replevin.

⁶ *McClaghry v. Cratzenberg*, 39 *Ill.*, 117, 123.

⁷ Under a statute requiring an allegation that the property was "not taken in execution on any order or judgment," the omission of the words *order or*, do not vitiate. *Auld v. Kimberlin*, 7 *Kans.*, 601.

It is not enough to allege that the goods were taken on execution against

III. DEFENDANT'S COURSE.

7. *Election.*—Defendant, unless he moves to set aside the proceedings as void or irregular, must elect whether he will look to the security in place of the property, and let the property be delivered to the plaintiff, or whether he will reclaim the property. And this election he must make within three days.

If within that time (without giving security to get a return) he does not except to plaintiff's sureties, he waives his objections to them. If within that time he does except, he manifests his election to let the property be delivered to plaintiff, and to look to the security, if it be approved, or to the liability of the sheriff, if it be not approved.¹

If he does not accept he may within the same three days serve a counter affidavit, undertaking and requisition, for a return of the property, or such part thereof as has been actually replevied. The mode of fixing the amount of the undertaking has been already stated. The fact that a trial on the merits and judgment has been had meanwhile, does not alone preclude such a demand for a return.² His demand prevents delivery to the plaintiff;³ and the justification of his sureties,⁴ or the omission of plaintiff to except to them, perfects his right to a return of the property.

Giving the undertaking to obtain a return admits that the property was in his possession at the commencement of the action,⁵ and was detained by him.⁶

him on a *void* judgment. Plaintiff cannot question the validity of the judgment in that manner. *Wilson v. Macklin*, 7 *Nebr.*, 50.

¹ *Cullen v. Miller*, 5 *Abb. N. C.*, 282, and cases cited; *Hofheimer v. Campbell*, 59 *N. Y.*, 269, aff'g 7 *Lans.*, 157.

² *Corn Exch. Bk. v. Blye*, 102 *N. Y.*, 305.

³ *Graham v. Wells*, 18 *How. Pr.*, 376.

⁴ See *Grant v. Booth*, 21 *How. Pr.*, 354; *Manley v. Patterson*, 3 *Code R.*, 89.

⁵ *Diossy v. Morgan*, 74 *N. Y.*, 11 (treating it as an estoppel and conclusive).

⁶ *Black v. Foster*, 7 *Abb. Pr.*, 406; s. c., 28 *Barb.*, 387 (treating it as a question of evidence for the jury).

But according to *Church v. Frost*, 3 *Supm Ct. (T. & C.)*, 318, obtaining a return does not estop the defendant from disavowing title and proving an offer of surrender to plaintiff before suit brought; because this shows that plaintiff had no cause of action.

8. *Re-surrender.*—If, after obtaining a return of the property, defendant wishes to surrender it, a mere offer to do so, unaccepted, is unavailing. He must offer to allow judgment.¹

IV. INTERVENTION OF THIRD PERSON.

9. *Statutory right of claim.*—A stranger to the action who claims as against the defendant a right to possession existing at the time the property was replevied, may, at any time before its actual delivery to either party, claim it of the sheriff by proper affidavit and notice proceeding from himself or his attorney or agent;² and the sheriff, if the plaintiff on request do not indemnify him, may surrender the property to the claimant without thereby incurring any liability to the plaintiff.³

I. PLAINTIFF'S PROCEEDINGS TO REPLEVY.

Form No. 758.

Affidavit in replevin (claim and delivery).

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is the plaintiff [*or, one of the plaintiffs—or, the agent—or, attorney of the plaintiff*⁴] in this action.

II. That he [*or, said plaintiff*] is [*if summons has been served, say, and at the time of the commencement of this ac-*

¹ *Brewster v. Silliman*, 38 *N. Y.*, 423.

² *Bishop v. Baxter*, 3 *Daly*, 176.

³ *N. Y. Code Civ. Pro.*, § 1709.

For the history of the remedy of a third claimant, see *Manning, &c. v. Keenan*, 73 *N. Y.*, 45, aff'g 9 *Hun*, 686.

A withdrawal of the claim to allow the sheriff to deliver, held not to waive the right of action against the sheriff. *Haskins v. Kelly*, 1 *Abb. Pr.*, *N. S.*, 63; *s. c.*, 1 *Robt.*, 160.

In *Bishop v. Baxter*, 3 *Daly*, 176, the court refused to try the question of agency or claim, on affidavits.

⁴ If made by agent or attorney, indicate in the allegations those made on information and belief. *N. Y. Code of Civ. Pro.*, § 1712.

tion,¹ was] the owner [*or if several, are, and were the owners*], and lawfully entitled to the immediate possession of the following described chattels [*or, lawfully entitled to the immediate possession of the following described personal property, claimed in this action, to wit [designating them, thus:]*]

One rosewood piano-forte, made by Steinway, and numbered [or, now in the house of Y. Z. at , worth \$400² [*and if chattels in bulk, state weight, measurement, or other quantity*].

[*If plaintiff is not owner, but merely claims as above stated, a right of possession, state the facts with respect to it,³ for instance, thus:*]

[*Where he claims under a special agreement.*] - And the plaintiff is entitled to the immediate possession thereof, by virtue of an agreement between him and the above-named Y. Z., of which the following is a copy [*inserting it*].

[*Or, where he claims as pledgee:* which said goods were delivered to said plaintiff by , as a security for the payment of dollars; and that said defendant, unknown to said plaintiff, took said goods from plaintiff's possession, against his will, and now refuses to return the same, while the said sum of money is still due and unpaid, and he is still entitled to said goods as his security therefor.]

[*Or, where he claims as lessee:* which goods said plaintiff hired of said defendant on the day of , 18 , for the term of months, and paid him therefor the sum of dollars; and that said term has not yet expired, and said defendant wrongfully retook possession of said goods.]

[*Or, where he claims as bailee for hire:* that said goods were deposited with plaintiff for storage, by their owner, M. N., for months, on an agreement by M. N. to pay the plaintiff storage therefor, which storage is worth dollars; and they have been taken from the plaintiff without his consent, and without payment of said storage.]

III. That said chattels⁴ are [*if summons has been served,*

¹ Under *N. Y. Code Civ. Pro.*, § 1696, it seems to be enough in an affidavit made after service of summons to say that plaintiff was entitled, &c., at the commencement of the action without alleging a present right.

² As to stating value, see paragraph 2, p. 253.

³ Required by *N. Y. Code Civ. Pro.*, § 1693, subs. 1.

⁴ Omission to say in terms that the goods described are those which it is desired to replevy—held not to vitiate. *Brown v. Poland*, 54 *Conn.*, 313; *s. c.*, 7 *Atl. Rep.*, 719.

say, and at the time of the commencement of this action, were¹ wrongfully detained by said Y. Z.²

IV. That the alleged cause of the detention thereof, according to this deponent's best³ knowledge, information and belief, is as follows [*stating it, for instance, thus*: that the defendant claims to hold them under an alleged assignment from one M. N.].

[*Or, where they are held under levy*: that defendant claiming to be sheriff of _____, has seized the same under an alleged execution—or, attachment—against the property of _____.]

[*Or, where possession was obtained by fraud*: that said defendant claims to have purchased the same from said plaintiff; but said pretended purchase was procured by fraud on the part of said defendant in representing himself to be solvent, and worth _____ dollars, when in fact he was insolvent, and wholly unable to pay his debts, and well knew the fact so to be, and made such representations to said plaintiff with intent to deceive and defraud him; and relying thereon said plaintiff parted with possession of said goods.]

[*Or, where they are held under pledge by one having no title*: that the said Y. Z. claims the right to retain possession thereof as security for the payment of a certain sum of money alleged to have been loaned to one M. N. by Y. Z. upon a pledge of said chattels with said Y. Z. by said M. N., although in fact said M. N. was not the owner thereof, and had no right to pledge any of them.]

[*Or, That deponent has no knowledge or information of any cause alleged for such detention.*]

V. That said chattels have not been taken by virtue of a warrant against the plaintiff for the collection of a tax, assessment or fine issued in pursuance of a statute of the State or of the United States⁴ [*or if taken under color of such a warrant,*

¹ See note 1, on p. 258.

² As to amending by joining another person not named in the affidavit, see *Bardwell v. Stubbett*, 17 *Neb.*, 485; s. c., 23 *Northwestern Rep.*, 344, holding such amendment not allowable. It would be otherwise, however, if such person or party was brought in because of claiming a right derived, *pendente lite*, from an original defendant.

³ Omission of the word "best" held not fatal. *Depew v. Leal*, 2 *Abb. Pr.*, 131.

There are other restrictions which

need not be negated in the affidavit. Thus property in possession of a marshal of the U. S. court, cannot be taken in replevin by process from a State court. *Patterson v. Mater*, 26 *Fed. Rep.*, 31; *Freeman v. Howe*, 24 *How. U. S.*, 450; 1 *Abb. U. S. Pract.*, 64, 69 (questioned in *Wells on Replev.*, 154, §§ 275-282).

As to right to maintain replevin against an officer who has taken property by virtue of a writ, see note in 75 *Am. Dec.*, 646.

⁴ See *Troy & Lansingb. R. R. Co.*

say, except as hereinafter stated—and state facts showing either that the taking was unlawful by reason of defects in the process, or other causes specified, or state facts which have subsequently occurred by reason of which the detention is unlawful. See next Form].

VI. That said chattels have not been seized by virtue of an execution or warrant of attachment¹ against the property of the plaintiff, or of any other person, from or through whom the plaintiff has derived title to said chattels, or any part thereof, since the seizure thereof [*or if they have been so seized, say, except as hereinafter stated*—and state the seizure and its unlawfulness, and set forth the facts on which exemption from the seizure is claimed, or specify facts which have subsequently occurred by reason of which the detention is unlawful. See next Form].*

VII. That the actual value of [each of] said chattels is as above stated, amounting in the aggregate to dollars.

VIII. That said plaintiff has brought this action in this court, against said Y. Z., by the issue of a summons, a copy whereof is hereto annexed, to recover the possession of said chattels. That said summons has been served, and no answer has been served by said defendant, and his time to answer has not expired [*or if in default for not appearing or pleading, but final judgment has not been entered—or, that said summons has not yet been served].*

IX. [*Where the affidavit is made by attorney or agent, instead of by the plaintiff, or one of the plaintiffs, in person.*²] The reason why this affidavit is not made by the plaintiff is that plaintiff is not capable of making it because of [illness—or, is not within the county of , which is the county where the said plaintiff's attorney resides—or, has his office], and that the material facts hereinbefore positively alleged, are within deponent's personal knowledge³ [and that the grounds of deponent's belief as to matters alleged on information and belief are as follows: *stating them as in the verification of a pleading.*]

[*Jurat.*]

[*Signature.*]

v. Kane, 72 N. Y., 614; and cases collected in *Wells on Replev.*, 124, § 244, &c.

¹ See *id.*, 137, § 243, &c.

² These allegations are required by N. Y. Code Civ. Pro., § 1712.

³ Where the statute (Ala.) authorized the affidavit to be made by the plaintiff, his agent, or attorney, an

affidavit in the U. S. court, made by the special agent of the general land office, "to the best of his knowledge, information, and belief," is sufficient until controverted. The conformity is "as near as may be" to the mode of proceeding prescribed by the code. *United States v. Bryant*, 111 U. S., 499.

Form No. 759.

Affidavit in replevin where exempt property has been seized on execution.¹

[*Insert in last Form, at the *:*] That said property is [a part of] plaintiff's necessary household furniture, the value of all of which is and at the time of levy was in the aggregate less than

dollars, besides the articles specifically declared exempt by the statutes of this State; and the plaintiff is a householder, supporting a family consisting of [his wife and one child]; wherefore, said property is exempt by law from seizure under execution, as deponent is advised by his counsel and verily believes.

[*Or*, That plaintiff is a householder, and by occupation—a carpenter and master builder;—and that said chattels are the working tools and implements of plaintiff, necessary to the carrying on of his said business—*or*, that deponent is a physician, and the said horse and chaise is necessary to enable him to carry on the practice of his profession;—wherefore, said property is exempt by statute from seizure under execution, as deponent is advised by his counsel and verily believes.]

Form No. 760.

Requisition to replevy.²

To the sheriff³ of the county of [or, of any county where the chattels described in the within—*or*, annexed—affidavit are found].

¹ Under the former statute requiring the affidavit to "show" exemption, the same rule that the facts on which the exemption depends should be stated was followed. *Spalding v. Spalding*, 3 *How. Pr.*, 297; s. c., 1 *Code R.*, 64. Although this, perhaps, was not essential. *Roberts v. Willard*, *id.*, 100.

² Must be indorsed upon or annexed to the affidavit. It is deemed the mandate of the court. § 1694.

This does not protect the sheriff when he takes the goods from a person other than the defendant or his agent, and such person has an ownership or special property in them. *Otis v. Williams*, 70 *N. Y.*, 208 (case of a wife pledgee of her husband's goods). *State v. Jennings*, 14 *Ohio*

St., 73. Otherwise if the goods obviously belong to defendant and are merely in the bare possession of a third person. *Wells on Replev.*, § 266. But under an *execution* on the judgment, the sheriff must take the property if he finds it in the hands of a third person, unless he can justify his refusal by showing that such person had a title or right of possession superior to the party to whom he was commanded to deliver it. *Hoffman v. Conner*, 76 *N. Y.*, 121.

³ If the sheriff is a party, address to the coroner. *Simcoke v. Frederick*, 1 *Ind.*, 54 (sanctioning amendment in this respect). *N. Y. Code Civ. Pro.*, § 172. As to deputies, see Volume I of this work, pp. 398, 399.

I hereby require you to take the chattels mentioned in the within [*or, annexed*] affidavit, from the defendant, and deliver the same to the plaintiff in this action.

[*Date.*]

[*Signature and office address of*],¹

Plaintiff's attorney.

[*To be indorsed upon or annexed to the affidavit.*]

[*Furnish sheriff with copy affidavit, requisition and undertaking, for service.*]

[*Also produce requisition and affidavit and return, on the trial; and annex them to judgment-roll.*²]

Form No. 761.

Undertaking³ in claim and delivery (replevin).

[*Title of court and action.*]

WHEREAS, affidavit has been made⁴ by [*or, on behalf of*] the plaintiff in this action, that the defendant therein wrongfully detains certain chattels in the said affidavit mentioned, of the value of dollars, and the plaintiff claims the immediate delivery of such chattels to him :

Now, THEREFORE, in consideration⁵ of the taking of said property, or any part thereof, by the sheriff of the county where the same may be found, by virtue of the said affidavit, and the requisition thereupon indorsed, we,⁶ the undersigned C. D., of [merchant], and E. F., of [broker], do hereby jointly and severally undertake and become bound to the defendant⁷ in the sum of [*not less than twice the value as*

¹ This requisition is good without teste. Even if it were process (see *N. Y. Code Civ. Pro.*, § 23) its authentication is specially prescribed by § 1694, and having such authentication, it is not, in a State court, void or voidable for omission in the teste. *Id.*, § 24. It is "deemed the mandate of the court" (compare § 3343, subd. 2) for the purpose of defining the power and duty of the sheriff. *Id.*, §§ 100-107, 2270.

² *N. Y. Code Civ. Pro.*, § 1717.

³ For general rules applicable to

undertakings, see Volume I, p. 461. As to replevin bond, *Bugle v. Myers*, 59 *Ind.*, 73.

⁴ Error in stating the date of the affidavit, held not to invalidate the obligation. *Hyde v. Patterson*, 1 *Abb. Pr.*, 248.

⁵ No special consideration is necessary (*Harrison v. Utley*, 6 *Hun*, 565), but the sureties should not be bound except upon the taking.

⁶ Required by *N. Y. Code Civ. Pro.*, § 1736.

⁷ Where the statute required a bond

stated in affidavit], for the prosecution of the said action;¹ for the return of said chattels² to the defendant, if possession thereof is adjudged to him, or if said action abates³ or is discontinued before said chattels are returned to the defendant; and for the payment to the defendant of any sum⁴ which the judgment awards to him against the plaintiff.

[*Date.*]

[*Signature.*]

[*Acknowledgment or proof, as in Form 495; and affidavit of sufficiency, unless waived by sheriff, as in Forms 496-498.*]

Form No. 762.

Approval of undertaking, by sheriff.⁵

I approve the within undertaking both as to its form and the sufficiency of the sureties thereof.

[*Date.*]

[*Signature of*],

Sheriff of county.

Form No. 763.

Notice of exception to sureties in replevin.

[*Title of court and action.*]

Please take notice, that the defendant does not accept the undertaking of the plaintiff in this action, and excepts to the

to the party, one to the sheriff was held void. *Purple v. Purple*, 5 *Pick.*, 226. See Volume I, p. 64.

¹ Omission here of the words "without delay, and with effect," though contained in the Montana statute, held not to invalidate the obligation. *Parrott v. Scott*, 6 *Mont.*, 340; s. c., 12 *Pacif. Rep.*, 763. A dismissal by plaintiff is a breach. *Id.*

² As to effect of undertaking only for a return of part, see *Eastman v. Barnes*, (Vt., 1886) 1 *New Engl. Rep.*, 347; s. c., 2 *Eastern Rep.*, 833.

³ It is not essential that plaintiff execute the undertaking. *N. Y. Code Civ. Pro.*, § 811; even when the statute requires an undertaking "on

behalf of the plaintiff." *Hedderick v. Poutet*, 6 *Mont.*, 345; s. c., 12 *Pacif. Rep.*, 765; s. P., Volume I of this work, p. 63. If he does, two sureties besides are necessary. *Burns v. Robbins*, 1 *Code R.*, 62.

⁴ This includes costs. *Canlon v. Dixon*, 14 *Oreg.*, 293; s. c., 12 *Pacif. Rep.*, 394, and cases cited.

⁵ The approval of the sheriff is a ministerial act and one for his protection. But he cannot arbitrarily refuse his approval. *Nosser v. Corwin*, 36 *How. Pr.*, 540.

The sheriff should indorse his approval on the undertaking. *Burns v. Robbins*, 1 *Code R.*, 62.

sufficiency of plaintiff's sureties [and to the form and sufficiency of the undertaking.¹]

[Date.]

[Signature and office address of],
Defendant's attorney [or, if he
has not appeared, of defendant,
or his agent].

[Address to],
Sheriff of

county.

[If not served within three days after the replevying and service of copy, requisition, &c., all objections to sureties are waived.²]

Form No. 764.

Notice of justification of sureties in replevin.

[Title of court and action.]

Please take notice, that the sureties in the undertaking on behalf of the plaintiff herein will justify before Hon. J. K., one of the justices of this court, at³, on the day of next, at o'clock in the noon.

[Date.]

[Signature and office address of],
Plaintiff's attorney.

[If defendant has appeared, address to his attorney, otherwise to sheriff. Serve within ten days after exception to sureties.⁴]

¹ A notice of exception to the sufficiency of the undertaking is not sufficient as a notice of exception to the sufficiency of the sureties. *Young v. Colby*, 2 *Code R.*, 68.

Defect in an undertaking may be cured upon exception thereto. *De Reguie v. Lewis*, 3 *Robt.*, 708, *Moncrief, J.*; *Smith v. McFall*, 18 *Wend.*, 521, 523.

It seems, the court will allow a new undertaking to be given *nunc pro tunc*, when the one given in the first instance is defective. *Newland v. Willetts*, 1 *Barb.*, 20; *Decker v. Judson*, 16 *N. Y.*, 439, 443. See *N. Y. Code Civ. Pro.*, §§ 725, 730.

After the chattel has been delivered to plaintiff by the sheriff, plaintiff's undertaking being approved, or not having been excepted to, there seems to be no authority in the court

to require plaintiff to give a new undertaking on the ground that his sureties have become insolvent. *Ludewig v. Dunsceith*, 3 *Law Bul.*, 97, C. P., J. F. Daly, J. Compare Volume I, p. 490, and pp. 89 and 202 of this Volume.

² *N. Y. Code Civ. Pro.*, § 1703.

³ A place within the county where the chattel was replevied or that where one of the sureties resides. *N. Y. Code Civ. Pro.*, § 1705.

⁴ *N. Y. Code Civ. Pro.*, § 1703.

Further time may be given sureties to justify, but a new notice must be given. *Burns v. Robbins*, 1 *Code R.*, 62.

The New York statute as to replevin, *N. Y. Code Civ. Pro.*, § 1705, provides as follows:

The justification of sureties, as prescribed in either of the last two

Form No. 765.

Notice of abandonment of part of claim in replevin.¹*[Title of court and action.]*

Please take notice, that the plaintiff herein abandons so much of his claim in this action as relates to the following chattels which have not been replevied, to wit [*specifying them*].

[Date.]

[*Signature and office address of*],
Plaintiff's attorney.

[Address] To

Defendant's attorney.

Form No. 766.

Notice by defendant that he demands judgment for return or value of chattel replevied.²*[Title of court and action.]*

Please take notice, that the defendant herein demands judgment for the return of the property replevied herein and delivered to the plaintiff, or to a person not a party to this action, or for its value [with dollars damages for its detention].

[Date.]

[*Signature and office address of*],
Defendant's attorney.

[Address] To

Plaintiff's attorney.

sections, must take place, either in the county where the chattel was replevied, or in the county where one of the sureties resides. The provisions, regulating the justification of bail, contained in article third of title first of chapter seventh of this Act, govern, except as otherwise expressly prescribed in this article, with respect to the notice of justification of the sureties; the officer before whom they must justify; the substitution of new sureties or a new undertaking; the examination and qualifications of the sureties; and the allowance of the undertaking. But after the allow-

ance, the undertaking and examination must be delivered to the sheriff.

The provisions of chapter 7, here referred to, are those regulating Bonds and Undertakings generally. See Volume I of this work, pp. 61, 461.

¹ Under *N. Y. Code Civ. Pro.*, § 1719, serve with or before notice of trial, and produce on the trial.

² Allowed by *N. Y. Code Civ. Pro.*, § 1725, to be served within the time allowed for service of a notice of trial. If served, a copy should be produced on the trial with the pleadings. *Id.*

Form No. 767.

Notice of motion; or order; for setting aside replevin (claim and delivery¹).

[*As in other cases, saying:*] that the affidavit made by the plaintiff in this action, and the requisition to the sheriff of the county of _____, indorsed thereon, and all proceedings taken by the plaintiff or by the said sheriff, respectively, by virtue thereof, may be set aside as void [and irregular, for that—*&c.*, specifying irregularity complained of], and that the property taken by the said sheriff under said affidavit and requisition may be restored by him to the said defendant [and for such other or further relief as may be just, and for the costs of this motion],

II. DEFENDANT'S PROCEEDINGS FOR A RETURN.

Form No. 768.

Notice requiring return of chattels replevied.

[*Title of court and action.*]

Please take notice, that the defendant, Y. Z., in this action requires a return to him of the chattels replevied herein [*or specify what if only part are to be returned*].

[*Date.*]

[*Signature and office address of*],

Defendant's attorney [*or if he has not appeared, of defendant, or his agent*].

To the sheriff of
the county of _____.

[*Serve with affidavit and undertaking within three days after the replevying and service of requisition, &c.*²]

[*Within three days after serving them, serve notice of justification of sureties,³ as in Form 764, substituting defendant for plaintiff, and vice versa.*]

¹ Move before the court. It may be better to appear especially for the purpose of the motion. See *Hyde v. Patterson*, 1 *Abb. Pr.*, 248. Compare *McAdam v. Walbran*, 8 *Civ. Pro.*, 451.

As to grounds of motion, see *McAdam v. Walbran* (*above*—affidavit alleging demand verified before demand was made); *O'Reilly v. Good*, 18 *Abb. Pr.*, 106; s. c., 42 *Barb.*, 521; *Niagara Elev. Co. v. McNamara*, 2

Hun, 416; s. c., 4 *Supm. Ct. (T. & C.)*, 604, aff'g 1 *Sheldon*, 360 (denying affidavit).

As to amending affidavit or supplemental affidavit, *Depew v. Leal*, 2 *Abb. Pr.*, 131; *Spalding v. Spalding*, 3 *How. Pr.*, 297; s. c., 1 *Code R.*, 64.

² *N. Y. Code Civ. Pro.*, §§ 1703, 1704.

³ *Id.*, § 1704, last clause.

Form No. 769.

Affidavit on part of defendant to reclaim chattels replevied.

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is the defendant [*or state connection with defendant, &c.; see Form 758*] in this action.

II. That on the day of , 18 , the chattels mentioned in the annexed notice were replevied herein, and a copy of the affidavit, requisition and undertaking served upon deponent [*or, said defendant*].

III. That the defendant does not except to the plaintiff's sureties herein.

IV. That deponent [*or, the defendant*] is the owner, and lawfully entitled to the possession of the aforesaid chattels [*or, is lawfully entitled to the possession of the aforesaid chattels, by virtue of a special property therein, by reason of the following facts:—set forth facts creating special property;¹ see Form 758*].

[*Jurat.*]

[*Signature.*]

Form No. 770.

Undertaking for defendant to reclaim chattels replevied.

[*Title of court and action.*]

WHEREAS, the plaintiff in this action has claimed the delivery to him of certain chattels, specified in the affidavit made by [*or, on behalf of*] the plaintiff for that purpose, of the alleged value of dollars, and has caused the same to be replevied by the sheriff of the county of , pursuant to statute, but the same have not yet been delivered to the plaintiff; and, whereas, the defendant desires [*part of*] said chattels to be returned to him [*if only a part of those taken, say, to wit—describing them*]:

Now, THEREFORE, we, C. D., of [*merchant*], and E. F., of [*broker*], for the procuring of such return, and in

¹ Required by *N. Y. Code Civ. Pro.*, § 1704.

consideration thereof, do hereby jointly and severally undertake and become bound to said sheriff¹ in the sum of [*not less than twice the value of the chattel of which return is demanded, as such value is stated in plaintiff's affidavit*] dollars, for the delivery to the plaintiff of the chattels so required to be returned, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death; and for the payment to him of any sum which the judgment awards against the defendant.

[*Date.*]

[*Signatures.*]

[*Acknowledgment or proof, as in Form 495, p. 6; Affidavit of sufficiency, unless waived by sheriff,² as in Forms 496-498, pp. 6 and 7.*]

[*Notice of justification, as in Form 764, substituting defendant for plaintiff, and vice versa.*]

III. INTERVENTION OF THIRD CLAIMANT.

Form No. 771.

Affidavit of third claimant in replevin.³

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says:

I. That he [*or, one Q. R., of* ⁴] claims, as against the defendant herein, the possession of the chattels below described by a right existing at the time that said chattels were in this action replevied of the defendant by the sheriff of the county of

II. That deponent [*or, said Q. R.*] is, and was at the time of such taking, [*the sole owner and*] lawfully entitled to the possession of such chattels, which are described as follows [*specify*

¹ It is no objection to the validity of the obligation that the undertaking purports to be given to plaintiff and not to the sheriff. *Slack v. Heath*, 1 *Abb. Pr.*, 331, and see *BONDS*. Volume I of this work, p. 61, and *UNDERTAKINGS*, p. 461.

² See *Grant v. Booth*, 21 *How. Pr.*, 354.

³ No other demand than service of the affidavit and notice of claim is necessary. *Manning v. Keenan*, 73 *N. Y.*, 45. It may be served at the sheriff's office. See Volume I, p. 481, *SERVICE*.

⁴ If the affidavit is not made by the claimant, allege particulars, as in Form 758, p. 260.

chattels claimed if only part are claimed]. [That deponent's—or, said Q. R.'s—right to such possession arises from—*state facts upon which right to possession depends*; see Form 758, p. 258].

[*If affidavit is made by agent or attorney, allege circumstances as in Form 758, p. 260,¹ substituting for plaintiff the name of the third person.*]

[*Jurat.*]

[*Signature.*]

Form No. 772.

Notice to be indorsed on above.

To the sheriff of the county of _____ :

Take notice, that I claim the chattels within referred to, and demand that you deliver them to me.

[*Date.*]

[*Signature and office address.*]

Form No. 773.

Notice by sheriff to plaintiff in replevin, of third claimant.

[*Title of court and action.*]

Take notice, that M. N. claims the property taken by me in this action, and that unless I am indemnified by the plaintiff against such claim I shall not keep the property nor deliver it to the plaintiff.

[*Date.*]

[*Signature of*],
Sheriff.

[*Address*] To _____,
Plaintiff's attorney.

Form No. 774.

Undertaking of indemnity by third claimant in replevin.

[*Title of court and action.*]

WHEREAS, M. N. claims [to be the owner, and] to have the right, as against defendant, to the possession of the following

¹ *N. Y. Code Civ. Pro.*, § 1712.

chattels [*specify them*], which have been taken by the sheriff of the county of _____, upon the affidavit and requisition of the plaintiff herein :

NOW, THEREFORE, we,¹ C. D., of _____ [merchant], and E. F., of _____ [broker], do hereby jointly and severally undertake and become bound to said sheriff in the sum of [*at least \$500, and not less than actual value of chattel and \$250 in addition thereto*], to indemnify said sheriff against any liability for damages, costs or expenses to be incurred in an action brought against him by said M. N., or any person deriving title from or through said M. N., by reason of the taking or detention of said chattels, or their delivery to the plaintiff, not exceeding said sum of [*as before*] dollars.

[*Date.*]

[*Signatures.*]

[*Acknowledgment or proof, as in Form 495, p. 6. Affidavit of sufficiency as required in N. Y. Civ. Pro., § 1711.*]

Form No. 775.

Notice of justification of the foregoing.

[*Title of court and action.*]

Take notice, that the sureties in the undertaking, of which a copy is annexed, will justify before the Hon. G. H., a justice of the _____ Court, at chambers, in the _____, at the _____ of _____, on the _____ day of _____, 18 _____, at _____ o'clock in the _____ noon.

[*Signature and office address of*],
Defendant's attorney.

[*Date.*]

[*Address*] To

Plaintiff's attorney.

[*Justification, and proceedings thereon; see Volume I, p. 483.*]

IV. PROCEEDINGS AGAINST SHERIFF

Form No. 776.

Notice to sheriff to make return in replevin.²

[*Title of court and action.*]

To the sheriff of the county of _____ :

Take notice, that you are hereby required, within ten days

¹ See Forms 761, 770, and notes. *N. Y. Gen. Rules*, No. 6, of 1884, and

² See *N. Y. Code Civ. Pro.*, § 1716; CONTEMPT, in this Volume.

after service upon you of this notice, to file with the clerk of this court the plaintiff's affidavit herein, and the accompanying requisition, with a return, as required by law, stating in what manner you have executed the latter, or to show cause at a special term of this court, to be held at [chambers at] the [Court House] in the [city] of , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, why you should not be punished for a contempt of this court, and an attachment should not issue against you therefor.

[Date.]

[Signature and office address of],
Attorney for .

ARTICLE VII.

SEIZURE OF CHATTEL UNDER FORECLOSURE.

1. Power of the court.

seize chattel under foreclosure of lien.

FORMS.

(777.) Affidavit to obtain warrant to

(778.) Undertaking.

(779.) Warrant to seize chattel under foreclosure.

1. *Power of the court.*—The power of the court to issue a warrant for the seizure of a chattel on the ground that the action was brought to foreclose a lien thereon, is purely statutory.¹ But a somewhat equivalent remedy may, upon proper facts, be had by receivership,² or by order to deposit in court or deliver to plaintiff,³ or by attachment.⁴

Form No. 777.

Affidavit to obtain warrant to seize chattel under foreclosure of lien.

[*Title of court and action.*][*Venue.*]

A. B., being duly sworn, says:

I. That he is plaintiff in the above action [*or otherwise state his relation to the cause.*]

II. That the above action was brought in this court to foreclose a lien upon [*designating chattel*], as appears by the complaint herein, a copy of which is hereto annexed [*or, which was filed on the day of , and served on the defendant Y. Z. on the day of , 18 .*]

[*Or state facts establishing the lien and the plaintiff's right to a sale.*]⁵

¹ Weisbach v. Pollock (Wash., Jan., 1887), 13 Pacif. Rep., 417; Carpenter v. Lott, 31 Hun, 349; N. Y. Code Civ. Pro., § 1737.

² Page 115 of this Volume.

³ Page 248 of this Volume.

⁴ Page 275 of this Volume.

⁵ See Powell v. Weaver, 56 Ga., 288.

III. That said lien, and the foregoing facts giving it, existed at the commencement of this action.

IV. That the plaintiff is not in possession of said chattel, but the same is [as deponent is informed and believes] in the possession of M. N.¹ [*Here add any circumstances supporting plaintiff's right to enforce immediate surrender.*]

[*Jurat.*]

[*Signature.*]

Form No. 778.

Undertaking to obtain warrant to seize chattel under foreclosure.

[*Title of the court and action.*]

Whereas, the above-named plaintiff has applied or is about to apply to [a judge of] this court for a warrant of attachment to seize certain chattels, for the foreclosure of a lien on which chattels this action is brought:

NOW, THEREFORE [*follow Form 786, from the asterisk; but substituting in place of the word "attachment" in the last line, the words "warrant or seizure"*].

Form No. 779.

Warrant to seize chattel in action to foreclose lien.²

THE PEOPLE OF THE STATE OF NEW YORK, to the sheriff of the county of _____ [*or, except in the N. Y. City Court,³ may say, to the sheriff of any county*].

WHEREAS, in an action brought in this court, by A. B. against Y. Z., application has been made to [the undersigned, a judge of] this court by A. B., plaintiff, for a warrant to seize and safely keep the chattels hereinafter described, to abide the final judgment in said action; and it satisfactorily appearing by affidavit that a cause of action such as specified in § 1737 of the Code of Civil Procedure exists in favor of the plaintiff and

¹ See *Carpenter v. Lott*, 31 *Hun*, 349. a judge of the court in which the action is pending.

² To be issued only by the court, or ³ See *N. Y. Code Civ. Pro.*, §§ 339 and 1738.

against the defendant, to foreclose a lien for the sum of dollars upon said chattels; and that the plaintiff is not in possession of said chattels; and the plaintiff having given the undertaking required by law:

NOW, YOU ARE HEREBY COMMANDED to seize the following chattels, to wit [*specify same*], being the chattels described in the complaint in said action, or so much thereof as may be found within your county, and to safely keep the same to abide the final judgment in the action, and that you proceed herein in the manner, and make your return within the time, required of you by law.

WITNESS: Hon. [*here name any justice of the Supreme Court, if the cause in which the warrant is issued is in that court, adding*], justice of our said court [*or if the cause is in a Superior City Court, County Court, N. Y. City Court, name any judge thereof, adding, judge of our said court*], at the County Court House [*or, the City Hall*], in _____, this [*date of issue*] day of _____, 18 _____.

[*If the warrant is issued by the court, here will follow:*]

, [Signature of clerk.]

[Seal, if any.]

[*If by a judge, signature of judge and initials of title, instead of signature of clerk and seal.*]

[*In either case add signature and office address of*,
Attorney for plaintiff.

ARTICLE VIII.

ATTACHMENT.

SECTION I.—AFFIDAVITS, AND UNDERTAKING, TO OBTAIN ATTACHMENT.

II.—THE WARRANT, AND PROCEEDINGS IN ITS ENFORCEMENT.

III.—VACATING OR DISCHARGING ATTACHMENT.

SECTION I.

AFFIDAVITS, AND UNDERTAKING, TO OBTAIN ATTACHMENT.

1. Nature of the remedy.	FORMS.
2. Power of the court.	(780.) Affidavit to obtain attachment.
3. The cause of action.	(General Form.)
4. Allegations not essential to a cause of action.	(781.) Allegation that defendant is about to depart.
5. Waiver by joining inappropriate cause of action.	(782.) — — threat to assign to hinder creditors.
6. The practice.	(783.) — — fraudulent transfer of property.
7. Time for applying.	(784.) — — fraud in contracting debt and disposing of property.
8. Prudential rules for drawing attachment papers.—Complaint.	(785.) — — fraud by representation through commercial agency and in general assignment.
9. — the affidavits.	(786.) Undertaking on attachment.
10. — mode of allegation.	
11. — amount.	
12. — counter-claims.	

1. *Nature of the remedy.*—An attachment under the Code is not the commencement of a proceeding. It is a provisional remedy *in an action which is commenced* by the service of a summons.¹

¹ Carr v. Van Hoesen, 26 Hun, 316 (holding that the sufficiency of the affidavit is not jurisdictional, and citing Matter of Griswold, 13 Barb., 412; Furman v. Walter, 13 How. Pr., 348, 352, and distinguishing Van Alstyne v. Erwine, 11 N. Y., 331, as an attachment under the Revised Statutes, which was the process by which jurisdiction was acquired).

On the other hand, an attachment is but an incident to the action, and if the action cannot be brought or maintained, the attachment must fail. *Exp. Des Moines & Minneapolis Railroad Co.*, 103 U. S., 794.

Certain claims contracted within the State for work or materials in building, repairing, equipping or provisioning, &c., vessels, and for wharfage and port expenses, loading, insuring, towing, pilotage, &c. (*N. Y. L.* 1862, c. 956, § 1), and for collisions by negligence or willful misconduct (*id.*, § 33), may be enforced by special statutory attachment *without action*, such an attachment being dischargeable by giving bond to pay the claim if it, and the acquiring of a lien for it, be established, in an action on the bond. *N. Y. L.* 1862, p. 946, c. 482; amended as to duration of the lien in *L.* 1886, p. 170, c. 88; *L.* 1885, p. 473, c. 273; *L.* 1863, p. 717, c. 422. This attachment is not a provisional remedy in an action, like the attachment treated in the text, but a special

2. *Power of the court.*]—The power of the court is wholly statutory,¹ and the remedy being regarded as a severe one, the statute is construed strictly, so far as necessary for the protection of the alleged debtor against oppression. But many technical rulings in the earlier cases under the Code, giving a very strict construction in cases where no such necessity exists, have been overruled by later decisions, under which it is the generally accepted rule that, except when necessary to prevent oppressive practice, the statute is to receive a liberal construction in support of the remedy it provides, and that substantial compliance with its provisions is enough.²

An application for an attachment is not a matter of right, even in a case clearly within the terms of the statute, but it is granted or refused in the sound discretion of the court.³

3. *The cause of action.*]—The present statute enumerating the cases in which an attachment may issue, and some earlier cases it supersedes, will be better understood if it be borne in mind that this was originally a remedy in commercial cases arising on contract coupled with anticipated evasion of the jurisdiction; while arrest became (after the abolition of imprisonment for debt) a remedy for cases of tort, especially if malicious or wanton. The marked tendency of recent successive amendments of the statutes has been to extend each remedy into the former domain of the other, so that now there are considerable classes of cases in which either remedy, and, in the discretion of the court, both remedies⁴ at once are allowable.

proceeding. As to the application of this remedy and the exceptions, see *Abb. N. Y. Dig.*, tit. *Shipping*, and *Constitutional law*; *Thorsen v. The J. B. Martin*, 26 *Wisc.*, 488; *Johnson v. Chicago & Pacific Elevator Co.*, 119 *U. S.*, 388; *Waples' Pro. in Rem.*, §§ 465, 545; and *Howe v. Teft* (*R. I.*, 1887), 4 *New England Rep.*, 108.

As to attachment for health officers' expenses and storage, see *N. Y. L.* 1865, p. 1208, c. 592, § 7. Harbor masters' charges and expenses, *L.* 1867, p. 44, c. 256.

¹ *Blossom v. Estes*, 84 *N. Y.*, 614, aff'g 23 *Hun.*, 472. The *N. Y.* statute (*Code Civ. Pro.*, §§ 635–637) defines the cases in which it is allowable. See *Forms* 781, 785 (*below*).

² See *Lamkin v. Douglass*, 27 *Hun.*, 517, rev'g 63 *How. Pr.*, 47.

³ Hence the refusal is not reviewable in the Court of Appeals. *Sartwell v. Field*, 63 *N. Y.*, 341; *Rae v. Mayor, &c.*, 62 *id.*, 631.

⁴ See p. 10 of this Volume.

4. *Allegations not essential to a cause of action.*—Independent of statute, a plaintiff may, besides alleging his cause of action in the complaint, add allegations not essential, such, for instance, as facts which will avoid an anticipated defense or will show his right to equitable relief incidental and preliminary to recovery. And by the present statute,¹ a plaintiff to be able to ask an arrest or have execution against the person, must state in the complaint the grounds therefor (except in the case formerly known as *ne exeat*).

The better opinion is that in all such cases—and even where, as in the case of grounds of arrest, such allegations *must* be proved—they are not part of the cause of action in such sense as to preclude an attachment, if without them the case would be proper for an attachment.²

5. *Waiver by joining inappropriate cause of action.*—The right to an attachment upon any cause of action is waived by joining in the same complaint a cause of action in respect of which defendant's property is not liable to attachment.³

6. *The Practice.*—Application is made *ex parte*; and under the New York statute, it must be to a judge of the court in which the action is brought, or to any county judge.⁴

¹ *N. Y. Code Civ. Pro.*, § 549.

² Compare *Ætna Ins. Co. v. Shuler*, 28 *Hun*, 338; *Wood v. Henry*, 40 *N. Y.*, 124, 128; *Church of Redeemer v. Crawford*, 36 *Super. Ct.*, 307, 319; *Austin v. Rawdon*, 44 *N. Y.*, 63; *Atocha v. Garcia*, 15 *Abb. Pr.*, 303; s. c., 24 *How. Pr.*, 186; *Whitney v. Hirsch*, 39 *Hun*, 325; *People and Taylor v. Mayor of New York*, 10 *Abb. Pr.*, 111; *Finkemaur v. Dempsey*, 8 *Civ. Pro. R.* (Browne), 418; *Alford v. Cobb*, 28 *Hun*, 22.

In *Humphrey v. Hayes*, 94 *N. Y.*, 594, 603, is a *dictum* that an allegation of fraud to justify arrest, such as is required by the amendment of 1879, would change the cause of action from contract to tort, or produce a misjoinder. The case, however, was determined on the point that the amendment did not apply to this pending action.

³ *Union Consold. Mining Co. v. Raht*, 9 *Hun*, 208; s. p., *Wilson v. Harvey*, 52 *How. Pr.*, 126.

An action against a joint debtor, not served in a previous action in which judgment was recovered on service of his co-debtor, is regarded as an action on the original contract for the purpose of obtaining an attachment. *N. Y. Code Civ. Pro.*, § 1940.

⁴ *N. Y. Code Civ. Pro.*, § 638. The rule as to ordinary *ex parte* applications is different. See Vol. I, p. 132.

It must be made on affidavit;¹ and the presentation of the complaint is not essential, although, if it be verified, it may be used as an affidavit for the purpose of the application.²

Inasmuch as it is not the function of a complaint to state evidence; the complaint alone is rarely sufficient.

7. *Time for applying.*—The application may be made at the very commencement of the action, and for this purpose, the issue of a summons is sufficient.³

An attachment may be granted at any time before final judgment.

According to the principles of the authorities cited in reference to ARREST,⁴ an attachment may be issued after verdict; and even after judgment when the judgment has been opened and allowed to stand merely as security pending a defense; nor would it be precluded by the ordinary stay of proceedings on a verdict for the purpose of making a case.

8. *Prudential rules for drawing attachment papers; the complaint.*—When the complaint is relied on as a part of the proof, see what allegations are on information and belief, and see that the verification is regular. Especially see that, if not positive and unqualified, it is not in the old form, qualified by saying, “except as to the matters therein *stated* on information,” &c., but, by saying, “except as to the matters therein *stated to be alleged* on information,” &c.; for if qualified in the old form, it will not avail as an affidavit.

9. — *the affidavits.*—An affidavit made by the plaintiff or the one of several co-plaintiffs who is acquainted with the facts, is desirable.⁵ If not had, pursue the rules stated in paragraph 6 on page 37, of this Volume.

If one, whose affidavit is desired, refuses to make affidavit,

¹ *N. Y. Code Civ. Pro.*, § 636.

² See Vol. I, p. 28, Vol. II, p. 35.

³ *N. Y. Code Civ. Pro.*, § 638, § 416; *Stoiber v. Thudium*, 44 *Hun*, 70.

⁴ Page 357, of this Vol.

⁵ That the affidavit may be either by plaintiff or by another person, see *Morgan v. Avery*, 7 *Barb.*, 656, 662; *Edick v. Green*, 38 *Hun*, 202; *Gribbon v. Back*, 35 *Hun*, 541; *United States v. Bryant*, 111 *U. S.*, 499. But affidavits by both are desirable.

he may be compelled to do so,¹ but plaintiff is not required to take this course,² and may, if he prefer, state his information, and the source, but must add the reason why the affidavit of his informant is not presented.³ In short, if the affidavits of the persons who give the information on which the plaintiff desires to proceed cannot be obtained, from the peculiar circumstances of the case, those circumstances must be stated, with all the grounds of suspicion, so as to satisfy the judge that the facts exist on which the attachment is sought, and that the plaintiff has produced the best evidence in his power to establish them.

If affidavits already used on a previous application are relied on as part of the proof, it is better to have them re-sworn to;⁴ but if this is not practicable, it is proper to serve copies; and, if the originals are not in possession of the plaintiff, to refer to where they may be found on file, with the date of filing, if practicable, taking care to produce them upon the application and mention them in the recital in the warrant, unless by reference in a fresh affidavit, and allegation of truth, the copies are in effect made original evidence for the purpose of the second application.

10. — *mode of allegation—directness and certainty.*]—The affidavit (or complaint) must state, not merely by way of recital,⁵ but by traversable allegations, facts constituting a cause of action.⁶ This requirement is jurisdictional.⁷

¹ See page 139, of Vol. I, and Forms, p. 202, &c.; *Allen v. Meyer*, 73 *N. Y.*, 1.

² *Bennett v. Edwards*, 15 *Weekly Dig.*, 250.

³ *Yates v. North*, 44 *N. Y.*, 271.

For the rules by which affidavits on information and belief are now tested, see, as to showing knowledge of the affiant, *Buhl v. Ball*, 41 *Hun.*, 61; *Marine Nat. Bk. v. Ward*, 35 *id.*, 395.

⁴ See Vol. I, pp. 38, 39.

⁵ *Manton v. Poole*, 4 *Hun.*, 638; s. c., 67 *Barb.*, 330 (order refusing to vacate for defect in this respect, reversed).

⁶ *Walt v. Nichols*, 32 *Hun.*, 276 (affirming vacatur, in action against commission merchants, for selling contrary to authority, it not being averred in the affidavit, that the market value of the property, at the time it was sold, exceeded the price at which it was sold, or that it afterward arose to a point above that price). *Smith v. Davis*, 29 *Hun.*, 306; *Pomeroy v. Ricketts*, 27 *id.*, 242 (holding that an allegation that defendant was indebted, &c., "for goods sold and delivered," insufficient because not alleging facts of sale, &c.).

⁷ *Jacobs v. Hogan*, 85 *N. Y.*, 243 (rev'g 15 *Hun.*, 197, for refusing to vacate on this ground).

A sworn complaint being now an affidavit,¹ its production is a sufficient compliance as to facts therein positively alleged. And it is not essential for the purpose of jurisdiction that the evidence to establish those facts be stated; for allegations sufficient to constitute a cause of action, positively verified, make a *prima facie* case. An exception to this rule is justly recognized in the case of those facts, such as the intent of the defendants, including malice, want of probable cause, and the like—as to which another person can only have an inferential knowledge.²

In general, where the statute calls for evidence of a fact, which is disconnected with any intent upon the part of the defendant, a simple statement of that fact by a person having knowledge thereof is sufficient.³ If, however, any fact thus relied on as constituting, either a part of the cause of action, or of the grounds of attachment, is upon the line, sometimes difficult to draw, between matters of facts and conclusions of law, details should be stated to substantiate it. And in all cases evidence is desirable, for an allegation may suffice to give jurisdiction, and yet fail to satisfy the mind of the judge.

Where the code or the settled practice sanctions the use in pleading of a short allegation which does not satisfy the above requirement, it will often be safer to make a fuller and more positive statement in the affidavit. This question arises for instance where the pleader in his complaint alleges performance in the short statutory phrase “duly performed all the conditions thereof on his part,” or where he sues on an account in the short common-law form (still sanctioned, notwithstanding the general rule of the code), alleging that defendant is indebted to plaintiff upon an account for goods sold and delivered.

11. — *amount.*]—In the case of an action on contract the amount due must be alleged,⁴ positively.⁵

¹ *N. Y. Code Civ. Pro.*, § 3343, subd. 11.

² *Lanier v. City Bk. of Houston*, 9 *Civ. Pro. R. (Browne)*, 161, and *cas. cit.*

³ *Kneel. on Att.*, 369.

⁴ *Tootle v. Smith*, 34 *Kans.*, 27; *s. c.*, *Pac. Rep.*, 577.

Where the affidavit was sufficient in this respect; *held*, that the fact that the complaint demanded sale of collaterals, and judgment for deficiency did not vitiate. *Hamilton v. Penney*, 29 *Hun*, 265.

⁵ *Black v. Scanlan*, 48 *Ga.*, 12; *Dean v. Bell*, 1 *N. Y. Month. L. Bul.*, 42; *Clowser v. Hall*, 80 *Va.*, 864; *s. c.*, 9 *Va. L. J.*, 688; *Garner v. White*, 14 *Ohio St.*, 192 (holding affidavit to belief insufficient).

It is not essential, but it is safest to follow in this the words of the statute, "that the plaintiff is entitled to recover [*a sum stated*] over and above all counter-claims," &c.¹

The amount must be accurately stated since, in the absence of statute authority, the court cannot sustain an excessive attachment by reducing the amount.

If unliquidated, the facts necessary to fix the amount of damages must be alleged.² If this be done, it is no objection that the damages are unliquidated.³

12. — *counter-claims.*—The language of the statute⁴ that "if the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him," requires an affidavit affording evidence that, so far as plaintiff knows, no counter-claim exists which will further reduce the claim; and although it is not necessary that the allegation be made by the plaintiff, nor that it follow the words of the statute,⁵ the allegation must be either by the plaintiff or one of several co-plaintiffs,⁶ or by an agent who is shown by the affidavit to have stood in such a relation to the transaction—as, for instance, where all the dealings of the parties have been had through him⁷—or to stand in such a relation to the accounts between the parties⁸ that he may be regarded as a proper witness, either to the fact that plaintiff is not aware of any counter-claim, or to the fact that there is no counter-claim.

¹ Allegation that defendant is indebted to plaintiff in a sum stated, and that the latter is justly entitled to recover said sum,—Held insufficient. *Ruppert v. Haug*, 87 *N. Y.*, 141.

² *Golden Gate Concentrator Co. v. Jackson*, 13 *Abb. N. C.*, 476; *Ackroyd v. Ackroyd*, 11 *Abb. Pr.*, 345; s. c., 20 *How. Pr.*, 93.

³ *United States v. Graff*, 4 *Hun*, 634; s. c., 67 *Barb.*, 304.

⁴ *N. Y. Code Civ. Pro.*, § 636. subd. 1.

⁵ *Ruppert v. Haug*, 87 *N. Y.*, 141; s. c., 1 *Civ. Pro. R.*, 411; 62 *How. Pr.*, 364.

⁶ *Donnell v. Williams*, 21 *Hun*, 216; s. c., 59 *How. Pr.*, 68.

⁷ *Frankel v. Hays*, 20 *Weekly Dig.*, 417; *Mallory v. Allen*, 15 *Abb. N. C.*, 338; *Gribbon v. Back*, 35 *Hun*, 541.

⁸ *National Park Bk. of N. Y. v. Whitmore*, 40 *Hun*, 499 (assistant cashier); *Lee v. Le Compagnie Universelle*, 2 *N. Y. State Rep.*, 612 (president of corporation in hands of receiver).

Form No. 780.

Affidavit to obtain attachment. (General Form.)¹

[Title of court and action.]

[Venue.]

A. B., being duly sworn, says :

I. That he is the plaintiff [or, one of the plaintiffs] above named [who at all the times hereinafter mentioned were and still are copartners under the firm name of _____, carrying on business in _____—or otherwise identify deponent, and state his relation to the case].

[In case of action on contract, state cause of action, as thus:]

II. That Y. Z., the above-named defendant, is justly and truly indebted to said plaintiff in the sum of _____ dollars upon the following facts, to wit: [here state the facts constituting the cause of action, not by way of recital, but positively; see Forms under Arrest, and in Volume I, p. 594; or, if the complaint is relied on in support of the application, may say: as appears by the complaint herein, verified on the _____ day of _____, 18____—and if any of its allegations material to the application are not positive, add: all of the allegations of which (numbered to _____) are true to the knowledge of this deponent—or annex corroborating affidavits].²

And that this [or, said] plaintiff is [or, said plaintiffs are] justly entitled to recover therefor, from the said defendant, the sum of _____ dollars³ [and interest thereon from the _____ day of _____, 18____], over and above all counter-claims known to the plaintiff[s] [or, and that deponent knows personally that there are no counter-claims existing in favor of the defendant].

[Or when the action is for tort, state cause of action, as thus:]

II. That on or about the _____ day of _____, 18____, at _____, Y. Z., the defendant above named, wrongfully took

¹ As to peculiar allegations necessary besides these, in the N. Y. City Court, see *N. Y. Code Civ. Pro.*, § 3169; particularly as to debtor's age, *Wentzler v. Ross*, 59 *How. Pr.*, 397; *Doctor v. Schnepf*, 2 *How. Pr.*, N. S., 52; as to corporation, *Mershon v. Leonard Scott Publishing Co.*, *N. Y. Daily Reg.*, Dec. 19, 1883.

² [Or may refer to and support verified complaint annexed, thus:]

And the grounds thereof appear in the verified complaint in this action, hereto annexed, all of the statements contained in which are true to the knowledge of this deponent, except

those therein stated to be alleged on information and belief, and as to those, the sources of his information and the grounds of his belief are as follows [here indicate them, and the reason why the informant's affidavit is not given, or give it, if practicable, and refer to it as annexed].

³ Variance between the attachment and the complaint, in respect to the amount, held fatal where the statute required the writ to state the amount "in conformity with the complaint." *Bowers v. London Bank*, 3 *Utah*, 417; 4 *Pacif. Rep.*, 225.

and converted to his own use [*&c., stating the tort positively; see Forms 731–785 (below); or, if complaint is relied on, refer to it and corroborate it, if necessary, as above*], as deponent is informed and believes; and the sources of his information as follows [*stating them*].

[*If the ground of attachment is non-residence.*]

III. That the ^{defendant}deponent is not a resident of this State, but resides at _____ in _____ [as deponent is informed by O. P., who is the agent and business correspondent at _____, in this State, of said defendant, and whose affidavit is hereto annexed; that said defendant is and for _____ years last past has resided at _____ aforesaid, and his name appears in the directory of said _____, for the current year, as a resident at No. _____ street therein.¹]

[*Or absconding of debtor.*]

III. That the defendant is a resident of this State, to wit, of _____; but cannot, after due diligence, be found within this State. That, as this deponent believes, the defendant has departed from this State to _____, in the State of _____ [*or, keeps himself concealed² within this State*], with intent to defraud his creditors or to avoid the service of a summons; and the grounds of his belief are as follows [*here set out in detail the facts and circumstances which show that the defendant has done so, and that diligent inquiries have been made³*].

¹ If letters or similar documents are relied on for information, annex and refer to copies. Even cable dispatches, and similar means, may be held sufficient. See Volume I, pp. 27, 28.

² As to what circumstances show concealment to avoid service, *Genin v. Tompkins*, 12 *Barb.*, 265; *aff'd* 1 *Code R., N. S.*, 12; *Wallach v. Sippilli*, 65 *How. Pr.*, 501, and Volume I of this work, pp. 640, &c., 655, &c.

³ For instance thus: That the said defendant has lately been engaged in converting his property into money, and has sold the goods in his store [*or, his stock and farming utensils*] for a less price than their real value, and has sold off his household furniture, and has been busily engaged in collecting in all debts and money owing to him; and that he left his family on Friday last, stating to deponent and others that he was going to the city of New York to purchase goods; that since that time he has not returned to

his said residence; that deponent has inquired of his wife where said defendant had gone, and when he would return, and was told that he had gone to New York city, and would be back in a day or two; that deponent has been informed by M. N., of _____, that he saw the said defendant on Monday last at Buffalo, and that said defendant informed said M. N. that he was then going to the State of [*Wisconsin*], and intended to purchase a tract of land in that State, and after he was located he should send for his family [*annex, and refer to affidavit of informant*].

For other forms of allegation adapted to differing cases, see Volume I, pp. 640, 641, 655, 656.

It is not enough to allege that defendant is about to dispose of his property and leave the State. *Hertz v. Stuart*, 3 *Weekly Dig.*, 332. Nor that he has absconded. *Hewitt v. Terry*, 56 *Mich.*, 591; s. c., 23 *Northwestern*

[*Or fraudulent disposition of property.*]

III. That the defendant, as deponent is informed and believes, has removed or is about to remove his¹ [*or, its*] property from the State with intent to defraud his [*or, its*] creditors, or² has assigned, disposed of or secreted,³ or is about to assign, dispose of or secrete his [*or, its*] property⁴ with intent to defraud his [*or, its*] creditors.⁵ The sources of deponent's information and belief are the affidavit of M. N., hereto annexed [*or state details here; see Forms 781-785, 891*].

[*Or foreign corporation.*]⁶

III. That the defendant Y. Z. is a foreign corporation, created by and under the laws of [*here indicate State or nationality, and, if suing in a local court, add any jurisdic-*

Rep., 326. Nor that he has left the State. *Mulherrin v. Hill*, 5 *Heisk. (Tenn.)*, 58.

There must be something to show intent to defraud creditors or avoid service.

The absconding, &c., of one partner is enough to sustain attachment against his interest, at suit of a firm creditor. *Buckingham v. Swezey*, 25 *Hun*, 84. But not against the property of both partners. *Bogart v. Dart*, 25 *Hun*, 395.

¹ The N. Y. statute of attachment (*N. Y. Code Civ. Pro.*, § 636) does not, like the statute of arrest, say "his" property. But the two statutes are construed alike; and disposal of plaintiff's property with fraudulent intent does not justify an attachment. *German Bank of London v. Dash*, 60 *How. Pr.*, 124; s. c., 23 *Abb. L. J.*, 215; *Achelis v. Kalman*, 60 *How. Pr.*, 491.

² It is not always practicable, nor is it essential, to state whether the disposal has been made or is about to be made. An allegation in the alternative is proper if the facts stated are appropriate to sustain an alternative inference; or the allegation may couple both statements with evidence that each allegation is true. See *Van Loon v. Lyons*, 61 *N. Y.*, 22; *McCraw v. Welch*, 2 *Col. T.*, 284; *Parsons v. Stockbridge*, 42 *Ind.*, 121.

The contrary was held in *Schatzman v. Strump* (*Hamilton, O., C. P.*), 7 *Cinn. L. B.*, 334, where the alternative allegation was merely in the words of the statute, without evidence in details [citing 1 *Handy*, 48, and *Drake on Att.*, 11].

³ The words "assigned, secreted or

disposed of," as employed in the statute, held not to have separate, distinct and exclusive meanings, so as to make the allegation "disposed of" insufficient as applicable to a transfer of the title to property, on the ground that the word "assigned" should have been used. *Auerbach v. Hitchcock*, 28 *Minn.*, 73; s. c., 9 *Northwestern Rep.*, 79.

As to what is sufficient evidence of concealment, see *Mott v. Lawrence*, 9 *Abb. Pr.*, 196; s. c., 17 *How. Pr.*, 559; *Frank v. Levie*, 5 *Robt.*, 599; *Denzer v. Mundy*, 5 *Robt.*, 636; *Kipling v. Corbin*, 66 *How. Pr.*, 12.

⁴ It is not necessary to show an intent extending to all of the defendant's property; such a disposal of any part thereof is enough. *Weiller v. Schreiber*, 11 *Abb. N. C.*, 175; *Hyman v. Kapp*, 22 *Weekly Dig.*, 310.

But under the Wisconsin statute, an affidavit stating that the defendant had disposed of or assigned "his property, or any part thereof," or was about to do so, with intent to defraud his creditors, was held insufficient. *Goodyear Rubber Co. v. Knapp*, 61 *Wis.*, 103; s. c., 20 *Northern Rep.*, 651.

⁵ Allegation of a disposal intended to delay and defraud plaintiffs instead of the defendant's creditors generally, held sufficient, it appearing from the affidavit that the plaintiffs were in fact creditors. *Auerbach v. Hitchcock*, 28 *Minn.*, 73; s. c., 9 *Northwestern Rep.*, 79.

⁶ See, on this subject, note in 18 *Abb. N. C.*, 435. It may be well, though not necessary, to make the jurisdictional allegation even when suing in a court of general jurisdiction.

tional fact necessary and not already alleged or shown by a duly verified complaint annexed and referred to, for instance: and that the plaintiff is a resident of the town of and county of , in the State of New York, or if the plaintiff is a non-resident or foreign corporation,¹ and that the subject of the action is situated within this State, to wit, at —or, and the said cause of action arose within this State, to wit, at].

[Or, in an action against a United States corporation.]

III. That the defendant is a corporation created and organized under acts of Congress of the United States [*if private acts, give title and citation*], and having its principal office in , and not in this State.²

[In any case] IV. That the above entitled action is [hereupon] commenced for said cause, and the annexed or accompanying summons therein has been issued³ [*or otherwise state the condition of the cause*].

V. That no previous application for an attachment of said defendant's property has been made in this action [*except, &c.*].⁴

[Jurat.]

[Signature.]

STATEMENTS OF ABSCONDING AND FRAUD, &c., SUITABLE FOR PARAGRAPH III OF FOREGOING FORM OF AFFIDAVIT TO OBTAIN ATTACHMENT.

781. *Allegation that defendant is about to depart.*⁵ [*Insert in Form 777.*]

III. That, as deponent is informed and believes, said defendant is about to leave this State in a very short time, and take with him his family, and that he is going to [Europe], and that the sources of deponent's information are [*specifying them, and indicating why informant's affidavit is not procured*].

That, as deponent is informed and believes, said defendant has packed up a large amount of silver-ware, and other valuables, which said defendant is about to take away with him out of this State, and which are the property of said defendant [*stating sources, &c., as above*].

That, as deponent is informed and believes, said defendant is making arrangements to convert other portions of his property into cash, with the intention, as deponent verily believes, of removing the same from this State, and in particular [*&c., and stating sources, &c., as above*].

¹ See *N. Y. Code Civ. Pro.*, § 1708; *Merchants' & Mfg. Co. v. Grand Trunk R. Co.*, 11 *Abb. N. C.*, 184; and *Adams v. Penn. Bank*, 35 *Hun*, 393.

² *Rosenbaum v. Union Pacific R. Co.*, 2 *How. Pr.*, *N. S.*, 45.

As to national banks, see *U. S. R. S.*, § 5242; Act of Cong. of March 3, 1887, § 4, quoted on pp. 730, 731, of Volume I of this work, and see cases cited in 8 *Abb. N. Y. Dig.* (1st supp.), p. 165, and in *Annual*, 1882-3, p. 33, 1884, p. 28.

³ This is usual, but it is not essential if summons be issued and be served with the warrant.

⁴ For the New York rule requiring this, see p. 2 of this Volume.

⁵ This is from the Form used in *Brewer v. Tucker*, 13 *Abb. Pr.*, 76, there held insufficient merely for not specifying the sources of information, or supplying other affidavits from deponent's informants, as indicated above.

That the said defendant has repeatedly said to this deponent that he did not intend to pay one cent for the notes so given by him to this deponent, for the furniture sold as aforesaid; and deponent verily believes that said defendant's intention, in removing and disposing of his property as aforesaid, is to defraud his creditors.

782. *Allegation of threat to assign to hinder creditors.*¹ [Insert in Form 777.]—III. This deponent says, that, as he verily believes, the said defendant is about to dispose of his property with intent to defraud his creditors. Deponent has, within the past three or four weeks, several times applied to the defendant to pay or secure said debt; and the defendant, on the day of _____ last, promised the plaintiffs that he would take an account of his stock, and show them a statement of his affairs, and give them security on his stock the next day. He did not call the next day; and deponent, on the day of _____, went to said defendant, and he told deponent he was not going to take an account of stock or give any security; deponent then told him the plaintiffs would sue him, and he replied that he would pay them twenty-five cents on the dollar for a full release, and if they would not accede to that he would put his property out of his name, and he would make an assignment preferring others, and plaintiffs could not get anything; and he would go right on doing business under somebody else's name.

783. *Allegation of fraudulent transfer of property.*² [Insert in Form 777, p. 234.]—III. That the defendants have assigned, secreted and disposed of their

¹ A threat to make an assignment, even though made for the purpose of inducing creditors to give forbearance, is not necessarily evidence of fraudulent intent. The weight of authority, in a conflict of cases, is to the effect that allegations consistent with an intent to make a lawful assignment are not enough, but a threat or intention to make an unlawful disposition must be shown. Compare *National Park Bk. v. Whitmore* (N. Y., 1887), 6 *Centr. Rep.*, 361; *Anthony v. Stype*, 19 *Hun.*, 265; *Evans v. Warner*, 21 *id.*, 574; *Ross v. Wigg*, 34 *id.*, 192; *Gasherie v. Apple*, 14 *Abb. Pr.*, 64; *Wilson v. Britton*, 6 *id.*, 97; *Farwell v. Furniss*, 67 *How. Pr.*, 188, & cas. cit.

If threats are relied upon, there must be evidence that they were made by the defendant or by a person authorized to speak for him. *Evans v. Warner*, 21 *Hun.*, 574.

² From *Catlin v. Ricketts*, 91 N. Y., 668.

The following recent cases on the question what circumstances in transfers of property manifest intent to defraud creditors, may aid the practitioner in drawing or testing affidavits. Compare cases for arrest on the same ground, in note A, to Form 890.

Large sales for cash, and indisposition to disclose condition of affairs, followed by an assignment for benefit of creditors, held insufficient.

Stringfield v. Fields, 13 *Daly*, 171; s. c., 7 *Civ. Pro. R. (Browne)*, 356.

Disappearance of goods unaccounted for, and proposal of a fraudulent scheme, held enough. *Frankel v. Hays*, 20 *Weekly Dig.*, 417.

As evidence of intent to defraud, imprudent buying, and opening branch house to sell out, held not enough. *Mack v. Jones*, 31 *Fed. Rep.*, 189.

Transfer of all firm assets to the wife of a partner for an inconsiderable debt, though not consummated, held enough. *Seckendorf v. Ketcham*, 67 *How. Pr.*, 526.

Executing, and withholding from record, transfers, until just before judgment, and continuing to act as owner meanwhile, held enough. *Allen v. Meyer*, 7 *Daly*, 229.

Buying without disclosing insolvency, and sale in the ordinary course of business, followed by a general assignment, not enough. *Freeman v. Campbell*, 1 *N. Y. State Rep.*, 728.

Preferring in a general assignment particular creditors who gave credit on the defendant's agreement to prefer them in case of failure, not a fraud on other creditors. *National Park Bk. v. Whitmore*, 6 *Central Rep.*, 361 (overruling, on this point, 40 *Hun.*, 499). *Contra*, *Smith v. Craft*, 11 *Biss.*, 340.

Omitting in general assignment to prefer wages as required by stat-

property with intent to defraud their creditors, and are about to assign, dispose of and secrete their property with the like intent.

[Corroborating affidavits to the following effect were annexed:—]

I spoke to defendant Y. Z. yesterday, at No. _____ street, in _____. He told me that his firm were wholly insolvent during last season, and prior to _____ last, and knew themselves so to be, and had no idea by continuing in business they could pull through.

That his copartner had taken about _____ dollars worth of goods lately from the copartnership stock, and sold the same, and kept the proceeds to himself, so that the same could not be found or discovered by the firm's creditors, and had also lately taken moneys from the firm's assets, with like intent, and that the firm had attempted to sell goods at low prices, so as to realize on the same, and hold the same to their individual use in such a way, that in case of their failure, which they shortly apprehended, they would have some means which their creditors could not reach.

[And another as follows:—] That said Y. Z. stated this day to deponent that their firm was about to fail, and were insolvent at the time they purchased the goods from plaintiff; that they had been sued by his brother to protect himself; that his partner had pocketed over _____ dollars, and the creditors would not get a cent, and that goods had been and were being removed by his partner, and he was afraid the creditors would get very little.

784. *Allegation of fraud in contracting debt and disposing of property.*¹ [Insert in Form 777.]—III. That the defendant has been guilty of a fraud in

ute, held not enough. *Blackington v. Goldsmith*, 3 *How. Pr.*, N. S., 77.

Technical defect in formalities of general assignment when ground of attachment as infecting it with fraud. *Tim v. Smith*, 13 *Abb. N. C.*, 31; reversed in effect in 14 *id.*, 447.

Though an assignment be a general one in trust for creditors, yet fraud in fact as against the creditors of the assignor furnishes the right to an attachment. *Skinner v. Oettinger*, 14 *Abb. Pr.*, 109; *Buhl v. Ball*, 41 *Hun*, 61, and cases cited.

Mere fact of assignment with preferences, and that the goods which plaintiff had just sold to defendant could not be found in his store, held not enough. *Wilmerding v. Cunningham*, N. Y. *Daily Reg.*, July 24, 1883; s. p., *Struthers v. Hoffstadt*, 19 *Weekly Dig.*, 242.

Assignment, with fraudulent preference of a dormant partner, held enough. *Claffin v. Hirsch*, 19 *Weekly Dig.*, 249.

Large drafts by individual members of a firm on the firm moneys just before assigning, held sufficient. *Victor v. Henlein*, 34 *Hun*, 562 (compare a previous decision in 33 *id.*, 549); *Globe Woolen Co. v. Carhart*, 67 *How. Pr.*, 403.

Transfer of interest by one partner to another, held sufficient. *Hirsch v.*

Hutchison, 3 *Civ. Pro. R. (Browne)*, 106.

Making general assignment for benefit of creditors, which is constructively fraudulent by reason of powers conferred on the assignee which may delay creditors, but there being no actual fraudulent intent, is not enough. *Milliken v. Dart*, 26 *Hun*, 24.

But an assignment which appropriates partnership or individual property, contrary to the respective rights of individual or partnership creditors, is sufficient ground as against a creditor aggrieved. *Friend v. Michaelis*, 15 *Abb. N. C.*, 354.

Partnership assignment, giving preference to debts of a firm composed of part of the partners, held not fraudulent within the rule. *Peckham v. Mattison*, 15 *Abb. N. C.*, 367, note (reviewing cases on question whether partnership assignment is fraudulent).

Transfer of firm assets by one partner to the other, and assignment by the other, with preference of his individual debts, accompanied by his confession of judgment to his individual creditors, held not enough to entitle partnership creditor to attachment. *Gutman v. McNulty*, 22 *Week. Dig.*, 241. (Compare 105 *N. Y.*, 476.)

¹ The authorities are not agreed as to how far fraud in contracting or

contracting said indebtedness, as deponent verily believes, and has assigned, disposed of and secreted his property, with intent to defraud his creditors.

Before the purchase of said goods to wit, on or about the day of , 18 , the defendant, in order to induce plaintiff to sell and deliver to him the goods in question on credit, stated to deponent that he was doing a good and lucrative business; that he was worth fully dollars over all his debts and liabilities; that he did not owe anything at all to his relatives; and that even if he should be in need of money he would rather go to any of his creditors than to his relatives, and that rather than ask his relatives for any money he would go to strangers. Relying upon this and upon the faith thereof, and not otherwise, these plaintiffs through deponent allowed him to have said goods on credit. Deponent further says that said statements of the defendant were and are in all respects false and untrue when he made the same.

On the day of , 18 , the said defendant made an assignment for the alleged benefit of creditors, dated on that day, and recorded on that day in the office of the clerk of the city and county of New York, in which *[here were concisely stated leading provisions of the assignment, showing large preferences to wife and brothers for alleged borrowed money]*.

Deponent says that he is conversant with the stock of merchandise owned by the defendant at the time of such assignment, having seen it this morning; that deponent knows the value of the said stock, having been in that business for about ten years; that the said stock is not of greater value than about dollars; that this morning defendant's bookkeeper stated to deponent

incurring the liability is ground for attachment by reason of such fraud being "an injury to personal property." It is well settled that an efficient interference with the owner's dominion or control of his property, is an "injury to property," within the meaning of the statute; although the thing itself, or subject of property, be not injured. Thus the conversion or embezzlement of securities is an injury to the owner's property in them. There is no good reason why the same principle should not be applied to a case where one is induced to part with his money or goods by false representations; and upon this view, an action to recover a sum of money only, as damages for such a fraud, is within this section of the statute; and to this effect are *Bogart v. Dart*, 25 *Hun*, 395 (action to recover advances made on forged paper); *Weiller v. Schreiber*, 11 *Abb. N. C.*, 175 (action for inducing sale of goods by fraud). To the contrary is *Wittner v. Von Minden*, 27 *Hun*, 234 (holding that in an action for damages for fraud in obtaining goods, attachment could not issue); and *Achelis v. Kalman*, 60 *How. Pr.*, 491 (holding apparently that in an action for conversion, founded on plaintiff's claim that he had rescinded the sale because induced by fraud, defendant's disposi-

tion of the property could not be ground for an attachment, although it might be for an arrest).

In some cases the doubt arising on these authorities may be avoided by framing the complaint for conversion. In cases where the fraud in contracting the debt and a fraudulent disposition of property are connected as part of one scheme to defraud creditors, the fraud in contracting the debt, even on the view that it is not in itself a cause of action on which attachment may issue, is proper evidence of the intent to defraud creditors, which will sustain an attachment in an action founded on the contract, or for a conversion. For an instance, see *Blake v. Bernhard*, 3 *Hun*, 397.

If breach of contract is stated as the cause of action, additional allegations in the complaint, showing fraud in contracting the debt, inserted for the purpose of avoiding an anticipated defense—such as unexpired credit, or a bankrupt's discharge—should not be deemed to render the action any the less an action on contract.

The above Form is adapted from an unreported case in which the attachment was sustained. For another form of affidavit to fraud in contracting debt and secreting property from creditors, see *Arrest*.

that all the outstanding accounts of the defendant amounted to dollars, which includes good, bad and doubtful debts; that the defendant had about dollars in merchandise in .

That the whole of said outstanding accounts and other assets will, in all probability, not realize more than sufficient to cover the two preferences of said [wife and brothers]; that all creditors will be left remediless.

Deponent verily believes that defendant at the time he obtained said goods from plaintiff, was already insolvent and knew himself to be so, and fraudulently concealed that fact from these plaintiffs. That as far as deponent has been able to learn, his liabilities amount to upwards of dollars, and that the greater part of them are for purchases of merchandise, consisting of , which the defendant has bought within the last three or four months, and none of which are paid for. Deponent further says that as regards the dollars preference to the wife of the defendant, the defendant, in the presence of deponent, on or about March , 18 , stated to this plaintiff that he had received from [name], a brother of his wife, dollars to help him, the defendant, in business, and that the money was part of his business capital, and not his wife's money, and he distinctly said that the money was his own and in his business, which made his capital so much larger. Nevertheless he now prefers his wife for the amount in the assignment, falsely claiming it to be a loan by the wife to him.

[Corroborating affidavits were added.]

785. *Allegation of fraud by representation through commercial agency and in general assignment.* [Insert in Form 777.]—III. Deponent says that the credit was given to defendants' firm upon the faith of the circumstances of the representations to W. & Co.'s Agency, set forth in W. G. S.'s affidavit annexed, and the fact that no notice of any dissolution of defendants' firm was published or brought to plaintiffs, if any dissolution ever took place. Deponent further says plaintiffs' first sales to defendants were , dollars, and , dollars, on credit. [For another Form, see *Arrest*.]

That the defendants, since the making of said contract, have removed or disposed of their property with intent to defraud the plaintiffs, in this, to wit: The general assignment, of which a copy is hereto annexed, dated , prefers said T. S. as a creditor for dollars, being money which she invested in the firm as capital at its organization. The assignee has paid said dollars to her and she has not paid plaintiffs. On and she drew out dollars from the joint funds, and said E. H. also on drew out dollars, and did not refund same to the assignee or creditors. This court, in the suits of C. v. H., and S. v. H., has adjudged said assignment to be fraudulent, and said assignee has paid dollars to said C. and S. upon such ground. Plaintiffs aver that said assignment and drafts of money were fraudulent as to them.

That the said assignee has filed a statement in the court that he has on hand dollars, "to be paid in accordance with the further directions of the general assignment, less his commissions, the costs of the accounting, and an additional counsel fee."¹

Form No. 786.

Undertaking on attachment.²

[Title of court and action.]

Whereas, the above-named plaintiff has applied, or is about

¹ From the affidavit in *Whitney v. Hirsch*, 39 *Hun*, 325.

² Deposit cannot be accepted instead. *Bate v. McDowell*, 48 *Super. Ct.*

to apply in the above entitled action, for a warrant of attachment against the property of the above-named defendant, Y. Z., in one of the cases provided by law :¹

Now, THEREFORE,* the undersigned,² C. D., of No. _____ street, in the city of _____, and county of _____, State of New York, merchant, hereby undertakes [*or if two join*, C. D., &c., *as above*, and E. F., of No. _____ street, in the town of _____ and county of _____, and State aforesaid, farmer, do hereby jointly and severally undertake], pursuant to the statute, that if the above-named defendant Y. Z. [*or*, defendants, or either of them], recovers judgment,³ or if the warrant is vacated,⁴ the plaintiff will pay all costs,⁵ which may be awarded to said defendant [*or*, defendants—*or*, either of them], and all damages which he [*or*, they] may sustain by reason of the attachment, not exceeding the sum of [*at least two hundred and fifty*] dollars.⁶

[*Date.*]

[*Signatures.*]

[*Acknowledgment, as in Form 495, p. 6, of this Volume; Affidavit of sufficiency as in Forms 496 to 498, pp. 6 and 7; Approval, as in Form 497, p. 7.*]

[*Justification if required, as in Volume I, p. 482.*]

(*J. & S.*), 219. For the general principles applicable to the security, see Vol. I, pp. 461 to 491.

¹ It is not essential to recite the ground of the application; and since the enactment of § 642 of the Code of Civil Procedure, which declares that it is no defense to an action on an undertaking, that a warrant was granted improperly, it may be better to omit any detailed recital as superfluous, and, possibly, embarrassing. The advantage of inserting any recital is to constitute conclusive evidence of the fact recited.

² It is not essential that plaintiff sign this undertaking, nor that there be more than one surety, if the court or judge accepts it without. *N. Y. Code Civ. Pro.*, § 811; *s. p.*, as to plaintiff, *Pierce v. Miles*, 5 *Mont.*, 549; *s. c.*, 6 *Pacif. Rep.*, 347. Other cases in Volume I, p. 469.

³ This includes final judgment on appeal. *Bennett v. Brown*, 20 *N. Y.*, 99; *aff'd* 31 *Barb.*, 158.

⁴ This clause would not be implied if not expressed. *Waterfield v. Wilber*, 7 *Western Rep.*, 864.

Partial vacating not a breach. *Sheldon v. Sabin*, 4 *Civ. Pro. R.*, 4; *Sheldon v. Barnes* (*Marine Ct.*), *N. Y. Daily Reg.*, Feb. 8, 1882; *Lee v. Homer*, 37 *Hun*, 634 (holding that the sureties are liable for costs where the complaint has been dismissed upon motion of the defendants, although the warrant has not been vacated).

⁵ *Baere v. Armstrong*, 26 *Hun*, 19, 20 (holding that in no event can the sureties be held liable for more than the difference between the amount paid by the principal for costs or damages and the sum specified in the undertaking).

As to what costs and expenses will be allowed as against the sureties, see *Northrup v. Garrett*, 17 *Hun*, 497.

⁶ The court have power to require further security. *Whitney v. Deniston*, 2 *Supm. Ct. (T. & C.)*, 471; and Volume I of this work, p. 490. One tenth the amount of the demand is sometimes required, in analogy to the rule as to arrest.

SECTION II.

THE WARRANT AND ITS ENFORCEMENT.

I. THE WARRANT.

FORMS.

- (787.) Warrant of attachment.
- (788.) The same; on the ground of wrongful conversion of public moneys.

II. LEVY AND CUSTODY.

- (789.) Inventory of property attached.
- (790.) Oath of appraisers.
- (791.) Return to attachment.
- (792.) Order requiring sheriff to make return.
- (793.) Appointment of keeper.
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- (795.) Affidavit of attorney for same purpose.
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III. PROPERTY, &C., IN HANDS OF THIRD PERSON.

- (799.) Certificate by sheriff to copy of attachment; and notice to third person of levy on property in his hands. General Form.
- (800-2.) *Statements of particular property attached, suitable to be inserted in the foregoing Form.*
- Interest in estate of decedent.
- Funds in hands of brokers.
- The same; another Form.
- (803.) Certificate admitting possession of funds of the debtor.
- (804.) Certificate of no property, &c.
- (805.) Certificate claiming lien, but denying the defendant's ownership.
- (806.) Affidavit to falsity of certificate, or refusal to make certificate.
- (807.) Order to appear to be examined as to property of debtor under attachment.
- (808.) The same; in the case of an officer of a corporation or association.
- (809.) The same;—another Form; spe-

cial directions as to examination, and books and papers.

- (810.) Certificate of referee to refusal to answer.
- (811.) Affidavit in corroboration.
- (812.) Affidavit, order and undertaking, when necessary to sue in name of sheriff in aid of attachment.
- (813.) Bond to indemnify the sheriff on his levying an attachment on property in the possession of a third person.
- (814.) Undertaking necessary to hold goods in the hands of a carrier by water, acting in good faith.

IV. INTERVENTION OF THIRD PERSON CLAIMING THE PROPERTY.

A. *Property other than vessels.*

- (815.) Notice to sheriff of third person's claim to property levied on.
- (816.) Notice by sheriff to plaintiff, of claim to attached property (other than a vessel), and of calling jury to price of claim.
- (817.) Subpœna to witnesses before sheriff's jury.
- (818.) Subpœna *duces tecum*.
- (819.) Subpœna ticket.
- (820.) Oath of jurors on claim to property levied on.
- (821.) Oath of witness on claim to property levied on.
- (822.) Inquisition of jury upon claim to property levied on.
- (823.) Undertaking by plaintiff to indemnify sheriff for levying on property other than a vessel or cargo.

B. *Vessels.*

- (824.) Affidavit of claimant (or his agent) of a vessel attached.
- (825.) Order appointing appraisers of domestic or foreign vessel.
- (826.) Appraisal of vessel or interest therein.
- (827.) Oath of appraisers of vessel.
- (828.) Undertaking by third person claiming release of domestic vessel.

- (829.) Order releasing domestic vessel.
 (830.) Undertaking by plaintiff to prevent release of foreign vessel.
 (831.) Order releasing foreign vessel.
 (832.) Affidavit of defendant to obtain release of foreign vessel when attachment has been vacated, after undertaking given.
 (833.) Undertaking by defendant to obtain release of foreign vessel after attachment has been vacated, but plaintiff's undertaking has not been discharged.
 (834.) Order for sale of foreign vessel, where plaintiff's undertaking has not been discharged, nor he indemnified.
 (835.) Affidavit by joint owner, or his agent, to obtain sale of foreign or domestic vessel
- not duly claimed by third person.
- V. SALE AND PROCEEDS.
- (836.) Affidavit to obtain sale of foreign or domestic vessel attached and not duly claimed by any third person.
 (837.) Affidavit to obtain order for sale of perishable property or property expensive to keep.
 (838.) Notice of motion or order to show cause thereon.
 (839.) Order for sale of perishable property or property expensive to keep.
 (840.) Order that sheriff pay into court proceeds made on attachment.
 (841.) Order that sheriff pay over to defendant or his assignee surplus proceeds.

I. THE WARRANT.

Form No. 787.

Warrant of attachment.¹

THE PEOPLE of the State of New York to the sheriff of the [city and] county of [or, *except in the N. Y. City Court*,² to the sheriff of any county of said State] :

¹ Under *N. Y. Code Civ. Pro.*, § 638, application for a warrant of attachment may be made *ex parte* to a judge of the court, or to any county judge, *i. e.*, this application, although *ex parte*, must be made to a judge of the court in which the action is commenced, and not to a judge of any other court except a county court. Hence this rule controls the application of the rules as to *ex parte* orders laid down in Volume I, pp. 132, 133, and the restriction of applications to a county judge for ordinary *ex parte* orders to a judge of the county where the action is triable or the attorney resides, seems inapplicable. See *People ex rel. Roosevelt v. Edson*, 1 *How. Pr.*, N. S., 482, and *People v. Donohue*, 15 *Hun*, 446, as to whether a judge of the

Common Pleas of the City of New York is a county judge within the statute.

² *N. Y. Code Civ. Pro.*, § 338; applied in *Neely v. McGrandle*, *N. Y. Daily Reg.*, Dec. 19, 1883.

The ground must be recited briefly (*N. Y. Code Civ. Pro.*, § 641; *N. Y. Gen. Rules*, No. 13, of 1884); and it is well not to state it more narrowly than it actually is, as a motion to vacate can be opposed by new papers only on the ground recited in the warrant. Except for the express requirement of the statute and rule, the recital would not be necessary. *Mayor, &c. v. Genet*, 63 *N. Y.*, 646; *s. p.*, *Tessier v. Crowley*, 16 *Nebr.*, 369; 17 *id.*, 207; *King v. Board*, 7 *W. Va.*, 701.

WHEREAS, an application has been made to the undersigned by the plaintiff A. B., for a warrant of attachment against the property of Y. Z., defendant, and it satisfactorily appearing to me by the affidavit of M. N., verified the day of , 18 , and by the summons [and verified complaint in this action], that the action is commenced to recover a sum of money only, as damages, for breach of contract, express or implied, other than a contract to marry [*or, for wrongful conversion of personal property—**or, for an injury to personal property, in consequence of negligence—**or, fraud—**or other wrongful act*]; and that a cause of action therefor exists against said defendant, and in favor of the plaintiff, for the sum stated in the affidavit, of dollars [and interest from the day of , 18]; [*and if on contract, and that the plaintiffs are entitled to recover said sum over and above all counter-claims known to them*];

And that the defendant is a foreign corporation;

[*Or, and that defendant is not a resident of the State;*]

[*Or, and that defendant is a resident of the State, and has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent;*]

[*Or, and that defendant has removed, or is about to remove his¹—**or, its—property from the State, with intent to defraud his—**or, its—creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete his—**or, its—property, with the like intent;*]

And the plaintiff having also given the undertaking required by law;

NOW YOU ARE HEREBY COMMANDED to attach and safely keep so much² of the property within your county³ which the said defendant Y. Z. has [*or, if there are several, say, which the said defendants W. X. and Y. Z., or either or any of them have*], or which he [*or, they, or either or any of them*] may have at any time before final judgment⁴ in this action, as will satisfy the said plaintiff's demand of [with interest from the said day of , 18], with costs and expenses;

¹ See note to Form 779.

² As a means of ascertaining the amount of the fund, the sheriff may doubtless levy on the whole, although the statute, as now expressed, limits the warrant to a direction to attach and keep so much only as may be necessary.

³ A sheriff cannot execute an attachment out of his own county. *Matter of Tilton*, 19 *Abb. Pr.*, 50.

⁴ *Lynch v. Crary*, 52 *N. Y.*, 181; s. c., 14 *Abb. Pr.*, *N. S.*, 85; rev'g 34 *Super. Ct. (J. & S.)*, 461.

and that you proceed herein in the manner and make your return within the time prescribed by law.¹

WITNESS: Hon. [*here name any justice of the Supreme Court, if the cause in which the warrant is issued is in that court, adding:*] justice of our said court [*or, if the cause is in a Superior City Court, County Court, or N. Y. City Court, name any judge thereof, adding, judge of our said court*], at the County Court House [*or, the City Hall*] in _____, this [date of issue] day of _____, 18 ____.

[*Signature of judge,² and initials of title.*]

[*Signature and office address of*],

Attorney for plaintiff.

Form No. 788.

Warrant of attachment on the ground of wrongful conversion of public moneys.³

[*Address as in last Form.*]

WHEREAS, an application has been made to the judge signing this warrant, by the people of the State of New York, plaintiffs, for an attachment against the property of W. M. T., defendant, in an action for wrongfully obtaining money belonging to the county of New York, and upon such application, it duly appearing by [the verified complaint in this action, and by] affidavit, that a cause of action exists in said action in favor of the said plaintiffs against said defendant, for the recovery of _____, with interest thereon from the _____ day of _____, 18 ____; and the said affidavit specifying the amount of the said claim, and the grounds thereof; and that the said defendant has wrongfully obtained and received money and property belonging to the county of New York, and has, while holding a public office, wrongfully converted money belonging

¹ Return day need not be mentioned. *Genin v. Tompkins*, 12 *Barb.*, 265; *Westphal v. Sherwood* (69 *Iowa*, 364; s. c., 28 *Northw. Rep.*, 640).

As to the time of return, see *N. Y. Code Civ. Pro.*, §§ 23, 712, 3343.

² By *N. Y. Code Civ. Pro.*, § 641, the warrant must be subscribed by the judge and by the plaintiff's attorney; and it was so held previously. *Genin v. Tompkins*, 12 *Barb.*, 265. But the omission of the signature of

the attorney may be supplied by amendment. *Kissam v. Marshall*, 10 *Abb. Pr.*, 424.

[*Within ten days after granting of warrant, file affidavits. N. Y. Code Civ. Pro.*, § 639. *And within thirty days after granting of warrant serve summons personally or commence publication, if summons had not been previously served. Id.*, § 538.]

³ Substantially the Form used in *People v. Tweed*, 63 *N. Y.*, 194.

to the county of New York; and the said plaintiffs having also given the undertaking required by law:¹

NOW YOU ARE HEREBY COMMANDED that you attach and safely keep all the property of the said defendant W. M. T. within your county, or so much thereof as may be sufficient to satisfy the plaintiff's said demand of _____, with interest as aforesaid [*or, as expressed in Code of Civ. Pro.*, § 641, attach and safely keep so much of the property within your county as the said defendant W. M. T. has, or which he may have, at any time before final judgment in this action, as will satisfy the plaintiff's said demand], together with costs and expenses, and that you proceed hereon in the manner and make your return within the time prescribed by law.

[*Teste and signatures as in last Form.*]

II. LEVY AND CUSTODY.

Form No. 789.

Inventory of property attached.

[*Title of court and action.*]

The undersigned M. N., sheriff of _____ county, and O. P. and Q. R., two disinterested freeholders of said county, hereby certify that the following is a true inventory of all the property seized by² the said sheriff, on a warrant of attachment, issued in the above entitled action by G. H., a justice of the

Court [*or, county judge of the county of* _____], together with a statement of the books, vouchers and papers taken into the custody of said sheriff on said warrant, and the estimated value of each parcel of real property and of each article of personal property, and also a true statement of such articles of the personal property as are perishable, as the same has been appraised by us [*list of items of personal property, setting estimated value opposite each, and in case of real*

¹ As to the necessity, however, of such undertaking in actions by the people, or by other public bodies, see *N. Y. Code Civ. Pro.*, §§ 640, 1990.

² As to definiteness of description, and supplying defects by parole or by amendment, see *Laughlin v. Hawley* 9 *Colo.*, 170; s. c., 11 *Pacif. Rep.*, 46;

Sanford v. Pond, 37 *Conn.*, 588; *Silver Bow Mining, &c., Co. v. Lowery*, 5 *Mont.*, 618; s. c., 6 *Pacif. Rep.*, 62; *Vanderheyden v. Gary*, 38 *How. Pr.*, 367; *Pumphrey v. Rafferty*, 5 *Ky. L. Rep. & J.*, 765; *Moore v. Kidder*, 55 *N. H.*, 488.

property, a description of it, stating the estimated value of each parcel, or of the interest of the defendant therein].

[And we further certify that the said is perishable property.]

[Date.]

[Signatures.]

[File within five days after levy, in the office of the county clerk of the county where the property is attached.¹]

Form No. 790.

Oath of appraisers.

[Entitle in the cause, unless indorsed on the return.]

O. P. and Q. R., being severally duly sworn, each for himself says, that he will well and truly make a full and just inventory, and well and truly appraise the property of the defendant Y. Z. in the above entitled action, seized by the sheriff of the [city and] county of , by virtue of the warrant of attachment issued in said action, according to the best of his ability.

[Jurat.]

[Signatures.]

Form No. 791.

Return to attachment.²

[Venue.]

I, M. N., sheriff of the county of , hereby certify and return, that by virtue of the within attachment, I have seized and taken into my possession the property of the defendant within named, specified in the inventory hereto annexed, and appraised the property therein specified at the sums mentioned in the annexed inventory.

[Date.]

[Signature.]

¹ *N. Y. Code Civ. Pro.*, § 654. The attachment however is to be filed in the office of the clerk of the court (§ 639).

² See *N. Y. Code Civ. Pro.*, § 712, and *Rodgers v. Bonner*, 45 *N. Y.*, 379.

Notice to compel sheriff to return attachment may be adapted from Form 776, and see *McGinn v. Ross*, 11 *Abb. Pr., N. S.*, 20; 33 *Super. Ct. (J. & S.)*, 346.

Form No. 792.

Order requiring sheriff to make return.¹

[*Name of*] Court [*or, if court order*] At a special term [*dec.*
as in Form 493, p. 4
of this Volume].

Upon reading and filing the affidavit of A. T., whereby proof is made of the neglect of _____, sheriff of the county of _____, to return an inventory of the property attached by him under the warrant of attachment issued herein on or about the _____ day of _____; now on motion of A. T., attorney for plaintiff [*or, defendant*]:

ORDERED, that said sheriff return an inventory thereof [within ten days after service² of a copy of this order].

[*Date, and signature of judge, with initials of title.*]

[*Or, if court order*] Enter: [*signature of judge by initials of name and title.*]

Form No. 793.

Appointment of keeper.³

I hereby constitute and appoint you keeper of all [*designating the articles*], by virtue of a writ wherein _____ is plaintiff, and said _____, defendant. You are, therefore, authorized and required to safely keep the same in custody of the law until otherwise ordered by me.

[*Signature of*]

Sheriff.

[*Date.*]

[*Address.*]

Form No. 794.

Affidavit to obtain order under attachment to open debtor's safe deposit box.⁴

[*Title of court and action.*]

[*Venue.*]

M. N., of _____, being sworn, says:

That he is deputy sheriff of the [city and] county of _____,

¹ Under *N. Y. Code Civ. Pro.*, § 681, application for this order may be made by either party *ex parte* to the court or a judge thereof.

² See Volume I, p. 431.

³ From *Connor v. Parker*, 114 *Mass.*, 331; sheriff's duty to keep is stated in *N. Y. Code Pro.*, § 614.

⁴ This and the three following Forms are from *U. S. v. Graff*, 67

and as such had placed in his hands by the sheriff of said county for execution, on the day of , 18 , a warrant of attachment against the property of the defendant L. G., issued by of the court, bearing date said day of , 18 , on the application of the plaintiff, ; that in obedience to said warrant and the direction of said sheriff, deponent attempted to attach property of said defendant believed to be in safe No. , of the Co., of .

That for that purpose he proceeded on the morning of said day of , to the premises of said company, where, as he was informed by plaintiff's attorney, and verily believes, the defendants have rented safe or box No. , and have valuable property deposited therein. That deponent then and there served a copy of said warrant of attachment on M., the treasurer of said company, at the same time showing him said original warrant, and demanded entrance behind the iron grating in said premises which shut off the safes or lock boxes, of which said safe or box No. , is one, which was denied by said treasurer. That deponent then demanded access to, and the contents of, said safe or box No. , of said treasurer, which was denied. That said grating was securely fastened and bolted and said safe or box locked, and deponent was unable to enter behind the grating or open said safe without the consent of said treasurer or using physical force to break open said grating and safe. That deponent then demanded of said treasurer a certificate of the property of said defendant held by, deposited with or in the possession of said trust company, which was refused by said treasurer, and no information in regard thereto given by him to deponent.

Deponent says that for the above reason he has not, as yet, had physical possession of said safe or lock box No. , or its contents.

[*Jurat.*]

[*Signature.*]

Form No. 795.

Affidavit of attorney for same purpose.

[*Title of court and action.*]

A. T. being duly sworn, says :

That he is the attorney for the plaintiff in the above action.

Barb., 304; s. c., less fully, 4 *Hun*, 634.

Compare *Hall v. Brooks*, 89 *N. Y.*, 33; rev'g 25 *Hun*, 577; holding that

the court cannot by order require a third person to deliver to the sheriff the attached fund.

That summons was issued herein and delivered to the sheriff for service on the day of , 18 .

That thereupon attachment against the property of defendant was duly issued out of this court to the sheriff of said county for execution, bearing date the day of , 18 .

Deponent further says, that on day of 18 , an indictment was found against the defendant by the grand jury of the United States for the southern district of New York, in the second circuit, for smuggling goods into the port of New York, and about that time defendant left this city and took up his residence in Montreal, in Canada. That plaintiff's attorney endeavored to find said G., and in his endeavor to that end had communication with the United States consul at Montreal in regard to G., and upon the day of , 18 , received from said consul a telegram, dated Montreal the day of , 18 , stating that L. G. had executed a power of attorney to his wife, I. G., to withdraw certain deposits from company, of street in , number of safe or deposit, . That deponent verily believes that the safe or lock box No. , referred to in the affidavit of deputy sheriff M., in this action, is the identical safe referred to in said telegram and is rented by the defendant herein.

Deponent further says, that, owing to the inability of the sheriff to have access to said safe, the same is liable to be opened by the defendant or those acting under him at any moment, and the contents thereof abstracted, to the great injury of the plaintiffs and loss of their security herein.

That to enable the sheriff to have access to said safe and contents, the order of the court is requisite, and the same should be granted as soon as possible and within the time which would be required to apply for the same on regular notice of motion, and that a stay or injunction against any one but said sheriff having access to said safe, in the meantime, is required to protect plaintiff's interests.

Deponent further says, that the defendant herein has not yet been served with the summons herein, nor has his appearance been entered [and that no previous application, &c.; see p. 2].

[*Jurat.*]

[*Signature.*]

Form No. 796.

Order to show cause thereon.

[*Title of court and action.*]

On the annexed affidavit of M. N. and A. T., and the papers

filed and the proceedings had in this action, and on such further affidavits as the court may hereafter permit the plaintiffs to use on this motion,

Let the _____ company of _____, show cause, before a special term of this court, to be held at _____ in _____, on the _____ day of _____, 18 _____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why they should not give the sheriff of the [city and] county of _____ access to safe No. _____, of said company, and possession of the contents thereof, under the warrant of attachment herein, or why they should not deliver to said sheriff whatever property of the defendant, L. G., said company may have in its custody or possession, or deliver to said sheriff a certificate of such property, or why said sheriff should not break open said safe to obtain access to and possession of its contents, or why such other or further relief, as to the court may seem proper, should not be granted to said plaintiff and said sheriff in the premises.

And in the meantime, and until the determination by the court of the motion raised by foregoing order to show cause ;

ORDERED, that the _____ company, of _____, its officers and agents, be and they hereby are enjoined and restrained from permitting any person, except the sheriff of the [city and] county of _____, or his deputy acting under the attachment heretofore issued in this action, to have access to or obtain possession of any portion of the contents of safe or lock box No. _____, of said company, or any safe of said company leased to or used by the defendant herein, L. G.

[Signature of judge.]

Form No. 797.

Order to open safe deposit box.

[Title and recitals as usual.]

ORDERED, that the motion to vacate the attachment herein be and the same is hereby denied ; and the sheriff of the [city and] county of _____, is hereby directed to open the tin box now in his custody and possession, not permitting counsel or agents of either party to this action to be present, and safely keep all property and evidence of debt liable to attachment therein found, and deliver to the defendant, or his authorized agent, all private papers, memoranda, invoices, and cor-

respondence, if any be found therein, and all articles not liable to attachment.

And the order made herein on the day of , 18 , directing the company of , to show cause why the sheriff should not have access to safe No. , of said company, and possession of the contents thereof, under the said attachment issued in this action, or why said company should not deliver to the sheriff whatever property of the defendant, L. G., said company may have in its possession or custody, or why said company should not deliver to the sheriff a certificate of such property, or why said sheriff should not break open said safe to obtain access to and possession of its contents, or why such other relief as to the court might seem proper should not be granted to the plaintiffs and said sheriff, having come on duly to be argued, it is, after reading and filing the additional papers used on the last mentioned motion, namely, said order to show cause and the affidavits of J. M., and E. H. S., respectively, on which the same was obtained, and the further affidavit of J. M., dated the day of , 18 , used on behalf of plaintiffs, and the affidavit of W. G. L., president of the company,

FURTHER ORDERED, that the sheriff of the [city and] county of , be and he hereby is directed to open safe No. , in the vault of said company, at No. street, in , by such means as he finds necessary, with least injury thereto possible, not permitting counsel or agents of either party to this action to be present; and that he take from said safe and safely keep all property and evidence of debt liable to attachment herein found therein, and deliver to the defendant, or his authorized agent, all private papers, memoranda, invoices, and correspondence, articles and papers not liable to attachment, if any there be, found in said safe.

[*Signature of judge.*]

Form No. 798.

Notice of attachment to bind real property.¹

[*Title of court and action, stating names of all the parties.*]

• NOTICE IS HEREBY GIVEN, that in an action which has been commenced in this court, by the above-named plaintiff, against

¹ Required by *N. Y. Code Civ. Pro.*, § 649, subd. 1, § 1217. The clerk filing, as priority may depend on

the above-named defendant, upon [*here briefly indicate nature of cause of action,¹ for instance*] a promissory note made by the defendant, a warrant of attachment against the property of the defendant Y. Z. was duly issued on the day of , 18 , and delivered to the sheriff of county for execution. The amount of the plaintiff's claim, which is stated in the said warrant, is dollars [with interest from the day of , 18], and expenses and costs. The real property levied upon, under said warrant of attachment, is [the defendant's interest in premises²] described as follows: All that certain lot [*giving particular description, as in a conveyance*].³ [Signature and office address of]

[Date.]

Attorney for plaintiff.

[*File,⁴ with direction to clerk as to indexing. See p. 29, of this Vol.*]

III. PROPERTY, &c., IN HANDS OF THIRD PERSON.

Form No. 799.

Certificate by sheriff to copy of attachment; and notice to third person of levy of property in his hands. General Form.⁵

I hereby certify the within to be a true copy of the original warrant of attachment, as issued to me in the within mentioned

that. Compare *id.*, §§ 649 and 697; and Vol. I, p. 85; *Burkhart v. McClellan*, 15 *Abb. Pr.*, 243, n.; *Rodgers v. Bonner*, 45 *N. Y.*, 379; *aff'd* 55 *Barb.*, 9; *Wilson v. Kelly*, 31 *Hun.*, 75; s. p., *Lamont v. Cheshire*, 65 *N. Y.*, 30.

¹ See *Briggs v. Hodgdon*, 78 *Maine*, 514; s. c., 7 *Atlan. Rep.*, 387.

² Any assignable interest is bound. *N. Y. Code Civ. Pro.*, § 645; *Sheridan v. House*, 4 *Abb. Ct. App. Dec.*, 218, and *cas. cit.* in note.

³ The notice should include only the property actually to be affected by the judgment, and should include only the property attached. *Fitzgerald v. Blake*, 42 *Barb.*, 513.

If it includes property not attached it is inoperative as to such property. *Id.*

A notice which merely described

the property attached as "all the real property of the defendant B, or in which she may have an interest, situate in Chenango county,"—*Held*, to be a nullity. *Jaffray v. Brown*, 17 *Hun.*, 575. As to effect of omitting description, see also *Warren v. Dick*, 17 *Nebr.*, 241; s. c., 22 *Northwestern Rep.*, 462.

⁴ See *Davis Sewing Mach. Co. v. Whitney* (*Mich.*, 1886); s. c., 28 *Northw. Rep.*, 674.

⁵ The sheriff's neglect to serve copies on the person in charge is an irregularity not affecting the jurisdiction; and leave to serve *nunc pro tunc* may be given to meet a motion to vacate the attachment on that ground. *Lawrence, J.*, *Davis v. Brooks*, not reported; s. p., *Adams v. Speelman*, 39 *Hun.*, 35.

As to the effect of leaving a copy

action, and that the attachment of which the within is a copy, is now in my hands, and that by it I am commanded to attach all¹ the property, real and personal, including money and bank notes [and things in action] of the within named defendant Y. Z. [*or, if there are several, say, of the defendants W. X. and Y. Z., or either or any of them*], within my county (except articles exempt from execution), which he has [*or, which they or either or any of them have*], or which he [*or, they or either or any of them*] may have at any time before final judgment in the action, and to take into my custody all books of account, vouchers, and other papers² relating to such personal property, debts,³ credits and effects, remittances and advances of said defendant [*or, said defendants, or either or any of them*],

of the warrant, in case of property, &c., in the hands of a third person, without the notice, see *Miles v. Brown*, 38 *N. Y. Super. Ct. (J. & S.)*, 400.

In support of the general principle of attaching goods or credits in the hands of third persons, by a simple service of a notice, see *Miller v. U. S.*, 11 *Wall.*, 268, 298.

¹ See note to Form No. 787, and to Form 801.

² This language (taken from 2 *R. S.*, 3, § 8) was held not to include correspondence. *Hergman v. Dettlebach*, 11 *How. Pr.*, 46.

³ As to what debts may be attached, see the following cases:

Wehle v. Conner, 83 *N. Y.*, 231 (moneys of defendant collected on execution against third person in sheriff's hands; but no formal notice on levy is necessary in such a case). Compare 22 *Am. L. Reg., N. S.*, 665, 671.

Kelly v. Roberts, 40 *N. Y.*, 432. A debt due defendant may be attached notwithstanding a promise made to defendant by the debtor to pay it to a third person, there being no trust or agency for the third person, and the latter having no notice of the promise; s. p., *Kelly v. Babcock*, 49 *N. Y.*, 318. Compare *Freund v. Importers & Tr. Nat. Bk.*, 12 *Hun*, 537, 540.

But otherwise where a trust has been created. *Rogers Loco. Works v. Kelly*, 19 *Hun*, 399; aff'd, 88 *N. Y.*, 234; s. p., *Hurd v. Farmers' Loan & Trust Co.*, 63 *How. Pr.*, 314.

But if the money is liable to be recalled at any time by the depositor (defendant) it is subject to attachment.

Lynch v. Crary, 34 *Super. Ct. (J. & S.)*, 461; rev'd on another point, 52 *N. Y.*, 181.

The certification of a check drawn upon a bank does not exempt the deposit from attachment while the check is outstanding in the drawer's hands, unless shown to have come into the hands of a *bona fide* holder. *Gibson v. Nat. Park Bank*, 98 *N. Y.*, 87.

As to what "property, debts, credits and effects" may be reached, see the following cases:

Johnston v. Stimmel, 89 *N. Y.*, 117; aff'g 26 *Hun*, 435 (proceeds of sale of mortgaged premises), compared with *Trotter v. Lehigh Zinc & Iron Co. (N. J., 1886)*, 2 *Central Rep.*, 737 (money ordered to be paid into court).

Hall v. Sampson, 35 *N. Y.*, 274; *Michelson v. Fowler*, 27 *Hun*, 159 (mortgagor's interest in chattel in his possession).

A legacy due from an executor may be attached. *Cummings v. Garvin*, 65 *Me.*, 301.

Also money deposited with clerk of court in lieu of undertaking. *Dunlop v. Patterson F. Ins. Co.*, 74 *N. Y.*, 145. Or in lieu of bail, though obtained from third person. *Salter v. Weiner*, 6 *Abb. Pr.*, 191. Compare 18 *Abb. N. C.*, 323, note, where the cases are collected.

As to what may not be:

Goldzier v. Young, 1 *City Ct.*, 84 (money in receiver's hands).

Otherwise of a receiver of a foreign corporation appointed in the State of its creation. *Dunlop v.*

together with all evidences of title of said defendant [*or*, of said defendants, or either or any of them], to such real property; and that all such property,¹ debts, credits and effects, and all rights and shares of stock, with all interest and profits thereon, and all dividends thereon or therefrom [and all bonds, promissory notes, and other instruments for the payment of money²] of the said defendant [*or*, of said defendants, or either or any of them] now in your possession or under your control, are, and those which may come into your possession, or under your control, will be liable to said warrant of attachment, and are hereby attached by me; and you are hereby required to deliver all such moneys, bank notes, books, vouchers, papers, debts, credits, effects, evidences of title to real property, shares of stock, interest, profits, and dividends thereon [and all bonds, promissory notes and other instruments for the payment of money], and all property capable of manual³ delivery, into my custody without delay. And I hereby require you to furnish me with a certificate, as required in that behalf by the Code of

Patterson F. Ins. Co., 74 *N. Y.*, 145.

Remmey v. Gedney, 1 *City Ct.*, 28 (salary of public officer). See also *Columbian Institute v. Cregan*, 11 *Civ. Pro. R.*, 87, and 7 *Abb. N. Y. Dig.*, supp., p. 135.

Lawrence v. Bank of Republic, 35 *N. Y.*, 320; *Matter of True*, 4 *Abb. N. C.*, 90; s. c., as *Matter of Freely*, 55 *How. Pr.*, 386; *Matter of Foley*, 10 *Daly*, 4; *Throop Grain Cleaner Co. v. Smith*, 3 *How. Pr.*, *N. S.*, 290 (proceeds of sale of assigned property).

Money of a debtor, deposited in a bank by another in the name of the latter, to whom the bank has given credit therefor, is not subject to attachment. *Greenleaf v. Mumford*, 4 *Abb. Pr.*, *N. S.*, 130; s. c., 50 *Barb.*, 543; 35 *How. Pr.*, 148.

¹ Shares owned by a non-resident defendant in the stock of a foreign corporation cannot be levied on under an attachment, though the officers of the corporation are within the State, engaged in carrying on the corporate business here. *Plimpton v. Bigelow*, 93 *N. Y.*, 592; s. c., 13 *Abb. N. C.*, 173; rev'g 12 *id.*, 202; 29 *Hun.*, 362, which rev'd 11 *Abb. N. C.*, 180; s. c., 63 *How. Pr.*, 484. But see *Winslow v. Fletcher*, 53 *Conn.*, 390; s. c. 4 *Atlan. Rep.*, 250; *People's Bank v. Gridley*, 91 *Ill.*, 457; s. c., 8 *Reporter*, 76.

Nor bonds executed by a railroad company, and in the hands of its agents, to be negotiated for its use. *Coddington v. Gilbert*, 17 *N. Y.*, 489; aff'g 5 *Duer*, 72; 2 *Abb. Pr.*, 242.

² A check being an "instrument for the payment of money," must be attached by a manual seizure. *Casper v. Wallace*, 50 *Super. Ct. (J. & S.)*, 147; aff'd in 101 *N. Y.*, 649.

³ The expression "property incapable of manual delivery to the sheriff," is applicable to property not only which is such in its nature, but to that which had become so from its peculiar position, as where it is under pledge or consignment, with advances made upon the property. *Clarke v. Goodridge*, 41 *N. Y.*, 210; s. c., 44 *How. Pr.*, 226; rev'g 54 *Barb.*, 78.

Property of the principal in the proceeds of sales and collections in his agents' hands is "property incapable of manual delivery." *Greentree v. Rosenstock*, 61 *N. Y.*, 583; aff'g 34 *Super. Ct. (J. & S.)*, 505. See also *Brownell v. Carnley*, 3 *Duer*, 9 (goods in custom house).

As to debts evidenced by negotiable security, and how the attachment is to be made effectual, see *Anthony v. Wood*, 96 *N. Y.*, 180; *Bills v. Natl. Park Bank*, 89 *N. Y.*, 343; rev'g 29 *Hun.*, 239; 47 *N. Y. Super. Ct. (J. & S.)*, 302.

Civil Procedure, of any rights, shares, debts or other property of said defendant [*or, of said defendants, or either or any of them*], incapable of manual delivery, held by you. And in default hereof you will be liable to the examination and attachment in such case provided by law. [*Or add, I especially attach—specifying particular property—of said defendant. See next three Forms.*]

[*Date.*]

[*Address.*]

[*Signature of*], Sheriff of the [city
and] county of .¹

STATEMENTS OF PARTICULAR PROPERTY ATTACHED, SUIT- ABLE TO BE INSERTED IN THE FOREGOING FORM.²

800. *Interest in estate of decedent.*—The right, title and interest of said W. F. D. in and to a certain sum of money, to wit, the sum of \$40,000, a legacy due to said W. F. D. from the estate of C. D., deceased, under his will admitted to probate the day of , 18 , by the surrogate of New York county, and under which said will you have qualified as executor; and also all the right, title and interest of the said W. F. D. in and to all moneys which he, said W. F. D., is entitled, or may hereafter be entitled, to receive from the said estate by way of interest; and also all the right, title and interest of the said W. F. D. as residuary legatee under the said will [*or, as heir or next of kin in said estate*], and also in addition thereto, all property such as is mentioned in the foregoing general notice.

801. *Funds in hands of brokers.*—And I further give you notice, that any and all stocks, bonds and gold and margins in the possession and control of yourself or of your firm, or of any member thereof, belonging to the defendants, or to any one or more of them, or in which, or the proceeds whereof, the defendants, or any one or more of them, are in any way interested, whether the said stocks, bonds and gold stand in the name of the defendants, or of any of them, or of any other person or persons, and any and all accounts of the defendants, or any one or more of them, with yourself, your firm, or any member thereof, or in which the said defendants, or any one or more of them, are in any way interested, whether such accounts are kept in the name of the said defendants, or of any of them, or of any other person or persons, or in which the said defendants, or any of them, are in any way interested, and any and all balances of accounts which shall or hereafter may result in favor of the said defendants, or of any of them, on a settlement of accounts with yourself, your firm, or of any member thereof, are liable to said warrant of attachment, and are hereby attached by me.

802. *The same. Another Form.*—I further give you notice, that besides other property indicated in the general notice of attachment heretofore served

¹ Signature by deputy sheriff is sufficient. *Gibson v. Natl. Park Bank*, 98 *N. Y.*, 87.

² Unnecessary in New York. *O'Brien v. Mech., &c., Ins. Co.*, 56 *N. Y.*, 52. That decision was doubted on principle, but followed, as rendering the remedy more effectual, in

Carter v. Koshland, 12 *Oreg.*, 492; s. c., 8 *Pacif. Rep.*, 556. If any part of the property is particularized, it is desirable to particularize all, or to show expressly that general words are intended to cover additional property. See 56 *N. Y.*, 56.

on you, the following named stocks, securities and gold coin, in the possession or control of your firm, belonging to the defendants, to wit: 7,000 U. Pac. [and so on], and also all property, right, interest and equity of the defendants in said stock, securities and gold coin, have been and are attached by me.

Form No. 803.

Certificate admitting possession of funds of the debtor.¹

[State facts, for instance, thus:]

[Copy of account current.]

We certify that we are carrying for and on account of W., F. & S., of _____, the stock specified in this account, and also \$51,945 05 gold coin; and that W., F. & S. are indebted to us, on account of said stocks and gold, in the sum of \$266,067 24.

[Date.]

[Signature.]

To M. N.,
Sheriff of the [city and] county of _____.

Form No. 804.

Certificate of no property, &c.¹

[Title of court and action.]

I, C. W. D., hereby certify that no property whatever, of any description, of the defendant Y. Z., and no debt owing to said Y. Z. was, at the time of the service of the attachment therein on me, nor at any time since has been, held by me for the benefit of said Y. Z.; and that no such property or debt of said Y. Z. was then, or at any time since has been, in my possession or under my control.

[Date, &c., as in last Form.]

¹ The certificate, although evidence against the person giving it, when sued thereon, is not conclusive upon him in such an action. *Almy v. Thurber*, 12 *Abb. N. C.*, 459; *Wright v. Cabot*, 47 *N. Y. Super. Ct. (J. & S.)*, 229; *s. c.*, 89 *N. Y.*, 570.

The sheriff is not bound by such

certificate, but may attach the property described by the certificate and all property liable to attachment in the possession of the party. *O'Brien v. Mechanics' & Traders' F. Ins. Co.*, 56 *N. Y.*, 52.

² See note to last Form.

Form No. 805.

Certificate claiming lien, but denying the defendant's ownership.¹

WE HEREBY CERTIFY that there were consigned to us in the name of the defendant one hundred and twenty-five bales of cotton, upon which before the service of said attachment, we had advanced two thousand and fifty dollars, for which with interest thereon and expenses we have a lien on said consignment, and we claim such lien.

We further certify that we are informed that said cotton was not really the property of defendant, but was owned otherwise than by him, subject to our said lien. Further, that on the instant we sold said cotton to be delivered on the instant, but the price cannot be determined until after delivery.

[*Date, &c., as in last Form but one.*]

Form No. 806.

Affidavit to falsity of certificate, or refusal to make certificate on which to move for examination.²

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. I am the plaintiff [*or, one of the plaintiffs*] in this action [who constitute the firm of B. & C., of this city].

II. On the day of , in company with A. T., my attorney in this action, I called on H. F. [who has been examined herein], at his office, No. street, in the city of , when the following conversation was had between him and me, in reference to his refusal to accept a draft for \$, drawn on him by the defendant B., to the order of my

¹ A bailee having a lien for an amount exceeding the value of the goods, does not forfeit his lien by certifying in good faith that he holds no goods of the defendant. *Bank of Mut. Redemp. v. Sturgis*, 9 *Bosw.*, 660.

² Sustained in an unreported case (N. Y. 1877) as sufficient grounds alike

for an order to answer or to punish for contempt.

An application for examination on the ground that no certificate had been given, not sustained, where a certificate had been given, which was objected to as defective. *Gray v. Solis*, 2 *Month. L. Bul.*, 12.

said firm, viz.: After a statement by said H. F., to the effect that he had shipped goods to the defendant on joint account, for which defendant had not accounted, I asked him: "Do I understand that you claim your shipments there, as liens against these here?" To which he answered: "No. The facts are, I have made two shipments to Mr. B., for which I have not yet received account sales. I have received from him these two consignments of champagne and goat skins, which I have not yet been able to sell, owing to the condition of the market, and until they are sold I have not, therefore, any funds of Mr. B. in my hands to pay it with."

[*If application is made ex parte, state condition of cause; and as to previous application, see p. 2, of this Vol.*]

[*Jurat.*]

[*Signature.*]

Form No. 807.

Order to appear and be examined as to property of debtor under attachment.¹

[*Name of*] Court [*or, if a court order*] At a special term [*&c., as in Form No. 493, p. 4*].

It appearing to me [*or, to this court*] by the affidavit of M. N. [*or, by the certificate of M. N., sheriff of the county of*], and the papers therein referred to as on file herein,² that the sheriff of the county of [*or, said sheriff*], with a warrant of attachment against the property of Y. Z., the defendant in this action, has applied to * O. P. for the purpose of attaching property of said defendant, held by said O. P. [*or, a debt owing to the defend-*

¹ By *N. Y. Code Civ. Pro.*, § 651, application for the order must be made to the court in which the action is brought, or to a judge thereof, or to "the county judge of the county to which the warrant is issued." The application being *ex parte* can, if in the Supreme Court, be made, it seems, to court or a judge thereof in any part of the State. Compare this section with Vol. I, pp. 131-133, 207.

But this section excludes Superior Court judges in Supreme Court actions, and as to county judges, allows application only to the county judge of the county to which the warrant is issued.

As to the remedy by action, see *Scott v. Morgan*, 94 *N. Y.*, 508.

² Such papers may be considered. *Matter of Crary*, 9 *Civ. Pro. R.*, 168.

ant by said O. P.], and that said O. P. refuses to furnish said sheriff with a certificate designating the amount and description of the property held by said O. P. for the benefit of the defendant [*or*, the amount of the debt owing by said O. P. to the defendant]; [*or*, has furnished a certificate as to the property—*or*, debt—so sought to be attached, which there is reason to believe is false;] now, on motion of A. T. attorney for plaintiff.

ORDERED, that O. P., of No. street, in the city of , appear and attend before me [*or*, before this court—*or*, before R. F., Esq., of , who is hereby appointed referee for the purpose—at¹ the office of , No. street] in , on the day of , 18 , at o'clock in the noon [*or* at such time as said referee shall name], and submit to an examination under oath concerning the property of the defendant or any debt or demand, owing from him to said defendant, sought to be affected by the attachment herein.

[Personal order of this service on said , on or before the day of , shall be sufficient.]

[*Authentication as in Form 491, p. 3, of this Vol.*]

Form No. 808.

The same;—in the case of an officer of a corporation or association.

[*As above, substituting for what is between the * * :*] O. P., President of the Bank, situate at , for the purpose of attaching the rights or shares which such defendant may have in the stock of said bank, together with the interest and profits thereon; and that the said O. P., president of the said bank, refuses to furnish said sheriff with a certificate designating the number of shares of the defendant in the stock of said bank, with any dividend or incumbrance thereon [*or*, the amount and description of any deposit or other property held by said bank for the benefit of said defendant].

¹ It must be a place within the county to which the warrant is issued. *N. Y. Code of Civ. Pro.*, 651.

Form No. 809.

The same;—another Form; special directions as to examination, and books and papers.

[*May insert directions as follows:*] to submit to an examination under oath concerning the holding or having in their possession or control at the time of the issue and levy of the attachment herein or in the possession or control of any of them, any property of the defendant, Y. Z., and concerning the amount, nature and description of the same and of the interest of the defendant therein and for whose benefit the same is held, and their and each of their doings therewith, and all particulars concerning the same, and concerning the truth or falsity of the certificate dated , 18 , and by them delivered to the sheriff herein; and that said O. P. have and produce then and there all books, accounts, writings, memoranda, whether by said defendant or by themselves, showing any of the matters hereinbefore referred to, and particularly all the books of said defendant, Y. Z., which were delivered to said O. P., at or about the day of , 18 , or since then in any manner referring to or showing the accounts assigned or claimed to be assigned to said O. P., at or about that date.

Form No. 810.

Certificate of referee to refusal to answer.¹

[*Title of court and action.*]

To the honorable the Court:

The undersigned, the referee before whom the examination of H. F. was, by order of Mr. Justice , bearing date the day of , 18 , directed to proceed, do hereby certify, at the request of the attorney for the plaintiffs, that the annexed paper writing, purporting to be minutes of the proceedings before me, under said order, correctly set forth the said proceedings had to this date.

[*Date.*]

[*Signature of*],
Referee.

¹ If desired to punish for contempt, take the referee's affidavit.

The remedy for refusal to *deliver*, is an action, *Hall v. Brooks*, 89 *N. Y.*, 33, or supplementary proceedings on

the judgment. He cannot be ordered, in this proceeding to deliver, *id.*, nor to make a certificate if he has refused to make one. *Buckingham v. White*, 25 *Hun*, 441.

Form No. 811.

Affidavit in corroboration.

[*Title of court and action.*]

[*Venue.*]

A. T., being duly sworn, says:

I. I am the attorney for the plaintiffs in this action.

II. I was present and conducted the examination of H. F. in this action, before R. F., Esq., the referee appointed for that purpose by the order of Mr. Justice _____, bearing date the _____ day of _____, 18 ____.

III. I have read the foregoing minutes of the proceedings in that examination, and know the contents thereof, and therein are correctly set forth the whole of said proceedings.

IV. The said H. F. did, on the _____ day of _____, as set forth in the said minutes, refuse to answer the questions numbered _____, contained in folios _____ thereof, although then and there directed and required by the said referee to answer the same.

V. I have read the foregoing affidavit of J. R. R., and know the contents thereof, and said affidavit is true to my own knowledge, so far as it relates to interviews had in my presence with said H. F.

VI. [*If an order to show cause is asked, state reason, for instance:*] An order to show cause is necessary to permit the examination to be continued on the _____ day of _____, to which day the examination stands adjourned [*and state condition of the cause, and as to previous application; see p. 2*].

[*Jurat.*]

[*Signature.*]

Form No. 812.

[*For affidavit, order and undertaking, when necessary to sue in name of sheriff in aid of attachment, see Vol. I, p. 555, &c.*]

Form No. 813.

Bond to indemnify the sheriff on his levying an attachment¹ on property in the possession of a third person.

[*For penal clause see Volume I, pp. 69 and 70.*]

WHEREAS, in a certain action pending in the Court of _____, wherein the above bounden A. B. [with C. D.] are plaintiffs, said plaintiffs did cause to be issued * under the hand of the Hon. J. K., one of the justices of said court, an attachment against the property of Y. Z., defendant, which attachment has been issued, directed and delivered to the said [name of sheriff], as such sheriff, requiring him to attach and safely keep all the property of the said defendant within his county, or so much thereof as might be necessary to satisfy the plaintiff's demand of _____ dollars, together with interest and costs.

And, whereas, certain personal property, that appears to belong to the said defendant Y. Z., † is claimed by some other person or persons,

NOW, THEREFORE, the condition of the above obligation is such, that if the above bounden obligors shall well and truly save, keep and bear harmless, and indemnify the said [name of sheriff], and all and every person and persons aiding and assisting him in the premises, of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, attachments, fines, special proceedings and executions, that shall or may at any time arise, come, accrue, or happen to be brought against him, them, or any of them, for or by reason of the § levying, attaching and making sale under or by virtue of such attachment of all or any personal property which he or they shall or may judge to belong to the said debtor, or for or by reason of the levying and making sale of any such or any other personal property, under or by virtue of any execution which may be issued in the said action above mentioned, ¶ or for or by reason of entering any ship or vessel, shop, store, building or other premises, for the taking of any such personal property, or for or by reason of the defense of any action or proceeding which may be so brought against him, them, or any of them, then this obligation [*&c.*; see Vol. I, p. 70].

¹ This is the usual form. Compare the sheriff of the county of New York Form 821 and note. By a statute may be absolutely discharged. See adopted since the above was in type, EXECUTION.

[*Acknowledgment as in Form 495, p. 6; Affidavit of sufficiency, if required, as in Forms 496-498, pp. 6 and 7; Approval, if required, as in Form 499, p. 7.*]

Form No. 814.

Bond necessary to seize goods in hands of carrier who has issued bills of lading.¹

[*Penal clause; see Vol. I, pp. 69, 70.*]

Whereas, in an action in the court of , by A. B. against Y. Z., an attachment has been issued [*continue as in next Form, from the * to the †*]:

Now, therefore, the condition of this obligation is such that if the said A. B. or the above-bounden obligors shall well and truly save, keep and bear harmless, and indemnify said [*owner and master*] against the consequences of any bill or bills of lading that said [*owner*] or [*master*] may have signed for said goods, or any part thereof, then this obligation [*&c.; see Vol. I, p. 70*].

Form No. 814a.

Undertaking necessary to seize goods in the hands of a carrier by water, acting in good faith.¹

[*Title of court and action.*]

WHEREAS, an attachment has been issued in the above entitled action, * and delivered to the sheriff of the [city and] county of , against the property of the defendant Y. Z., and the plaintiff has caused, or desires to cause, the same to be levied upon goods of the defendant Y. Z., which have been shipped at , within this State, for transportation, without reshipment or transhipment in this State, to a port or place without the State, to wit, , upon a vessel, to wit, the , whereof M. N. is owner [*or, master*]: †

Now, THEREFORE, A. B., the plaintiff [*or, the agent or attorney of the plaintiff*] in the said action² [*stating occupation and residence of signer, as in other cases*], and C. D., of No. street, in the town of , and county of , in the State of New York [merchant], do hereby jointly and severally undertake to and with said [*owner or master*], pursuant to the statute, in the sum of dollars, to pay to the said [*owner or master*] all the expenses, damages and charges which may be incurred by him, or to which he may be

¹ See *Campbell v. Conner*, 70 N. Y., 424; aff'g 41 Super. Ct. (J. & S.) 459; N. Y. Code Civ. Pro., §§ 652, 653. Both securities may be required, or one undertaking to the effect of both. ² N. Y. Code Civ. Pro., § 652.

subjected, for unlading the goods from the vessel, and for all necessary detention of the vessel for that purpose.

[*Date.*]

[*Signatures.*]

[*Acknowledgment as in Form 495, p. 6 of this Vol.; Affidavit of sufficiency, as in Forms 496-498, pp. 6 and 7; Approval,¹ as in Form 499, p. 7; Justification, if required, as in Volume I, p. 482.*]

IV. INTERVENTION OF THIRD PERSON CLAIMING THE PROPERTY.

A. PROPERTY OTHER THAN VESSELS, &C.

Form No. 815.

Notice to sheriff of third person's claim to property levied on.¹

[*Title of court and cause, if known.*]

Please take notice, that the [wagon] and other property this day attached [*or, levied on*] by you in the above entitled action is * claimed by O. P., of _____, as his property, and is not the property of the defendant in the above entitled action.

[*Signature and office address of*],

[*Date.*]

Attorney for [*claimant*].

[*Address*] To the Sheriff of _____.

Form No. 816.

Notice by sheriff to plaintiff, of claim to attached property (other than a vessel),² and of calling jury to try such claim.

[*Title of court and action.*]

Take notice, that O. P. makes claim to the property levied⁴

¹ Approval must be by a judge of the court or a county judge of the county wherein the vessel is situated, or in New York city, by a judge of a Superior City Court there. *N. Y. Code Civ. Pro.*, § 652.

² *N. Y. Code Civ. Pro.*, § 657. Where an affidavit is required it may easily be adapted from Form 758,

p. 260. For the affidavit in case of a vessel, see Form 824. For the effect of a statute requiring an affidavit, &c., see *Tyler v. Hanscom*, 28 *Minn.*, 1; *Tuttle v. Wheaton*, 57 *Iowa*, 304; 10 *Northwestern Rep.*, 748.

³ This Form and Nos. 818 to 820 are from *Crocker on Sheriffs*, 562, &c.

⁴ The sheriff has no right to im-

on by me under the attachment issued out of the Court
 against the property of Y. Z. in the above entitled action, and
 that I shall proceed to try the claim of the said O. P. before a
 jury to be summoned by me for that purpose at , on the
 day of , 18 .

[*Date.*] [Signature],
 Sheriff of county.

[*Address to claimant, and attorneys for plaintiff and defend-
 ant.*]

Form No. 817.

Subpœna to witnesses before sheriff's jury.¹

The People of the State of [New York],² to [*naming
 witnesses*], greeting :

We command you, that all business and excuses being laid
 aside, you [and each of you] appear and attend before the
 undersigned, sheriff of the [city and] county of , at his
 office * in the County Court House [*or, City Hall*], in ,
 in the said county, on the day of , 18 , at
 o'clock in the noon, to testify and give evidence on the
 part of O. P., on the trial of the validity of a claim interposed
 by O. P., of title to [*or, of the right of possession of*] certain
 goods or effects seized by said sheriff as the property of Y. Z.
 by virtue of a warrant of attachment, in an action in the
 Court, between A. B. and Y. Z. [*or, if the subpœna is
 addressed to a party, say, between you and—name of adverse
 party*]. † And for a failure to obey, you will be deemed guilty
 of a contempt of court, and liable to pay all loss and damages
 sustained thereby to the person aggrieved, and forfeit fifty
 dollars in addition thereto.³

WITNESS, Hon. [*here name any justice⁴ of the Supreme
 Court if the action is in that court, adding*], justice of our said
 court [*or if in a Superior City Court, City Court of N. Y.,*

panel a jury to try the validity of a
 claim, except where the goods have
 been levied upon. *N. Y. Code Civ.
 Pro.*, § 657; *Halben v. Reilly*, 9 *Daly*,
 271.

application of either party to the trial.
N. Y. Code Civ. Pro., § 108.

² *Id.*, § 22.

³ *Id.*, § 855.

⁴ *Id.*, § 22.

¹ To be issued by the sheriff on

or a County Court, name any judge thereof, adding, judge of our said court], at _____, the _____ day of _____, 18 ____¹,
 [Signature of _____], Sheriff of the [city
 and] county of _____².

[Signature and office address of _____],
 Attorney for [party subpoenaing the witness].

Form No. 818.

Subpœna duces tecum.

[As in last Form, inserting at the †:] And you are hereby required to bring with you, and then and there produce [here describe the book or paper].

Form No. 819.

Subpœna ticket.

By virtue of a writ of subpœna, to you directed, and herewith shown to you, you are commanded, that all business and excuses laid aside, you appear and attend before M. N., the sheriff of the [city and] county of _____, at his office [continue as in Form 817, from the * (with the addition contained in Form 818, if inserted), and stopping with the word "thereto," before the teste].

By the Sheriff.

[Date.] [Name and office address of _____],
 Attorney for [party subpoenaing].
 [Address to witness.]

Form No. 820.

Oath of jurors on claim to property levied on.

You and each of you do swear that you will well and truly try the claim of O. P. to the property levied on by the sheriff of _____ county, under the attachment in favor of A. B. against Y. Z., and true inquisition make according to the evidence, so help you God.

¹ N. Y. Code Civ. Pro., § 22.

² *Id.*, § 108, subd. 2; *id.*, § 854. Omission of seal is not fatal (*id.*, §§ 23, 24) in a court of the State.

Form No. 821.

Oath of witness on claim to property levied on.

You do swear that the evidence you shall give to the jury, touching the claim of O. P. to the property levied on by the sheriff of _____ county, under the attachment in favor of A. B. against Y. Z., shall be the truth, the whole truth, and nothing but the truth, so help you God.

Form No. 822.

Inquisition of jury upon claim to property levied on.

[*Title of court and action.*]

The undersigned, being a jury summoned and sworn by the sheriff of the [city and] county of _____, to try the claim of O. P. to the property levied on by the said sheriff under the attachment herein in favor of A. B. against Y. Z., to wit [*specifying the property*], do upon our oaths say that the title to the said property was [*or, was not*] in the said O. P. at the time of said levy.

IN TESTIMONY WHEREOF we have hereunto set our hands and seals, this _____ day of _____, 18 ____.

[*Signatures and seals of*],
Jurors.

Form No. 823.

Undertaking by plaintiff to indemnify sheriff for levying on property other than a vessel or cargo.¹

[*Title of court and action.*]

WHEREAS, an attachment has been issued in the above entitled action in favor of the above-named plaintiff A. B. against the property of the above-named defendant Y. Z., under which M. N., sheriff of the [city and] county of _____

¹ See, as to vessel, Forms 828, 830; more than one surety, is for the court as to cargo, Form 814. It is not essential that plaintiff sign this undertaking, and whether there must be or judge to say. *N. Y. Code Civ. Pro.*, § 811; Volume I, p. 461, &c.

has attached and taken into his custody certain goods and chattels [*specifying them*];

And whereas O. P., of _____, claims the same, and a jury has, by its inquisition, found the said property in said claimant:

Now, THEREFORE, C. D., of No. _____ street, in the city of _____ and county of _____, State of _____ [merchant], hereby undertakes [*or if two join*, C. D., &c., as above—and E. F., of No. _____ street, in the town of _____, county of _____, and State aforesaid, farmer, do hereby jointly and severally undertake], pursuant to the statute, to indemnify the said sheriff for the detention thereof.¹

[*Date.*]

[*Signature.*]

[*Acknowledgment, as in Form 495, p. 6; Affidavit of sufficiency, as in Forms 496-498, pp. 6 and 7; Approval, as in Form 499, p. 7; Justification, if required, as in Volume I, p. 482.*]

B. VESSEL (CLAIMS OF THIRD PERSON).

Form No. 824.

Affidavit of claimant (or his agent) of a vessel attached.¹

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says:

I. That an attachment issued in the above entitled action has been levied by the sheriff of the county of _____, on the [*naming vessel*—or, on the share or interest of Y. Z. in the _____], a vessel belonging to the port of _____, in [*name of state or nation*], as if the said vessel was in whole or in part property of the defendant herein.

II. That neither said vessel, nor any share or interest therein, belongs to said defendant, but said vessel belongs [*and if a*

¹ This is the language of the statute (*N. Y. Code Civ. Pro.*, § 658), which provides that if such undertaking is given the sheriff must detain the property; but the sheriff has power to require a bond before levying on property which is not in possession of

the debtor, but in that of a third person. *Chamberlain v. Beller*, 18 *N. Y.*, 115. See Form 812.

² *N. Y. Code Civ. Pro.*, § 680 (domestic vessel); *id.*, § 666 (foreign vessel).

foreign vessel may add—as deponent is informed and believes], to , who resides at in , and that deponent is agent at , for said [name of claimant].

[If the application be *ex parte*, state as to previous application, and if an order to show cause be asked for (see Form 489, p. 2), make the same statement and show the condition of the cause.]¹

[*Jurat.*]

[*Signature.*]

Form No. 825.

Order appointing appraisers of domestic or foreign vessel attached.²

[Name of] Court [or, if court order] At a special term [&c., as in Form 493, p. 4].
[Title of action].

Upon the affidavit of M. N., verified the day of , 18 , annexed [and on proof of due notice to the plaintiff herein, given according to the direction of this court], and after hearing M. T., attorney for the claimant, and A. T. [or, no one appearing] for the plaintiff in opposition; now on motion of M. T., attorney for [name of claimant]:

ORDERED, that Q. R., of , R. S., of , S. T., of , three indifferent persons, be and they hereby are appointed to make a valuation of said vessel [or of said one-half share or interest in said vessel].

[Authentication, as in Form 491, p. 3.]

Form No. 826.

Appraisal of vessel or interest therein attached.²

[Title of court and action.]

The undersigned [names], appointed by [the annexed]

¹ In case of a foreign vessel the statute expressly requires notice, but it may be such as the court or judge deems reasonable to the plaintiff. *N. Y. Code Civ. Pro.*, § 667.

² Under *N. Y. Code Civ. Pro.*,

§§ 660, 666, this order must be made by the court or judge thereof; and, in case of a foreign vessel, upon such notice to the plaintiff as the court or judge deems reasonable.

³ *N. Y. Code Civ. Pro.*, § 661.

order herein, dated [*or, entered*] the day of ,
 18 [*or if not annexed, recite it, as thus:*] to make a valuation
 of the , a vessel belonging to the port of ,
 in , and attached [*or, a share in which has been at-*
ached] herein, as the property of the defendant Y. Z., and
 which is claimed by O. P., of , hereby report that
 we have made a valuation of said vessel [*or, share or interest in*
said vessel], and find that the value of the same is the sum of
 dollars.

[*Date.*]

[*Signature of*],
 Appraisers.

Form No. 827.

Oath of appraisers of vessel attached.¹

[*Unless indorsed on the appraisal, entitle.*]
 [*Venue.*]

Q. R., R. S. and S. T., of , appointed by the
 order mentioned in the annexed [*or, foregoing*] valuation,
 being duly sworn, each for himself says: That the said valua-
 tion is in all respects just and fair, and that the value of the
 vessel [*or, share or interest in the vessel*] therein mentioned is
 truly stated therein according to the deponent's belief.

[*Jurat.*]

[*Signatures.*]

[*Under N. Y. Code Civ. Pro., § 661, the valuation and
 oath are to be immediately returned to the court or judge.*]

Form No. 828.

Undertaking by third person claiming release of domestic vessel attached.²

WHEREAS, an attachment issued in the above entitled action
 against the property of the defendant, Y. Z., has been levied

¹ To be annexed to or indorsed on the appraisal. *N. Y. Code Civ. Pro., § 661.*

² *N. Y. Code Civ. Pro., § 662.* This undertaking must be executed by the

claimant or his agent. *Id.* One surety may be accepted as sufficient, or the court or judge may require more. *Id.*, § 811. Vol. I, p. 469, &c.

by the sheriff of the [city and] county of _____, upon the [name of _____ vessel] at _____, a vessel belonging to the port of _____, in New York; and M. N., of _____, has claimed said vessel or the share or interest therein levied on; and appraisers duly appointed have, by a valuation duly returned to [Hon. J. K., a judge of] this court, valued said vessel [or, _____ interest or share in said vessel] at the sum of _____ dollars.*

Now, THEREFORE, we [name, residence, and vocation of claimant or his agent; and name, residence, and vocation of surety or sureties] do hereby, jointly and severally, undertake to and with the said sheriff, and pursuant to the statute, that, in an action to be brought on this undertaking, the said [name claimant] will establish that he was the owner of the said vessel [or, share or interest], at the time of the levy thereupon; and that, in case of his failure to do so, he will pay the amount of the aforesaid valuation, with interest from the [date of the undertaking] to the sheriff; or, if the warrant is vacated or annulled, to the defendant, or his personal representative.

[Date.]

[Signatures.]

[Acknowledgment, as in Form 495, p. 6; Affidavit of sufficiency, in twice the appraisal, as in Forms 496–498, pp. 6, 7; Approval, as in Form 499, p. 7. Deliver to the sheriff, with the valuation and oath, within two days after return of appraisal.]

Form No. 829.

Order releasing domestic vessel attached.¹

[Name of] Court [or, if court order] At a special term [&c., as in Form 493, p. 4, of this Volume].

[Title of action.]

Upon the annexed certificate of the sheriff acknowledging the delivery to him [or, affidavit of M. N., showing the delivery to the sheriff] of the undertaking and approval, and the valuation and oath, copies of which are hereto annexed, and upon the warrant of attachment and order for appraisal hereto-

¹ May be *ex parte*. If so, present and recite affidavit as to previous application. See Form 490, p. 2.

fore filed herein, and on motion of said M. T., attorney for said M. N.:

ORDERED, that the [name of vessel] of [or, the share or interest in the vessel] mentioned in said undertaking be forthwith discharged from said attachment by the sheriff upon service of this order upon him.

[Authentication, as in Form 491, p. 3.]

Form No. 830.

Undertaking by plaintiff to prevent release of foreign vessel attached.¹

WHEREAS, an attachment issued in the above-entitled action against the property of the defendant, Y. Z., has been levied by the sheriff of the [city and] county of , upon the [name of vessel], at , a vessel belonging to the port of , in the [name of state or nation]; and M. N., of , has claimed said vessel [or, the share or interest in said vessel levied on]; and appraisers duly appointed have, by a valuation duly returned to [Hon. J. K., a judge of] this court, valued said vessel [or, interest or share in said vessel] at the sum of dollars.

NOW, THEREFORE, we, the undersigned [name and residence of plaintiff, if he signs; and name, residence, and vocation of surety or sureties], do hereby, jointly and severally, undertake to and with the [name of claimant], and pursuant to the statute, that we will pay such damages as may be recovered for seizing the said vessel [or, share, or interest], in an action brought against the sheriff, or A. B., the plaintiff in the attachment, within three months from the approval of this undertaking, if it appears therein that the vessel, share, or interest belonged, at the time of attaching it, to said M. N., in whose behalf the aforesaid claim is made.

[Date.]

[Signatures.]

[Acknowledgment, as in Form 495, p. 6; Affidavit of sufficiency in twice the appraisal, as in Forms 496-498, pp. 6, 7; Approval, as in Form 499, p. 7. Deliver within three days after return of appraisal.]

¹ N. Y. Code Civ. Pro., § 668. It is not essential that the plaintiff sign; and an undertaking with one surety may be accepted. *Id.*, § 811. Vol. I, p. 469.

Form No. 831.

Order releasing to claimant foreign vessel attached.¹

[*Name of*] Court [*or, if court order*] At a special term [*dec., as in Form 493, p. 4, of this Volume*].

Upon the annexed affidavit of M. N., showing that no undertaking has been delivered or given to him, pursuant to law, to prevent the release of the [*name of vessel*] mentioned in the valuation and oath dated the day of , 18 , a copy of which is hereto annexed; and upon the warrant of attachment and order for appraisal heretofore filed herein on the day of , 18 ; and on motion of M. T., attorney for said M. N.:

ORDERED, that the [*name of vessel*] of [*or, the share or interest in the vessel*] mentioned in said undertaking be forthwith discharged from said attachment by the sheriff upon service of this order upon him.

[*Authentication, as in Form 491, p. 3.*]

Form No. 832.

Affidavit of defendant to obtain release of foreign vessel when attachment has been vacated, after undertaking given.²

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says:

I. That he is [the agent at of] the owner of the [*name of vessel*] of , on whose claim said vessel, after having been attached in this action as the property of the defendant, Y. Z., was duly appraised at the sum of dollars, as appears from the warrant of attachment and return thereof, and the order appointing appraisers and the sworn valuation returned by them filed herein on the day of , 18 .

¹ Under *N. Y. Code Civ. Pro.*, § 669, this order must be made by the court or a judge thereof and may be *ex parte*. If so made, present affidavit as to previous application. See Form 490, p. 2.
² *N. Y. Code Civ. Pro.*, § 670.

II. That the said warrant of attachment has been vacated or annulled [*or, has been discharged as to said—*or*, the share or interest in said attached vessel*] by an order dated [*or, entered*] herein on the day of , 18 , and that deponent [*as agent of said claimant*] is entitled to the possession thereof [*or, if it has been sold, state the fact, and the amount of proceeds in the sheriff's hands or in the court*].

III. That the undertaking given by plaintiff on the day of , 18 , to prevent the release of said vessel has been discharged and cancelled, and surrendered to the plaintiff on the day of , at .

IV. [*If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 833.

Undertaking by defendant to obtain release of foreign vessel after attachment has been vacated, but plaintiff's undertaking has not been discharged.¹

[*As in Form 828, to the asterisk, continuing:*] and whereas said attachment has been vacated [*or, has been discharged as to said share or interest in said vessel—and if vessel has been sold, recite the fact and amount of proceeds in hands of sheriff or in court:*]

NOW, THEREFORE, I [*or, we—name, residence, and vocation of claimant, or agent, or surety or sureties*], do hereby [*jointly and severally*] undertake to and with the plaintiff and pursuant to the statute that I [*or, we*] will indemnify A. B., the plaintiff, against all charges and expenses in consequence of the undertaking given by him herein on or about the day of , 18 , to prevent the release of said vessel.

[*Date.*]

[*Signatures.*]

[*Acknowledgment on proof, as in Form 495, p. 6; Affidavit of sufficiency as in Forms 496 to 498, pp. 6 and 7; Approval, as in Form 497, p. 7, of this Vol.; Justification, if required, as in Vol. I, p. 482.*]

¹ See *N. Y. Code Civ. Pro.*, § 670. It is not essential that plaintiff should sign this undertaking; and one surety may be accepted. *N. Y. Code Civ. Pro.*, § 811. Vol. I, p. 469.

Form No. 834.

Order for sale of foreign vessel attached, where plaintiff's undertaking has not been discharged, nor he indemnified.¹

[*Caption and recitals, according to the case; see Form 492 or 493, p. 4, of this Volume.*]

ORDERED, that said [one-half interest or share in said] vessel be sold by the sheriff [*here may give special directions as to time and notice*], and that the proceeds of the sale, after deducting lawful fees and expenses, be paid by said sheriff to [*names of persons who executed the undertaking on part of plaintiff*], for their indemnity.

[*Authentication as in Form 491, p. 3.*]

Form No. 835.

Affidavit by joint owner, or his agent, to obtain sale of foreign or domestic vessel not duly claimed by third person.

[*May be easily framed by reference to Form 831, and N. Y. Code Civ. Pro., § 673.*]

V. SALE, AND PROCEEDS OF SALES AND COLLECTIONS.

Form No. 836.

Affidavit to obtain sale of foreign or domestic vessel attached and not duly claimed by any third person.²

[*As in next Form, to the *, continuing:*] the [*name of vessel*], of [or, the one-half share or interest of the defendant Y. Z., in the—*name of vessel*—of].

II. That no claim to said vessel has been made upon the plaintiff, nor any upon the sheriff, as deponent is informed by , at the office of the sheriff, upon inquiry there this day

¹ This order is made by the court or judge. *N. Y. Code Civ. Pro.*, § 671. This affidavit may readily be adapted from previous Forms. See Form 832.

The application may be either to the court or the judge.

² *N. Y. Code Civ. Pro.*, §§ 672, 673.

made by deponent, nor any upon the keeper in charge of said vessel, as appears by the affidavit of said keeper, hereto annexed.

[*Or, if a domestic vessel, may admit claim, and show that a proper undertaking has not been given by the claimant.*]

III. That a sale of said vessel without further delay is necessary, by reason of the following facts [*stating particulars*].

IV. [*State whether defendant has appeared, &c.*]

[*If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 837.

Affidavit to obtain order to sell property which is perishable or expensive to keep.¹

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is the plaintiff herein [*or otherwise state his relation to the cause*].

II. That on , 18 , a warrant of attachment was granted against the property of the defendant above named, issued to the sheriff of the county of , who thereupon, and on the day of , 18 , attached * [a stock of groceries, including a wagon, one horse and harness].

III. That the following articles among those attached are perishable and will rapidly decay² and spoil, and must be sold, if at all, within [a few days—*stating particulars*].

¹ This and two following Forms are sustained by *Byrnes v. Robinson*, 19 *Weekly Dig.*, 454, where it was held that this order may be made without first making an inventory; and that notice to the sheriff is not necessary.

² It must appear that the property is inherently liable to deterioration and decay, and it is not sufficient to

show that it will depreciate in value because of changes in the styles and fashions. *Fisk v. Spring*, 25 *Hun.*, 367; s. c., 62 *How. Pr.*, 510; 1 *Civ. Pro. R.*, 378, with note in latter. See also *Davis v. Ainsworth*, 14 *How. Pr.*, 346 (where potatoes were ordered to be sold).

IV. That it is expensive to keep said [horse]; its value is about dollars, and the cost of keeping it is about dollars per week.

[If application is *ex parte*, state as to previous application. See Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause, as in Form 489, p. 2.]

[*Jurat.*]

[*Signature.*]

Form No. 838.

Notice of motion or order to show cause why property that is perishable or expensive to keep should not be sold.¹

[As in Form 488, p. 1, or 491, p. 3, of this Volume, substituting for the italic clause between the * and the †:] for an order that the sheriff sell [or, why the sheriff should not sell] at public auction the levied on by him under the warrant of attachment issued herein on the day of , 18 .

Form No. 839.

Order for sale of property that is perishable or expensive to keep.²

[Name of] Court [or, if court order] At a special term [dec., as in Form 493, p. 4, of this Vol.].

[Title of action.]

It appearing to me [or, to this court] by the affidavit of A. B., verified the day of , 18 [and the inventory returned to the warrant of attachment issued by me—or, this court—herein], that part of the property seized by the sheriff of the [city and] county of , under said warrant, to wit [ten barrels of apples], is perishable; and that [the horses] are expensive to keep; and that due notice has been given of this motion to the [adverse party] pursuant to the direction of

¹ This order may be made either upon or without notice, as the urgency of the case requires, in the opinion of the court or judge, except in case the property to be sold consists of live animals, when "such notice shall be given to the parties to the action of

the application for the order as the court or judge prescribes." *N. Y. Code Civ. Pro.*, § 656.

² This order may be made by the court or judge. *N. Y. Code Civ. Pro.*, § 656.

the court; and after hearing _____, of counsel for the [moving party], and _____ [or, no one appearing] for _____ in opposition; and on motion of _____, attorney for [moving party]:

ORDERED, that said _____ be sold by said sheriff, by public auction, at _____ [mentioning place], after _____ days [such time as may be reasonable under the circumstances] previous notice of the time and place of such sale being given by him in writing, posted in three or more public places in _____, and by advertising the same _____ days successively¹ immediately previous to and on the day of sale, in the _____ newspaper printed at _____ [and by service of notice on the attorneys for the plaintiff and the defendant _____ days before the sale].

[Leave is hereby given the plaintiff to become the purchaser at such sale, if he so desires.²]

[*Authentication as in Form 491, p. 3, of this Volume.*]

Form No. 840.

Order that sheriff pay into court proceeds made on attachment.¹

[*Caption and recitals, see Form No. 493, p. 4, of this Volume.*]

ORDERED, that the sum of _____ dollars, proceeds of the demands collected [or, of the property sold—*or both*] under the attachment herein, be by the sheriff forthwith [or, within _____ days after service of a copy of this order] paid into court [or, deposited in the _____ Trust Company—*or*, Bank—of _____, to be drawn out only upon the order of the court].

Enter: [*signature of judge by initials of name and title.*]

Form No. 841.

Order that sheriff pay over to defendant or his assignee surplus proceeds.⁴

[*Caption and recitals, according to the case; see Forms No. 492 and 493, p. 4, of this Volume.*]

ORDERED, that M. N., the sheriff of the [city and] county

¹ See Volume I, p. 386.

² This clause is sometimes desirable, as for instance where plaintiff was a pledgee or agent for the defendant.

³ This order is made by the court upon the *ex parte* application of either party. *N. Y. Code Civ. Pro.*, § 675.

⁴ Under *N. Y. Code Civ. Pro.*, § 676, the court, "or the judge who granted the warrant," may, upon "notice to the plaintiff and the plaintiffs in the other warrants or executions," make this order "at any time during the pendency of the action."

of pay to the defendant Y. Z. [*or*, to O. P., the assignee of the defendant Y. Z.] the sum of dollars, being a surplus remaining in his hands arising from the proceeds of the sale of the property attached herein [*or*, arising from moneys or demands collected by him—*or both*] over and above such sum as will be required to pay the plaintiff's demand with the costs and expenses of this suit [and of all other warrants of attachment or executions now in his hands chargeable upon said fund].

And it is further ordered, that the property of the defendant not sold [*describing it*] be and the same is hereby released from the said attachment [*or*, attachments], and the said sheriff is hereby ordered to deliver the same to said ,

[*Authentication as in Form 491, p. 3, of this Volume.*]

SECTION III.

VACATING OR DISCHARGING ATTACHMENT.

- | | |
|---|---|
| 1. Motion to vacate or modify attachment, or increase security, on original papers. | (860.) Affidavit for subsequent attaching creditor's motion to vacate attachment. |
| 2. — on defendant's papers. | (361.) Affidavit for an assignee's motion to vacate attachment. |
| 3. — when to be made. | (862.) Affidavit on motion to vacate attachment by one claiming under a transfer from defendant subsequent to attachment. |
| 4. Who may move. | (863.) Affidavit to vacate attachment on the ground of unexpired credit. |
| 5. Defendant or third person having partial interest. | (864.) Order vacating attachment. |
| 6. — third person. | (865.) Notice of motion to discharge attachment, as to all or part of the property, on giving security. |
| FORMS. | (866.) Undertaking to obtain discharge of property attached. |
| (842.) Notice to sheriff that property levied on is exempt. | (867.) Order discharging attached property on security being given. |
| (843.) Affidavit to obtain order to show cause why attachment should not be vacated on the original papers. | (868.) Affidavit to move to discharge attachment as to interest of a copartner in leviable property. |
| (844.) Order to show cause on original papers, or fresh papers, or both, why attachment should not be vacated or modified, or security increased. | (869.) Undertaking on application to discharge interest in partnership goods and chattels from attachment. |
| (845.) Notice of motion on the original papers, or fresh papers, or both, to vacate or modify the warrant, or to increase the security, or both. | (870.) Affidavit to move to discharge attachment as to non-leviable |
| (846-859.) Statements of grounds of motion to vacate attachment suitable to be inserted in preceding Forms of order to show cause or notice. | |

- | | |
|--|---|
| <p>property belonging to defendant and his copartner.</p> <p>(871.) Affidavit in corroboration by the fund holder.</p> <p>(872.) Order discharging attachment as to partnership fund.</p> <p>(873.) Affidavit to move to vacate notice of attachment on real property.</p> | <p>(874.) Order cancelling notice of pendency of action and attachment of real property.</p> <p>(875.) Notice of motion to tax sheriff's fees on attachment.</p> <p>(876.) Order taxing sheriff's fees on attachment.</p> |
|--|---|

1. *Motion to vacate or modify attachment, or increase security, on original papers.*—To vacate or modify an attachment, or increase the security, application may be made on the original papers, (1) to the court (held by any judge¹) and on notice; or, (2) to the judge who granted it, in which case the application may be made either in court or out of court, and without notice; but he may require notice to be given.²

After such a motion, the plaintiff, even if he has appeared, cannot oppose on fresh proof, but is confined to his original affidavits.³

Such motion is no bar to a subsequent motion to vacate on the merits upon affidavits on defendant's part.⁴

A motion is deemed to be on the original papers within these rules, and not upon affidavits on the defendant's part, notwithstanding the necessary affidavit merely to obtain an order to show cause is used,⁵ or that the moving party, being a third person, presents the necessary affidavit to show the existence of the lien,⁶ or other circumstances, giving him a right to move, and excusing delay.⁷

2. — *on defendant's papers.*—For the like relief, application may be made, upon affidavits on the defendant's part (and on notice), (1) to the court; or, (2) to any judge of the court.

¹ Ruppert v. Haug, 87 N. Y., 141; s. c., 62 How. Pr., 364; 1 Civ. Pro. R., 411.

² N. Y. Code Civ. Pro., § 683, first clause.

³ Steuben Co. Bk. v. Alberger, 75 N. Y., 179 (where court relied on analogy to cases of injunction). N. Y. Code Civ. Pro., § 627; and arrest, *id.*, § 568; s. p., Trow's Printing, &c., Co. v. Hart, 85 N. Y., 500; Dickinson v. Benham, 12 Abb. Pr., 158; Buhl v. Ball, 41 Hun, 61, 65, holding that in such a case the plaintiff cannot supply defects in the original affidavits).

⁴ Thalheimer v. Hays, 103 N. Y., 648; s. c., 3 N. Y. State Rep., 441.

⁵ Brewer v. Tucker, 13 Abb. Pr., 76.

⁶ Steuben Co. Bk. v. Alberger, 75 N. Y., 179; rev'g 14 Hun, 379.

⁷ Trow's Printing, &c., Co. v. Hart, 85 N. Y., 500; aff'g 9 Daly, 413; s. c., 60 How. Pr., 190.

Such a motion the plaintiff may oppose, by new proof by affidavits on his part, "tending to sustain any ground for the attachment recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration granted in insolvent proceedings; in which case the plaintiff may show any matter, in avoidance thereof, which he might show upon the trial."¹

A motion is deemed to be on papers on defendant's part within these rules if defendant applies on plaintiff's complaint as well as on the original papers when they did not include it;² or on affidavits which put in issue any of plaintiff's allegations, although the allegations so controverted are immaterial,³ or affidavits which go to support any ground for vacating, as distinguished from affidavits merely showing the standing in court of the moving party or the seasonableness of his motion.

3. — *when to be made.*—Such motion may be made at any time before the actual application of the attached property or the proceeds thereof, to the payment of a judgment recovered in the action.⁴

It is not precluded by the fact that the attachment has been discharged upon defendant giving security for the debt;⁵ nor

¹ *N. Y. Code Civ. Pro.*, § 683; *Coffin v. Stitt*, 5 *Civ. Pro. R. (Browne)*, 261 (holding that on a motion on an affidavit denying the debt, plaintiff might supply evidence that the debt had matured before suit was brought).

Muser v. Lissner, 67 *How. Pr.*, 509 (holding that where defendant moves to vacate on an allegation that the debt was not due when the suit was brought, plaintiff may show fraud entitling him to disregard agreement for credit).

² *Ives v. Holden*, 14 *Hun*, 402.

³ *Godfrey v. Godfrey*, 75 *N. Y.*, 434.

⁴ *N. Y. Code Civ. Pro.*, § 682. A mere levy is not such an application. *Woodmansee v. Rogers*, 82 *N. Y.*, 88; *aff'g* 20 *Hun*, 285; 58 *How. Pr.*, 439.

The motion may be made after final judgment and execution issued; if it be before application of the proceeds. *Parsons v. Sprague*, 3 *Civ. Pro. R. (Browne)*, 290; s. c. 65 *How. Pr.*, 151.

And if denied, appeal is proper, even after such application, *Market Natl. Bk. v. Pacific Natl. Bk.*, 30 *Hun*, 50; *rev'g* 2 *Civ. Pro. R. (Browne)*, 330; s. c., 64 *How. Pr.*, 1.

As to the right to move to vacate a void attachment even after judgment, see *Goodyear Rubber Co. v. Knapp*, 61 *Wis.*, 123; s. c., 20 *Northwestern Rep.*, 657.

⁵ *Dusseldorf v. Redlich*, 16 *Hun*, 624; *Claffin v. Baere*, 57 *How. Pr.*, 78; s. p., *Garbutt v. Hanff*, 15 *Abb. Pr.*, 189; *Currie v. Riley*, 14 *Weekly Dig.*, 407.

is an application founded on the objection that the complaint fails to show a cause of action on which an attachment could issue, precluded by the fact that a motion made before the complaint had been filed or served, had been denied.¹

4. *Who may move.*—A defendant may move without putting in a general appearance.² Nor is he precluded from moving by the facts that a third person has claimed as his own the property attached, and the plaintiff has given a bond of indemnity against such claim.³

5. *Defendant or third person having partial interest.*⁴—It is no objection to such a motion, either on the part of a defendant or a third person,⁵ that he is interested in only a part of the property attached.

6. — *third person.*—One who has, even subsequent to the attachment, acquired a title to,⁶ or lien on⁷ any part of the attached, property may move to vacate or modify the warrant or the attachment on the ground of the insufficiency of the affidavits on which it was granted.

But the burden is on such third person to adduce evidence of a valid transfer or lien in support of his claim.⁸

¹ *N. Y. Code Civ. Pro.*, § 686.

² *Manice v. Gould*, 1 *Abb. Pr.*, *N. S.*, 255.

³ *Whitelegge v. Witt*, 12 *Daly*, 319.

As to other objections, see paragraph 1.

⁴ *Walts v. Nichols*, 32 *Hun*, 276.

⁵ *Trow's Printing, &c., Co. v. Hart*, 85 *N. Y.*, 500; *affi'g* 9 *Daly*, 413.

⁶ *Trow's Printing, &c., Co. v. Hart*, 35 *N. Y.*, 500; *affi'g* 9 *Daly*, 413.

⁷ *Steuben Co. Bank v. Alberger*, 75 *N. Y.*, 179; *s. p.*, *Natl. Shoe, &c., Bank v. Mechanics, &c., Bank*, 89 *N. Y.*, 440 (receiver of an insolvent national bank appointed after the issuing of the attachment); *s. p.*, *Smith v. Davis*, 29 *Hun*, 306; *s. c.*, 3 *Civ. Pro. R. (Browne)*, 74; *Neal v. Sachs*, 15 *Weekly Dig.*, 476; *Ruppert v. Haug*, 87 *N. Y.*, 141 (where subsequent judgment-creditor levied execution on the attached property); *People's Bank v. Mechanics' Bank*, 62 *How. Pr.*, 422 (such subsequent lienor need not be made a party to enable him to make the motion).

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As to foreign assignee, liquidators, etc., compare *Hibernia Natl. Bk. v. Lacombe*, 21 *Hun*, 166; *affi'd* in 84 *N. Y.*, 367; *Matter of Waite*, 99 *N. Y.*, 433.

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Form No. 842.

Notice to sheriff that property levied on is exempt.¹

[*As in Form 815 to the *, continuing*] exempt from levy and sale on execution by reason of [*stating facts establishing exemption*].

[*Date, &c., as in Form 804.*]

Form No. 843.

Affidavit to obtain order to show cause why attachment should not be vacated.

[*Title of court and action.*]

[*Venue.*]

T. Z., being duly sworn, says:

I. That he is the attorney for the defendant herein;

II. That a warrant of attachment against the property of said defendant was issued herein on and about the day of , 18 , under which the sheriff of the [city and] county of , has taken possession of the property of the said defendant; that said sheriff is now in possession thereunder.

III. That the defendant desires to make a motion to vacate said warrant on the papers on which the same is granted, and that too much delay and expense will be occasioned if a notice

tion and belief that the moving party's attachment had been levied were insufficient).

Delmore v. Owen, 44 *Hun*, 296 (holding that a jurisdictional defect in the attachment of the moving party, appearing on the record, was fatal).

A denial of an execution creditor's motion to vacate, on the ground that his judgment is invalid, is no bar to a subsequent similar motion by him on the ground that the attachment is a cloud upon a title claimed by him to the attached property. *Steuben County Bk. v. Alberger*, 83 *N. Y.*, 274; s. c., 61 *How. Pr.*, 227; 11 *Weekly Dig.*, 279.

¹ The law does not require written notice in order to render the officer liable (*Finnin v. Malloy*, 33 *Super. Ct.* [J. & S.], 382), but notice must be given within a reasonable time (*Brooks v. Hathaway*, 8 *Hun*, 290); and for convenience of proof, it will be best to give it in writing, stating the facts on which the claim is founded.

of motion be given for the first Monday of _____, which is the earliest day such notice could be given. Therefore, deponent applies for an order to show cause, returnable the _____ of _____, 18 ____.

IV. No previous application for such order has been made to any court or judge [except, &c. See p. 2].

[*Jurat.*]

[*Signature.*]

Form No. 844.

Order to show cause on original papers, or fresh papers, or both, why attachment should not be vacated or modified,¹ or security increased.²

[*Title of court and action.*]

Upon the warrant of attachment granted herein on the day of _____, 18 __, and the papers upon which it was granted [*if motion is on fresh papers, add, or substitute*—the affidavit of _____, a copy of which is hereto annexed—and, *may add,* the answer³ already served herein], and on motion of T. Z., attorney for defendant [*if appearing specially say*—appearing for the purposes of this motion only—or, attorney for M. N., —*naming third person who moves*];

ORDERED, that plaintiff show cause before me at [*or, before this court at a special term thereof, to be held at chambers, at _____, in _____, on the _____ day of _____, 18 __, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why an order should not be granted vacating the said warrant of attachment [or, modifying said warrant of attachment—stating in what particulars—or, requiring an increase of the security given by the plaintiff⁴—or for one or more of these forms of relief, together, or in the alternative*], and such other or further relief as may be just⁵

¹ As to motion to reduce the amount of the attachment, see *Trubee v. Alden*, 6 *Hun*, 75.

² See pp. 330-1, as to policy of applying *ex parte*, or on motion, and whether to the court or the judge.

³ The statute of limitations is not available, unless interposed by answer. *Plimpton v. Bigelow*, 12 *Abb. N. C.* 202; s. c., 29 *Hun*, 362; rev'd, on other grounds, in 93 *N. Y.*, 592.

⁴ The amount of security is discretionary. *Riggs v. Cleveland, &c.*, R. R. Co., 21 *Weekly Dig.*, 45.

⁵ If the order stops here, a *vacatur* may be granted for substantial grounds on the papers, but not for irregularity. If irregularities are specified, but this previous clause omitted, the motion may, perhaps, be confined to the specified grounds. Therefore, it is well, in case of irregularity, to ask the

[*and if motion is, in any part, on the ground of irregularity, add*], such relief being also asked upon the following grounds, among others, in that [*here designate particulars complained of*];¹ *see following Forms, 846 to 859*, with costs of this motion.

[*If stay is granted, add,*] and in the meantime and until the entry of the order upon the final determination of this motion, let all proceedings on the part of the plaintiff, his attorney and the sheriff, his deputies and agents, be stayed; except to protect the levy heretofore made.

Service of a copy of this order on _____, 18 __, shall be sufficient.

[*Authentication as in Form 491, p. 3, of this Vol.*]

[*For special appearance where defendant moves and does not appear generally, see Vol. I, p. 717, Form 390.*]

Form No. 845.

Notice of motion on the original papers, or fresh papers, or both, to vacate or modify the warrant, or to increase the security, or both.²

[*Title of court and action.*]

Please take notice, that upon the warrant of attachment granted herein on the _____ day of _____, 18 __ [and the papers upon which it was granted and the affidavit of _____, a copy of which is hereto annexed,—and the answer already served herein], the undersigned will move the court, at a special term to be held [*or if warrant was granted by judge out of court, may say, will move the Hon. J. K.,*] at the county court-house [*or, city hall*] in the city of _____, on the _____ day of _____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, for an order vacating the said warrant of attachment [*or, modifying said warrant of attachment—stating in what particulars—or, requiring an increase of the security given by the plaintiff—or for one or more of these forms of relief, together, or in the alternative*], and such other or further relief as may be just [*and if motion is, in any part, on the ground*

vacatur generally and to add that such relief will also be asked upon the specified grounds, as above.

¹ Vol. I, p. 147; *Stevens v. Middle-*

ton, 14 *Weekly Dig.*, 126. The report of s. c., in 26 *Hun*, 470, omits reference to this point.

² See notes to last Form.

to defraud his creditors, or to avoid the service of a summons [*or*, has not—been shown to have—had any intent to defraud his creditors—*or*, removed or disposed of his property with intent—*&c.*].

855. *Allegations on information.*¹—That said affidavits on which said warrant was granted are fatally defective, in that the material averments thereof are either upon information claimed to have been received by the affiants without averring sufficient reason why the persons giving such information did not themselves make affidavits in respect thereof, or because it is not stated in said affidavits that the affiants believed such information to be true, or because certain of the averments are upon information and belief without stating the source of such information, or are mere conclusions, or are secondary evidence.

856. *Defect of service by publication.*²—That there has been a failure to serve the defendant either personally or by commencing publication within [thirty] days after the issuing of said warrant.

857. — That the alleged order for service by publication was not founded upon a complaint duly verified, showing a sufficient cause of action against the defendant.³

858. — That there was no proof by affidavit presented to the judge who granted said alleged order for service by publication of the additional facts required to justify the granting thereof.

859. *Omission to serve.*—That no copy of the affidavit on which the attachment was issued was delivered to the person from whose possession the attached property was taken.

Form No. 860.

Affidavit for subsequent attaching creditor's motion to vacate attachment.⁴

[*Title of court and action.*]

[*Venue.*]

H. P. M., being duly sworn, says, that he is a deputy sheriff⁵ in the office of the sheriff of the city and county of

¹ See p. 279, of this Vol.

² See Vol. I, p. 645.

³ See Vol. I, p. 647.

⁴ See p. 332, of this Vol.

⁵ The affidavit, if by the attorney, may be supported by the return of the sheriff and certificate that the property is the same. Where the affidavit made by the attorney, averred that the sheriff levied upon property under the attachment without disclosing the attorney's means of knowledge, or the time when or the property upon which

the pretended levy was made—held insufficient proof of such a lien as would give the moving party a right to vacate. *Tim v. Smith*, 93 *N. Y. Abb. N. C.*, 87; *aff'g* 65 *How. Pr.*, 199; s. c., 13 *Abb. N. C.*, 31; *Davis v. Brooks*, 14 *Week. Dig.*, 454 (statement of acquisition of lien, on information and belief).

So also of an affidavit made by the managing clerk of the junior creditors' attorney, on information and belief, and stating that the deputy sheriff who made the subsequent levy

I. That on or about the of , 18 , in an action in the Court, brought to recover dollars and interest, in which A. B. was plaintiff and the above-named Y. Z. was defendant, a warrant of attachment was issued to the said sheriff, whereupon the said sheriff, acting by deponent, his said deputy, duly deputized and authorized in that behalf, duly levied the same on or about the date aforesaid, upon certain personal property of said defendant [*describing it*].

II. That on or about the day of , 18 , in an action in the Court of , brought to recover dollars, or thereabouts, in which G. F. H. was plaintiff and the above-named Y. Z. was defendant, a warrant of attachment, a copy of which is hereto annexed, marked Exhibit D., was issued to the said sheriff, whereupon the said sheriff, acting by deponent, his said deputy, duly authorized in that behalf, on or about the last named date, and subsequently to the aforesaid previous levy, levied the same upon the same property of said defendant.

III. That at the time of the first levy as aforesaid the said property was taken into the custody of said sheriff, since which time it has continued to be in his custody and possession.¹

IV. [*If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause and the necessity for an order to show cause, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 861.

Affidavit for an assignee's motion to vacate attachment.²

[*Title of court and action.*]

[*Venue.*]

G. C. H. being duly sworn, says :

On the day of , 18 , the defendant F. W. duly

admitted the making of such levy, but was unwilling to make an affidavit, and no positive refusal was alleged and no fact stated by the deputy sheriff in making the alleged admission was put before the court. *Knudson v. Matuska & Craig Furniture Co.*, 1 *How. Pr.*, N. S. 152; s. c., 7 *Civ. Pro. R.* (*Browne*), 86.

¹ If irregularity is relied on as the ground of the motion, in this and the following affidavits, specify it unless it appears on the face of the papers.

² From *Marine N. Bk. v. Ward*, 35 *Hun*, 395, where an order denying the motion was reversed.

See p. 332 of this Volume.

executed and delivered to me an assignment in writing, whereby he assigned to me all his individual property upon trust to take possession of the property and convert it into money, and after paying the expenses of the trust, to pay first the individual indebtedness of said W. to his individual creditors, if sufficient should be realized for that purpose, and if not, to apply the property ratably to such payment, and if any surplus remained after paying such individual indebtedness, to apply the same to the payment of the partnership indebtedness of said W. as a member of the firm of G. & W., without any preferences to any of the creditors, either individual or partnership. I thereupon duly accepted and assented to such assignment, and such assent duly appeared in writing in such assignment; the said assignment was on said duly subscribed and acknowledged by said W. and by myself, and recorded in the offices of the county clerk and of the register of county, where said W. resided, and also of county, where said W. carried on his business at the date thereof. I have since acted and am now acting as assignee for the benefit of the creditors of said F. W. under such assignment, and as such have an interest in his property which has been attached in this action, which interest was acquired after said property was so attached, and on , as aforesaid.

[*If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause and the necessity of an order to show cause, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 862.

Affidavit on motion to vacate attachment by one claiming under a transfer from defendant subsequent to attachment.¹

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says:

I. That on or about the day of , 18 , the above-named defendant Y. Z. executed and delivered to deponent, for a valuable consideration, a deed of conveyance of the follow-

¹ Adapted from the case of *Trow's* 500; aff'g 60 *How. Pr.*, 190, where *Printing, &c., Co. v. Hart*, 85 *N. Y.*, the affidavit was sustained.

See p. 332 of this Volume.

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|--|---|
| <p>property belonging to defendant and his copartner.</p> <p>(871.) Affidavit in corroboration by the fund holder.</p> <p>(872.) Order discharging attachment as to partnership fund.</p> <p>(873.) Affidavit to move to vacate notice of attachment on real property.</p> | <p>(874.) Order cancelling notice of pendency of action and attachment of real property.</p> <p>(875.) Notice of motion to tax sheriff's fees on attachment.</p> <p>(876.) Order taxing sheriff's fees on attachment.</p> |
|--|---|

1. *Motion to vacate or modify attachment, or increase security, on original papers.*—To vacate or modify an attachment, or increase the security, application may be made on the original papers, (1) to the court (held by any judge¹) and on notice; or, (2) to the judge who granted it, in which case the application may be made either in court or out of court, and without notice; but he may require notice to be given.²

After such a motion, the plaintiff, even if he has appeared, cannot oppose on fresh proof, but is confined to his original affidavits.³

Such motion is no bar to a subsequent motion to vacate on the merits upon affidavits on defendant's part.⁴

A motion is deemed to be on the original papers within these rules, and not upon affidavits on the defendant's part, notwithstanding the necessary affidavit merely to obtain an order to show cause is used,⁵ or that the moving party, being a third person, presents the necessary affidavit to show the existence of the lien,⁶ or other circumstances, giving him a right to move, and excusing delay.⁷

2. — *on defendant's papers.*—For the like relief, application may be made, upon affidavits on the defendant's part (and on notice), (1) to the court; or, (2) to any judge of the court.

¹ Ruppert v. Haug, 87 N. Y., 141; s. c., 62 How. Pr., 364; 1 Civ. Pro. R., 411.

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Such a motion the plaintiff may oppose, by new proof by affidavits on his part, "tending to sustain any ground for the attachment recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration granted in insolvent proceedings; in which case the plaintiff may show any matter, in avoidance thereof, which he might show upon the trial."¹

A motion is deemed to be on papers on defendant's part within these rules if defendant applies on plaintiff's complaint as well as on the original papers when they did not include it;² or on affidavits which put in issue any of plaintiff's allegations, although the allegations so controverted are immaterial,³ or affidavits which go to support any ground for vacating, as distinguished from affidavits merely showing the standing in court of the moving party or the seasonableness of his motion.

3. — *when to be made.*]—Such motion may be made at any time before the actual application of the attached property or the proceeds thereof, to the payment of a judgment recovered in the action.⁴

It is not precluded by the fact that the attachment has been discharged upon defendant giving security for the debt;⁵ nor

¹ *N. Y. Code Civ. Pro.*, § 683; *Coffin v. Stitt*, 5 *Civ. Pro. R. (Browne)*, 261 (holding that on a motion on an affidavit denying the debt, plaintiff might supply evidence that the debt had matured before suit was brought).

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The motion may be made after final judgment and execution issued; if it be before application of the proceeds. *Parsons v. Sprague*, 3 *Civ. Pro. R. (Browne)*, 290; s. c. 65 *How. Pr.*, 151.

And if denied, appeal is proper, even after such application, *Market Natl. Bk. v. Pacific Natl. Bk.*, 30 *Hun*, 50; *rev'g* 2 *Civ. Pro. R. (Browne)*, 330; s. c., 64 *How. Pr.*, 1.

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is an application founded on the objection that the complaint fails to show a cause of action on which an attachment could issue, precluded by the fact that a motion made before the complaint had been filed or served, had been denied.¹

4. *Who may move.*—A defendant may move without putting in a general appearance.² Nor is he precluded from moving by the facts that a third person has claimed as his own the property attached, and the plaintiff has given a bond of indemnity against such claim.³

5. *Defendant or third person having partial interest.*⁴—It is no objection to such a motion, either on the part of a defendant or a third person,⁵ that he is interested in only a part of the property attached.

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But the burden is on such third person to adduce evidence of a valid transfer or lien in support of his claim.⁸

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As to other objections, see paragraph 1.

⁴ *Waits v. Nichols*, 32 *Hun*, 276.

⁵ *Trow's Printing, &c., Co. v. Hart*, 85 *N. Y.*, 500; *aff'd* 9 *Daly*, 413.

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⁷ *Steuben Co. Bank v. Alberger*, 75 *N. Y.*, 179; *s. p.*, *Natl. Shoe, &c., Bank v. Mechanics, &c., Bank*, 89 *N. Y.*, 440 (receiver of an insolvent national bank appointed after the issuing of the attachment); *s. p.*, *Smith v. Davis*, 29 *Hun*, 306; *s. c.*, 3 *Civ. Pro. R. (Browne)*, 74; *Neal v. Sachs*, 15 *Weekly Dig.*, 476; *Ruppert v. Haug*, 87 *N. Y.*, 141 (where subsequent judgment-creditor levied execution on the attached property); *People's Bank v. Mechanics' Bank*, 62 *How. Pr.*, 422 (such subsequent lienor need not be made a party to enable him to make the motion).

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T. Z., being duly sworn, says:

I. That he is the attorney for the defendant herein;

II. That a warrant of attachment against the property of said defendant was issued herein on and about the day of , 18 , under which the sheriff of the [city and] county of , has taken possession of the property of the said defendant; that said sheriff is now in possession thereunder.

III. That the defendant desires to make a motion to vacate said warrant on the papers on which the same is granted, and that too much delay and expense will be occasioned if a notice

tion and belief that the moving party's attachment had been levied were insufficient).

Delmore v. Owen, 44 Hun, 296 (holding that a jurisdictional defect in the attachment of the moving party, appearing on the record, was fatal).

A denial of an execution creditor's motion to vacate, on the ground that his judgment is invalid, is no bar to a subsequent similar motion by him on the ground that the attachment is a cloud upon a title claimed by him to the attached property. Steuben County Bk. v. Alberger, 83 N. Y., 274; s. c., 61 How. Pr., 227; 11 Weekly Dig., 279.

¹ The law does not require written notice in order to render the officer liable (Finnin v. Malloy, 33 Super. Ct. [J. & S.], 382), but notice must be given within a reasonable time

(Brooks v. Hathaway, 8 Hun, 290); and for convenience of proof, it will be best to give it in writing, stating the facts on which the claim is founded.

of motion be given for the first Monday of _____, which is the earliest day such notice could be given. Therefore, deponent applies for an order to show cause, returnable the _____ of _____, 18 ____.

IV. No previous application for such order has been made to any court or judge [except, &c. See p. 2].

[*Jurat.*]

[*Signature.*]

Form No. 844.

Order to show cause on original papers, or fresh papers, or both, why attachment should not be vacated or modified,¹ or security increased.²

[*Title of court and action.*]

Upon the warrant of attachment granted herein on the day of _____, 18 __, and the papers upon which it was granted [*if motion is on fresh papers, add, or substitute*—the affidavit of _____, a copy of which is hereto annexed—and, *may add*, the answer³ already served herein], and on motion of T. Z., attorney for defendant [*if appearing specially say*—appearing for the purposes of this motion only—or, attorney for M. N., —*naming third person who moves*];

ORDERED, that plaintiff show cause before me at [or, before this court at a special term thereof, to be held at chambers, at _____], in _____, on the _____ day of _____, 18 __, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why an order should not be granted vacating the said warrant of attachment [or, modifying said warrant of attachment—*stating in what particulars*—or, requiring an increase of the security given by the plaintiff⁴—or *for one or more of these forms of relief, together, or in the alternative*], and such other or further relief as may be just⁵

¹ As to motion to reduce the amount of the attachment, see *Trubee v. Alden*, 6 *Hun*, 75.

² See pp. 330-1, as to policy of applying *ex parte*, or on motion, and whether to the court or the judge.

³ The statute of limitations is not available, unless interposed by answer. *Plimpton v. Bigelow*, 12 *Abb. N. C.*, 202; s. c., 29 *Hun*, 362; rev'd, on other grounds, in 93 *N. Y.*, 592.

⁴ The amount of security is discretionary. *Riggs v. Cleveland, &c., R. R. Co.*, 21 *Weekly Dig.*, 45.

⁵ If the order stops here, a *vacatur* may be granted for substantial grounds on the papers, but not for irregularity. If irregularities are specified, but this previous clause omitted, the motion may, perhaps, be confined to the specified grounds. Therefore, it is well, in case of irregularity, to ask the

[*and if motion is, in any part, on the ground of irregularity, add*], such relief being also asked upon the following grounds, among others, in that [*here designate particulars complained of*;¹ *see following Forms, 846 to 859*], with costs of this motion.

[*If stay is granted, add,*] and in the meantime and until the entry of the order upon the final determination of this motion, let all proceedings on the part of the plaintiff, his attorney and the sheriff, his deputies and agents, be stayed; except to protect the levy heretofore made.

Service of a copy of this order on _____, 18 __, shall be sufficient.

[*Authentication as in Form 491, p. 3, of this Vol.*]

[*For special appearance where defendant moves and does not appear generally, see Vol. I, p. 717, Form 390.*]

Form No. 845.

Notice of motion on the original papers, or fresh papers, or both, to vacate or modify the warrant, or to increase the security, or both.²

[*Title of court and action.*]

Please take notice, that upon the warrant of attachment granted herein on the _____ day of _____, 18 ____ [and the papers upon which it was granted and the affidavit of _____, a copy of which is hereto annexed,—and the answer already served herein], the undersigned will move the court, at a special term to be held [*or if warrant was granted by judge out of court, may say, will move the Hon. J. K.,*] at the county court-house [*or, city hall*] in the city of _____, on the _____ day of _____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, for an order vacating the said warrant of attachment [*or, modifying said warrant of attachment—stating in what particulars—or, requiring an increase of the security given by the plaintiff—or for one or more of these forms of relief, together, or in the alternative*], and such other or further relief as may be just [*and if motion is, in any part, on the ground*

vacatur generally and to add that such relief will also be asked upon the specified grounds, as above.

¹ Vol. I, p. 147; *Stevens v. Middle-*

ton, 14 *Weekly Dig.*, 126. The report of S. C., in 26 *Hun*, 470, omits reference to this point.

² See notes to last Form.

to defraud his creditors, or to avoid the service of a summons [*or*, has not—been shown to have—had any intent to defraud his creditors—*or*, removed or disposed of his property with intent—*&c.*].

855. *Allegations on information.*¹—That said affidavits on which said warrant was granted are fatally defective, in that the material averments thereof are either upon information claimed to have been received by the affiants without averring sufficient reason why the persons giving such information did not themselves make affidavits in respect thereof, or because it is not stated in said affidavits that the affiants believed such information to be true, or because certain of the averments are upon information and belief without stating the source of such information, or are mere conclusions, or are secondary evidence.

856. *Defect of service by publication.*²—That there has been a failure to serve the defendant either personally or by commencing publication within [thirty] days after the issuing of said warrant.

857. — That the alleged order for service by publication was not founded upon a complaint duly verified, showing a sufficient cause of action against the defendant.³

858. — That there was no proof by affidavit presented to the judge who granted said alleged order for service by publication of the additional facts required to justify the granting thereof.

859. *Omission to serve.*—That no copy of the affidavit on which the attachment was issued was delivered to the person from whose possession the attached property was taken.

Form No. 860.

Affidavit for subsequent attaching creditor's motion to vacate attachment.⁴

[*Title of court and action.*]

[*Venue.*]

H. P. M., being duly sworn, says, that he is a deputy sheriff⁵ in the office of the sheriff of the city and county of

¹ See p. 279, of this Vol.

² See Vol. I, p. 645.

³ See Vol. I, p. 647.

⁴ See p. 332, of this Vol.

⁵ The affidavit, if by the attorney, may be supported by the return of the sheriff and certificate that the property is the same. Where the affidavit made by the attorney, averred that the sheriff levied upon property under the attachment without disclosing the attorney's means of knowledge, or the time when or the property upon which

the pretended levy was made—held insufficient proof of such a lien as would give the moving party a right to vacate. *Tim v. Smith*, 93 *N. Y.* 87; aff'g 65 *How. Pr.*, 199; s. c., 13 *Abb. N. C.*, 31; *Davis v. Brooks*, 14 *Week. Dig.*, 454 (statement of acquisition of lien, on information and belief).

So also of an affidavit made by the managing clerk of the junior creditors' attorney, on information and belief, and stating that the deputy sheriff who made the subsequent levy

I. That on or about the _____ of _____, 18____, in an action in the _____ Court, brought to recover _____ dollars and interest, in which A. B. was plaintiff and the above-named Y. Z. was defendant, a warrant of attachment was issued to the said sheriff, whereupon the said sheriff, acting by deponent, his said deputy, duly deputized and authorized in that behalf, duly levied the same on or about the date aforesaid, upon certain personal property of said defendant [*describing it*].

II. That on or about the _____ day of _____, 18____, in an action in the _____ Court of _____, brought to recover _____ dollars, or thereabouts, in which G. F. H. was plaintiff and the above-named Y. Z. was defendant, a warrant of attachment, a copy of which is hereto annexed, marked Exhibit D., was issued to the said sheriff, whereupon the said sheriff, acting by deponent, his said deputy, duly authorized in that behalf, on or about the last named date, and subsequently to the aforesaid previous levy, levied the same upon the same property of said defendant.

III. That at the time of the first levy as aforesaid the said property was taken into the custody of said sheriff, since which time it has continued to be in his custody and possession.¹

IV. [*If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause and the necessity for an order to show cause, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 861.

Affidavit for an assignee's motion to vacate attachment.²

[*Title of court and action.*]

[*Venue.*]

G. C. H. being duly sworn, says :

On the _____ day of _____, 18____, the defendant F. W. duly

admitted the making of such levy, but was unwilling to make an affidavit, and no positive refusal was alleged and no fact stated by the deputy sheriff in making the alleged admission was put before the court. *Knudson v. Matuska & Craig Furniture Co.*, 1 *How. Pr. N. S.* 152; s. c., 7 *Civ. Pro. R. (Browne)*, 86.

¹ If irregularity is relied on as the ground of the motion, in this and the following affidavits, specify it unless it appears on the face of the papers.

² From *Marine N. Bk. v. Ward*, 35 *Hun*, 395, where an order denying the motion was reversed.

See p. 332 of this Volume.

executed and delivered to me an assignment in writing, whereby he assigned to me all his individual property upon trust to take possession of the property and convert it into money, and after paying the expenses of the trust, to pay first the individual indebtedness of said W. to his individual creditors, if sufficient should be realized for that purpose, and if not, to apply the property ratably to such payment, and if any surplus remained after paying such individual indebtedness, to apply the same to the payment of the partnership indebtedness of said W. as a member of the firm of G. & W., without any preferences to any of the creditors, either individual or partnership. I thereupon duly accepted and assented to such assignment, and such assent duly appeared in writing in such assignment; the said assignment was on said duly subscribed and acknowledged by said W. and by myself, and recorded in the offices of the county clerk and of the register of county, where said W. resided, and also of county, where said W. carried on his business at the date thereof. I have since acted and am now acting as assignee for the benefit of the creditors of said F. W. under such assignment, and as such have an interest in his property which has been attached in this action, which interest was acquired after said property was so attached, and on , as aforesaid.

[If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause and the necessity of an order to show cause, as in Form 489, p. 2.]

[Jurat.]

[Signature.]

Form No. 862.

Affidavit on motion to vacate attachment by one claiming under a transfer from defendant subsequent to attachment.¹

[Title of court and action.]

[Venue.]

M. N., being duly sworn, says:

I. That on or about the day of , 18 , the above-named defendant Y. Z. executed and delivered to deponent, for a valuable consideration, a deed of conveyance of the follow-

¹ Adapted from the case of *Trow's* 500; aff'g 60 *How. Pr.*, 190, where the affidavit was sustained.

See p. 332 of this Volume.

ing described premises [*description*]. And that said deed was duly recorded in the office of _____, on the _____ day of _____, 18____, in book _____, p. _____, of Conveyances.

II. That on the _____ day of _____, 18____, a warrant of attachment was granted in this action by Hon. J. K., one of the justices of this court [*or*, county judge of _____ county], and filed in this court against the property of the above-named defendant Y. Z., and among other property levied upon under said attachment, were the premises above described.

III. That a judgment was entered in said action, as deponent is informed and believes, on the _____ day of _____, 18____, against the said defendant for the sum of _____ dollars, but that no part of the said attached property has been applied to the payment of the judgment recovered in said action,¹ and said judgment remains unpaid [*state source of information*], and said attachment remains in force, and is claimed by plaintiff to be a lien on said premises.

IV. That at the time of the execution and delivery of said deed of conveyance to deponent, said attachment had been levied upon said pieces and parcels of land, but deponent had no knowledge of the fact.

V. That said conveyance was before any judgment had been entered in the above action.

VI. That deponent is the sole owner of said premises, and has been since the said _____ day of _____.

[*If there has been delay in moving, add excuse, as thus:*]

VII. That the reason why the motion was not made sooner is that the defendant Y. Z. told deponent from time to time since he learned said property had been levied upon, that the plaintiff had agreed to release it from said attachment, and would do so, and deponent believed that it would be done, without obliging him to resort to a motion to have it done.

VIII. That a notice of the said attachment, for the sum of _____ dollars, with a description of said premises, was on the _____ day of _____ last filed in the county clerk's office, in the [city and county] of _____.

[*If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state*

¹ See p. 332.

as to previous application, and also the condition of the cause and the necessity for an order to show cause, as in Form 489, p. 2.]

[*Jurat.*]

[*Signature.*]

Form No. 863.

Affidavit to vacate attachment on the ground of unexpired credit.¹

[*Title of court and action.*]

[*Venue.*]

Y. Z. being duly sworn, says:

I. I am the person named as defendant herein, and reside at _____, in [New Jersey].

II. I formerly carried on business as a manufacturer of shoes at No. _____ street, _____ city, where on _____ last, I had a large quantity of property.

III. On that day I made a general assignment for the benefit of my creditors without preferences, and delivered that property to my assignee, and left it in his possession.

IV. I am informed and believe that on _____ the sheriff of the [city and] county of _____ seized that property under the warrant of attachment issued herein, and has held possession of it ever since.

V. I am informed and believe that this action is brought to recover the sum of _____ dollars upon my alleged breach of contract to pay the purchase price of merchandise sold and delivered by plaintiffs as partners under the firm name of F. B. & Co., to me on and between _____ and _____ in the present year.

VI. The last mentioned sum is the aggregate very nearly of _____ invoices of merchandise bought by me of F. B. & Co., on and between the date last mentioned, each on a credit of _____ months from the date of invoice; and at the date the warrant of attachment issued in this action, the credit upon only four of such invoices, and to the sum of _____ dollars, had expired, and the credit on _____ of such invoices, aggregating _____ dollars, had not expired.

¹ From an unreported case. Plaintiff may meet this by showing fraud. See p. 331.

VII. The following schedule is a correct statement of the invoices bought by me upon credit as aforesaid, and shows truly the date when each was bought, the amount of each, and the date when each was and is payable. It is compiled from my books and from the bills rendered me by the plaintiffs. *[Add schedule.]*

VIII. The last eight of such invoices, amounting in the aggregate to dollars, are not yet due. I annex to this affidavit the original invoices and statement received from the plaintiffs by me, marked respectively A, B, C and D, showing the terms of credit to have been months on each of the last aforesaid invoices.

IX. I am advised and believe that as to dollars of the claim herein there had been no breach of contract when this action was commenced, and that as to dollars thereof there has been no breach yet.

X. The summons in this action has not been personally served upon me within the State of New York, and I have not appeared in this action. I appear now for the sole and special purpose only of moving to vacate the attachment herein, and not otherwise.

[If order to show cause is asked, state as to previous application and the necessity of the order, as in Form 489, p. 2.]

[Jurat.]

[Signature.]

Form No. 864.

Order vacating attachment.

[Caption and recitals, according to the case, as in Form 492 or 493, p. 3, of this Volume. For a variety of recitals, often important on these motions, see Volume I, p. 285, &c.]

ORDERED, that the attachment granted herein on the day of , 18 , against the property of the defendant , be vacated [and the sureties on the undertaking given thereon exonerated and discharged] on the ground that *[specifying ground¹]*.

¹ See last thirteen Forms; and Volume I, p. 292.

An order vacating the warrant, if it does not state the ground, may be sustained on any legal ground appearing in the case. *Pomeroy v. Moss*, 15 *Week. Dig.*, 25.

If the order vacating does not state the ground, it will be presumed in the Court of Appeals that the motion was granted, in the exercise of the discretion which the court has on such applications (unless perhaps it may be that the notice of motion or order to

[*Where plaintiff is allowed to retain attachment on giving further security, may add:*] unless within [three] days after the entry and service of this order the plaintiff files and serves a further undertaking in addition to that heretofore given herein, to answer to the defendant in the sum of dollars for all damages which have resulted or may result from said warrant of attachment and the levy thereof upon defendant's property, and pay \$10 costs of this motion, the sureties upon said undertaking to justify upon notice if excepted to.

[*Where collections, &c., have been made, may add:*] ORDERED, also, that any and all proceeds of sales and moneys by said sheriff collected, and all the property attached remaining in his hands, be delivered and paid by him to the defendant or his agent, and released from the attachment.

[*Where stay is ordered on condition, state it, for instance thus:*¹] ORDERED, FURTHER, that pending the hearing and decision of an appeal from this order, all proceedings of the defendants, their servants and agents, with reference to the property on which said attachment has been levied, be and the same hereby are stayed, on condition :

First, that the plaintiff forthwith file and serve his notice of said appeal, and place the same upon the calendar of the general term of this court.

Second, that within [eight] days from the entry hereof the plaintiff file and serve an undertaking in the sum of dollars, with two sufficient sureties, to the effect that if this order, or any part thereof, is affirmed on appeal, or if said appeal is dismissed, the appellant will pay on demand the sum recovered or directed to be paid by the order, or the part thereof as to which it is affirmed, and also any and all damages that may result to defendants from said stay of proceedings, not exceeding said sum of dollars, the sureties on said undertaking to justify according to law, if excepted to : and it is further

ORDERED, that upon the failure or omission of the plaintiff to perform any of the above mentioned conditions, the stay herein shall fall and this order shall become absolute.

show cause, by specifying only a different ground, might preclude this; or unless the general term order assigns a ground); and that exercise of discretion includes as a general rule the sufficiency of the proofs. *Thorington v. Merrick*, 101 *N. Y.*, 5; *Bate v. McDowell*, 97 *N. Y.*, 646; *Tracy v. First Natl. Bk.*, 37 *N. Y.*, 523.

Nor will the Court of Appeals look into the opinion of the court below to supply such omission in the order. *Brooks v. Mexican, &c., Construction Co.*, 93 *N. Y.*, 647.

¹ For other conditions, see Volume I, pp. 294, 297.

ORDERED, that the plaintiff pay defendant ten dollars, costs of this motion.¹

[*Authentication as in Form 491, p. 3, of this Volume.*]

Form No. 865.

Notice of motion to discharge attachment, as to all or part of the property, on giving security.²

[*Title of court and action.*]

Please take notice,³ that on [*describing papers, if any*], I shall move this court at a special term, to be held [at chambers] at the City Hall [*or, the County Court House*], in , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard [*or, shall move before Hon. J. K.—naming judge who granted the warrant—at his office, in the city of , on the day of , 18 , in the noon*], for an order that the attachment granted in this action, and dated the day of , be discharged as to all the property attached [*or, if the relief is sought only as to a part, specify the part*], on giving due security.

[*Date.*] [*Signature and office address of*],
[*Address to*], Attorney for [defendant W. X.].
Plaintiff's attorney.

Form No. 866.

Undertaking to obtain discharge of property attached.⁴

[*Title of the court and action.*]

A warrant of attachment having been issued in the above action, to the sheriff of the [city and] county of

¹ See Volume I, p. 288.

² Notice of this motion is not essential, unless directed by the court or judge (*N. Y. Code Civ. Pro.*, § 696), except that, if the application is made only in behalf of some of the defendants where there are two or more, then, under § 689, at least two days' notice of the application, with a copy of the affidavit relied on, must be served upon the plaintiff's attorney.

The motion may be made any time before final judgment. *N. Y. Code Civ. Pro.*, § 687; *Spencer v. Rogers Loco. Works*, 13 *Abb. Pr.*, 180; *Zere-*

ga v. Benoist, 7 *Robt.*, 199; s. c., 33 *How. Pr.*, 129; *Wright v. Rowland*, 36 *How. Pr.*, 248, and see reversal of s. c. in 4 *Abb. Ct. App. Dec.*, 649, 652.

³ If the defendant moves and has not already appeared, add notice of appearance as in Forms 385, 387, Volume I, p. 713.

⁴ In this case there must be two or more sureties (*N. Y. Code Civ. Pro.*, § 688), unless one is a Fidelity or Guaranty company. Volume I, p. 468.

It is not essential that defendant also sign. § 811, Volume I, p. 469.

[against the property of the defendant]; and the above-named having appeared in the action, and now applying [or, being about to apply] to the judge who granted the warrant [or, to the above-mentioned court], for an order to discharge the same [as to a part of the property attached¹]:

Now, THEREFORE, we, M. N., of No. _____ street, in the city of _____, and county of _____, merchant, and O. P., of No. _____ street, in said city, merchant, hereby jointly and severally undertake, pursuant to the statute: that said _____ will, on demand, pay to the above-named plaintiff the amount of any judgment which may be recovered against the defendant in this action [or, if the undertaking is given by one of several defendants, say: which may be recovered against any of the defendants in this action—or, if proof of separate property has been made, say: which may be recovered in this action against the said—name of applicant—either alone or jointly with any other defendants], not exceeding [at least equal to the plaintiff's demand, or at the defendant's option, the appraised value of the property attached²] _____ dollars, with interest.

[Date.]

[Signatures.]

[Acknowledgment or proof, as in Form 465, p. 6; Affidavit sufficiency, as in Forms 496–498, p. 6; and Approval, as in Form 499, p. 7.]

[File undertaking with clerk of the court, and serve certified copy with notice of filing. See Form 500, p. 8; Justification in case of exception, as by bail upon arrest. N. Y. Code Civ. Pro., § 690.]

Form No. 867.

Order discharging attached property on security being given.³

[Name of] Court [or, if court order] At a special term [dec., as in Form 493, p. 4, of this Volume].

[Title of action.]

The defendant [name, if only one of several], having appeared in this action, and having given sufficient security for

¹ One undertaking will not suffice to discharge attachments in two different actions. *Walton v. Daly*, 17 Hun, 601.

² N. Y. Code Civ. Pro., § 688.

³ From *Ellsworth v. Scott*, 3 Abb. N. C., 9.

the plaintiff's demand [*or otherwise indicate nature or object of the security, and, if application is by one of several defendants, making proof of separate property, say, and said* having made proof by affidavit to the satisfaction of the court —*or, the undersigned—that the property with respect to which the application is made, belongs to him separately*]:

ORDERED, that the attachment granted by [me] against the property of the above-named Y. Z. on the day of 18 , be and the same is hereby discharged as to the whole¹ of said property [*or if as to part only, specify which part*], and that the sheriff deliver the property so attached and remaining in his hands, as required by law.²

[*Date and signature of judge with initials of title.*]

[*Or, if court order*] Enter: [*signature by initials of name and title.*]

Form No. 868.

Affidavit to move to discharge attachment as to interest of a copartner in leviable property.³

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says:

I. That the above-named defendant Y. Z., and this deponent, are and have been, at all the times hereinafter mentioned, partners composing the firm of Y. Z. & Co., in the business of , at No. street, in the city of , county of , in this State, where they have [*briefly describing property*], belonging to them in equal shares [*or otherwise—here state distinctly the relative interests of the partners so as to show the value of the defendant's interest*].

¹ The order should state whether the discharge applies to the whole or a part only; and if the latter, what part. *Ellsworth v. Scott*, 3 *Abb. N. C.*, 9, which see, for the practice in obtaining a discharge.

² As a general rule, it is even less necessary now than it was before the new code, to insert directions as to the manner of the re-delivery; and unless such directions are called for by spec-

ial circumstances, it is best to omit them. *Id.*

³ For notice, see Form No. 865. Application is to be made to the judge who granted the warrant or to the court. *N. Y. Code Civ. Pro.*, § 693.

The object of this remedy is to relieve against the rule in *Smith v. Orser*, 42 *N. Y.*, 132; *aff'd* 43 *Barb.*, 187; *Goll v. Hinton*, 8 *Abb. Pr.*, 120. See also *Staats v. Bristow*, 73 *N. Y.*, 264.

II. That this action is brought against deponent's said partner, on a cause of action against him alone, and this deponent has not been made a defendant therein; and is not, nor is he alleged to be, liable in any way thereon.

III. That on the day of , 18 , a warrant of attachment, granted herein, against the property of said Y. Z., was levied by the sheriff of the [city and] county of , upon the interest of the said defendant Y. Z. in the aforesaid goods and chattels, and the said sheriff has [*here state facts as to levy and possession*].

IV. That [*here state the condition of cause, showing that*] final judgment has not yet been entered in the action.

V. [*Here allege any ground besides copartnership interest, which may be relied on as impeaching the attachment.*]

VI. [*May also allege facts tending to fix value; or determining the sufficiency of sureties offered.*]

[*If application is ex parte, state as to previous application; see Form 490, p. 2. If an order to show cause is asked, state as to previous application, and also the condition of the cause and necessity of order to show cause, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 869.

Undertaking on application to discharge interest in partnership goods and chattels from attachment.

[*Title of court and action.*]

M. N., of , now applying, or being about to apply for an order that the attachment heretofore issued in this action to the sheriff of the [city and] county of , against the property of the defendant Y. Z., be discharged as to the interest of said Y. Z. in the goods and chattels of the firm of M. N. and Y. Z.:

Now, THEREFORE, we [*naming at least two sureties, with their residences and occupations; see Vol. 1, p. 461*], do hereby jointly and severally undertake, pursuant to the statute, that we will pay to the sheriff of the [city and] county of , on demand, the amount of any judgment which may be recovered against said defendant Y. Z., herein, or which may be recovered against him in any other action wherein said [*naming the*

applicant copartner] is not a defendant [*or, are not defendants*], and wherein a warrant of attachment or an execution may come to the hands of the said sheriff of the [city and] county of _____, at any time before the aforesaid warrant of attachment is vacated or annulled, not exceeding the sum of _____ dollars [*which must not be less than the value of the defendant's interest in the goods or chattels seized.*]

[*Date.*]

[*Signature.*]

[*Acknowledgment or proof as in Form 495, p. 6; Affidavit of sufficiency as in Forms 496-498, pp. 6 and 7. Order fixing amount and approving undertaking, as in Form 499, p. 7.*]

[*The order of discharge may be easily adapted from Form 867.*]

Form No. 870.

Affidavit to move to discharge attachment as to non-leviable property belonging to defendant and his copartner.¹

[*As in Form 868, to the *.*]

II. That said firm, since the said day, has, from time to time, for the account of its numerous customers and dealers in _____, caused stocks, bonds and gold to be bought and sold in New York, through H. & Co., brokers in New York, and correspondents of said firm of W., F. & S., and that margins and moneys derived from and furnished by the customers and dealers of said firm in _____, from time to time, since said day, have been forwarded to and remitted to said firm of H. & Co., to serve as moneys and margins in their hands on account of the transactions entered into by them, for the account of the said firm, acting as brokers for _____ dealers.

III. That all the moneys, funds, credits and property of said firm of W., F. & S., standing to their credit with, or held by said firm of H. & Co., were remitted by said firm of W., F. & S., since this deponent became a member of said firm, and are applicable and should be applied in settlement of the affairs and liabilities of said firm as at present constituted, and that the rights and interests of its creditors and this deponent may

¹ This, with the affidavit in corroboration, were sustained by *Barry v. Fisher*, 8 *Abb. Pr.*, N. S., 369; to same effect, *Weston v. Conant*, 1 *City Ct.*,

224. Compare *Smith v. Orser*, 42 *N. Y.*, 132; aff'g 43 *Barb.*, 187, and *N. Y. Code Civ. Pro.*, § 693.

be and are seriously injured by the attempt to attach the funds and property standing to the credit of the present firm on account of [*designating the alleged cause of action against the old firm*], and which took place, if ever, several months before deponent became a member of said firm, and that the undertaking given on the issuing of this attachment herein is utterly inadequate.

[*If application is ex parte, state as to previous application; see Form 490, p. 2; if an order to show cause is asked, state as to previous application, and also the condition of the cause, and the necessity of an order to show cause, as in Form 489, p. 2.*

[*Jurat.*]

[*Signature.*]

Form No. 871.

Affidavit in corroboration by the fund holder.

[*Title of court and action.*]

[*Venue.*]

C. H., of _____, being duly sworn, says:

I. That he is a member of the firm of H. & Co., upon whom an attachment in this action has been served, and that upon the _____ day of _____, 18____, his said firm of H. & Co. duly made and delivered to the sheriff of the [city and] county of _____, a certificate, of which a copy is hereunto annexed, marked "B," which certificate was accompanied by an account or statement of the stock and gold which the deponent's said firm was carrying for the firm of W., F. & S., of _____.

II. That all moneys and other property in the hands of deponent's firm, and belonging to the said firm of W., F. & S., have been so received from the new firm since the _____ day of _____, 18____, and are held by deponent's firm as margins on account of transactions, for said last-mentioned firm, which is composed of the defendants in this action and W. W. R., which was formed on the said day, and of which deponent's firm then had notice.

III. That deponent's firm has no moneys or property belonging to the firm of W., F. & S., as the said last-mentioned firm was constituted prior to said day.

IV. Deponent further says, that the attachment operates very injuriously upon the interests of deponent's said firm, and of the said W. W. R., and of the present firm of which he is a member, and of his and their correspondents and agents.

[*Jurat.*]

[*Signature.*]

Form No. 872.

Order discharging attachment as to partnership fund.¹

[*Caption as in Form 492 or 493, p. 4, of this Vol.*]

On reading [*if not already filed, add: and filing*] the affidavit on which the attachment in this action was granted, verified by A. B., on the day of , 18 , and the attachment and notices thereof, served by the sheriff on Messrs. H. & Co., the affidavits of W. W. R. [*&c.*], verified [*&c.*], the certificates made and delivered to the sheriff by H. & Co., and the order to show cause heretofore granted on the day of , 18 , and proof of due service thereof [and an undertaking given on the part of W., F. & S., dated the day of , 18], and after hearing F. M., in support of said order to show cause [appearing specially on behalf of the above-named , for the purpose of the motion only], and A. T., in opposition; and due deliberation being had:

ORDERED,² that the execution of the attachment, and the service of the notices by the sheriff of the city and county of , of the attachment issued herein on H. & Co., be and the same are hereby declared ineffectual for the purpose of attaching the funds, balances, and property in their hands, standing to the credit, or held for the account, of the present firm of W., F. & S., composed of the defendants and W. W. R.

AND IT IS FURTHER ORDERED, that the funds, balances, and property with said H. & Co., so standing to the credit of, or held for the account of, the said present firm of W., F. & S., at the time of the issuing of the said attachment, and at all times subsequent thereto, be, and the same are hereby released and discharged from the effect and operation of said attachment.³

[*Authentication, as in Form 491, p. 3.*]

¹ From *Barry v. Fisher* (above).

³ See *Ellsworth v. Scott*, 3 *Abb. N.*

² This paragraph is appropriate only where the original levy was legal. C., 9.

Form No. 873.

Affidavit to move to vacate notice of attachment on real property.¹[*Title of court and action.*][*Venue.*]

Y. Z. being duly sworn, says:

I. That he is defendant in the above entitled action [*or otherwise state his relation to the cause*].

II. That on or about the day of , 18 , an attachment against said defendant's property was issued herein, and delivered to the sheriff of the [city and] county of , and that the same was levied or claimed to have been levied upon the premises of this defendant at .

III. That on the day of , 18 , a notice of said attachment with a description of the real property so claimed to have been levied upon was filed with the clerk of said county, a copy of which is hereto annexed.

IV. That thereafter, by an order of the judge who granted said warrant, dated [*or, of this court, entered*] on or about the day of , 18 , said attachment was vacated [*or, was discharged as to the said real property—or, as to the portion of said real property known and described as follows—description—and if the order thus referred to has not been served on all of the parties to whom notice of this motion is to be given, add: a copy of which order is hereto annexed*].

V. [*May add any allegation showing prejudice to defendant by the outstanding notice.*]

[*If application is ex parte, state as to previous application, see Form 490, p. 2; if an order to show cause is asked, state as to previous application, and also the condition of the cause, and the necessity of an order to show cause, as in Form 489, p. 2.*]

[*Jurat.*][*Signature.*]

¹ Under *N. Y. Code Civ. Pro.*, § 711, application must be made to the court "upon such notice as it deems just." Hence it is best to take an order to show cause or a direction on the notice of motion that service in a specified manner or time shall be sufficient. To entitle the applicant to the order as matter of right, it is held in *Jaffray v. Brown*, 17 *Hun*, 575, that the affidavit must show a valid attachment; but the court have undoubtedly power to cancel a notice which is void. See Vol. I, p. 275.

Form No. 874.

Order cancelling notice of pendency of action and attachment of real property.*[As in Form 503, p. 29.]*

Form No. 875.

Notice of motion to tax sheriff's fees on attachment.¹*[Title of court and action.]*

Please take notice, that the annexed bill will be presented for taxation before the Hon. *[name of judge who granted the warrant]*, at court chambers, on the day of , 18 , at o'clock in the noon, at which place you are notified to be present, and that affidavits, of which copies are hereto annexed, will be read on behalf of the sheriff.

[Signature of]

Sheriff.

*[Date.]**[Address]* ToAttorney for *[the party liable for the payment]*.

Form No. 876.

Order taxing sheriff's fees on attachment.²*[Title of court and action.]*

An attachment having been issued in the above entitled action on the day of , 18 , directed to M. N., then sheriff of the *[city and]* county of , commanding him to attach and safely keep the property of the defendant within his county, or so much thereof as should be sufficient to satisfy the demand of the plaintiff of dollars, with interest, and the said *[naming sheriff]*, having applied for the

¹ See *Woodruff v. Imperial Fire Ins. Co.*, 90 *N. Y.*, 522, 524; *aff'd* 27 *Hun.* 229, where this and the following Form was sustained.

Under *N. Y. Code Civ. Pro.*, § 3807, subd. 2, this motion may, by virtue of

§ 26, be in the city of N. Y., be made before any judge of the court. *Hall v. U. S. Reflector Co.*, 31 *Hun.* 609; *aff'd*, without opinion, in 99 *N. Y.*, 634.

² See note to last Form.

adjustment and allowance of his compensation and fees on said attachment,

Now, on reading and filing the affidavits of J. McK. and A. E. W., and after hearing A. T., of counsel for the plaintiff, in opposition to said M. N.'s claim as sheriff as aforesaid, and H. T., of counsel for said sheriff,

I do hereby settle, adjust and allow¹ the compensation and fees of said M. N., as sheriff of the [city and] county of _____, at the sum of _____ dollars² [*and may add*, which sum is made up of the following items, which are hereby allowed [*inserting schedule*], which I hereby certify and allow as reasonable and proper for his trouble and expenses, and all his services in the premises.

[*Date.*]

[*Signature of judge, with initials of title.*]

¹ The most that the judge can do, is to adjust the fees; an order for their payment is improper. *Hall v. U. S. Reflector Co.*, 31 *Hun*, 609; *aff'd*, without opinion, in 99 *N. Y.*, 634.

² As to what fees the sheriff can allow the auctioneer for selling, see *Griffin v. Helmbold*, 72 *N. Y.*, 437.

ARTICLE IX.

ARREST.

SECTION I.—OBTAINING ARREST.

II.—VACATING ORDER; DISCHARGING FROM ARREST; AND MODIFYING SECURITY.

III.—SURRENDER, EXONERATION, ETC.

SECTION I.

OBTAINING ARREST.

- | | |
|---|--|
| 1. The remedy; and power of the court. | (889.) The same; in action on a foreign judgment. |
| 2. The cause of action; allegations extrinsic. | (890.) Fraud in contracting the debt. |
| 3. Waiver by joining inappropriate cause of action. | (891.) Absconding, or intent to defraud creditors by transfer or secreting property. |
| 4. The practice. | (892.) Undertaking on arrest (except in replevin). |
| 5. Time for applying. | (893.) Order (by judge) for arrest (for all cases except replevin and <i>ne exeat</i>). |
| 6. Prudential rules for drawing arrest paper. | (894.) Alias order of arrest. |
| 7. Several and separate fraud, etc. | |

FORMS.

I. ACTIONS OTHER THAN REPLEVIN.

- | | |
|---|---|
| (877.) Affidavit to obtain order of arrest except in replevin.
General Form. | (895.) Affidavit to obtain order of arrest by reason of apprehended evasion of the jurisdiction. (<i>Ne exeat</i>). |
| (878–91.) <i>Statements of cause of action and ground of arrest suitable to insert in the foregoing Form.</i> | (896.) Order of arrest; by the court. (<i>Ne exeat</i>). |
| (878.) Personal injury; assault. | |
| (879.) Cruelty (in action for limited divorce). | II. REPLEVIN. |
| (880.) Injury to real property by withholding possession. | (897.) Affidavit to obtain order of arrest on replevin for goods fraudulently disposed of with intent to deprive plaintiff thereof. |
| (881.) Injury to personal property; by embezzlement. | (898.) Affidavit accompanying the foregoing to inability to replevy. |
| (882.) Conversion. | (899.) Return by sheriff that goods were concealed, &c. |
| (883.) Breach of promise to marry. | (900.) Order of arrest in replevin. |
| (884.) Fraud; in obtaining advances. | |
| (885.) Deceit; through mercantile agency. | III. AMENDING COMPLAINT. |
| (885a.) Replevin. | (900a.) Affidavit to obtain order to amend complaint so as to support arrest; see Form 877. |
| (886.) Fiduciary capacity; money received in trust, to pay over. | (901.) Order to amend complaint so as to support arrest. |
| (887.) The same; money received by a collecting agent. | |
| (888.) The same; proceeds of property sold on commission. | |

1. *The remedy ; and power of the court.*—What has been said under the head of Attachment (p. 275, 1, 2,) in respect to the nature of the remedy and the power of the court, applies equally to Arrest.

2. *The cause of action ; allegations extrinsic.*—In addition to what is there said respecting the cause of action, it should be observed that the New York statute as recently amended, the better to protect personal liberty, requires that the ground of arrest in a civil action be now always made one of the issues in the action,¹ with the single exception of apprehended evasion of the jurisdiction in a case in which such evasion might defeat a remedy in contempt (formerly ground for *ne exeat*).

An action against a joint debtor, not served in a previous action in which judgment was recovered on service of his co-debtor, is regarded as an action on the original contract for the purpose of obtaining an arrest.²

3. *Waiver by joining inappropriate cause of action.*—The right to arrest upon any cause of action is waived if plaintiff

¹ Since this amendment of *N. Y. Code Civ. Pro.*, § 549, in 1886, uniting in one section, under the heading of cases "when the right to arrest depends on the nature of the action," actions on contract and actions for tort, with a requirement that the facts constituting the ground of arrest in actions on contract (which were formerly regarded as extrinsic to the action) must be alleged in the complaint and proved upon the trial,—it seems to be thought by some that the ground of arrest is now always involved in or necessarily commingled with the cause of action, and can no longer be regarded as extrinsic to the cause of action, with the single exception mentioned in the text.

But it should be observed that the statute even as thus amended authorizes arrest "in an action upon contract" (§ 549, subd. 4), so that an action may still be regarded as upon contract, notwithstanding the necessary allegations either of fraud in contracting the debt, or of intent to defraud creditors. And if the effect of the amendment be held to make all actions in which arrest is sought, actions for tort, serious inconveniences which could not have been contemplated in the amendment of the statute, will result in abolishing the right to arrest one of several joint debtors for his sole fraud, when the action is against both; in restricting the right of counter-claim, and perhaps the power of the court to order a reference; and in raising doubt as to the right to issue execution against the person (§ 1487); and as the language of the amended statute would be fully satisfied by alleging the contract as the cause of action upon which the demand for relief is founded, and alleging the ground of arrest in a manner to give defendant notice that a body execution might follow recovery, it seems unnecessary to hold that the required allegation of the ground of arrest will, of itself, transform the action into an action of tort. And it is clearly impossible so to hold where the ground of arrest is merely a fraudulent disposal of property with intent to defraud creditors.

² *N. Y. Code Civ. Pro.*, § 1940.

iff joins in the same complaint, a cause of action in respect of which the defendant is not liable to arrest.¹

4. *The practice.*]—Application is made *ex parte*; and under the New York statute, it must be made to a judge of the court in which the action is brought, or to any county judge;² except that,

1. In *quo warranto* an order to arrest an usurper who has obtained fees or emoluments, may be made by "the court or a judge:"³ and,

2. In a case for specific relief, an order to arrest on the ground of apprehended evasion of jurisdiction, which might defeat the remedy, may be granted only by the court.⁴

It must be made on affidavit,⁵ and, as matter of precaution, a complaint should also be presented; but the better opinion is that the presentation of the complaint is not essential.⁶

If the complaint be verified, it may be used as an affidavit for the purpose of the application.⁷

Inasmuch as it is not the function of a complaint to state evidence, the complaint alone is rarely sufficient.

¹ *Madge v. Puig*, 71 *N. Y.*, 608; *Am. Un. Tel. Co. v. Middletown*, 80 *id.*, 408.

Held otherwise of a recovery of part of an entire claim. *Fitch v. McMahon*, 103 *N. Y.*, 690; s. c., 3 *N. Y. State Rep.*, 147.

² The rule as to ordinary *ex parte* applications, is different. Vol. I, p. 132.

A judge of the New York Common Pleas may act. *People v. Donohue*, 15 *Hun*, 446. And a local officer, such as may exist in some counties, elected to discharge the duty of surrogate where there is an acting county judge and surrogate (*L.* 1849, c. 306, § 1), may grant the order without regard to whether the office of county judge was vacant, or his inability to act; for such local officers were, by *L.* 1851, c. 198, § 1, authorized to perform the duties that can be performed by a county judge *out of court*. *Seymour v. Mercer*, 13 *How. Pr.*, 564.

³ *N. Y. Code Civ. Pro.*, § 1949. As to what judge in such case, compare *id.*, § 1949, § 561, and the last note in Vol. I, p. 131.

⁴ *Id.*, § 551.

⁵ *Id.*, § 557.

⁶ The contrary has been held in some cases of minor authority; but even if these cases were sound, the power of amendment ought to cure the defect in any case where there is substantial reason for not presenting the complaint.

⁷ *N. Y. Code Civ. Pro.*, § 3343, subd. 11.

So held even before the present statute. *Brady v. Bissell*, 1 *Abb. Pr.*, 76; *Turner v. Thompson*, 2 *id.*, 444; *Palmer v. Hussey*, 59 *N. Y.*, 647. And when the order could not be procured on the pleadings, an affidavit was necessary. *Corwin v. Freeland*, 6 *N. Y.*, 560; rev'g 6 *How. Pr.*, 241; s. r., *McGilvery v. Morehead*, 2 *Cal.*, 607.

5. *Time for applying.*—The application may be made at the very commencement of the action, and for this purpose the issue of a summons is sufficient.¹

It is not too late at any time before final judgment; nor even after final judgment in a case of apprehended evasion of the jurisdiction, to defeat specific relief (*ne exeat*). In any case the order may be made after verdict² or decision.³ And it may be made even after judgment once entered has been opened and allowed to stand as security pending another trial.⁴ Stay of proceedings for the purpose of making a case does not prevent the application.⁵

6. *Prudential rules for drawing arrest papers.*—The rule stated on pages 278–280, in respect to the allegations in the complaint and affidavit for the purpose of obtaining an attachment, apply with enhanced strictness to arrest. It is always better to apply upon a sworn complaint and to support all the allegations, whether relating to the cause of action or to the ground of arrest by evidence in some detail, and positively sworn to so far as practicable.

Particular care should be taken to state the defendant's name correctly.⁶ But fictitious names or descriptions may be used when necessary, on the same grounds on which they are allowed in the summons.⁷

7. *Several and separate fraud, &c.*—The fraud which is a

¹ *N. Y. Code Civ. Pro.*, § 558.

² *Danenbaum v. Mandelbaum*, 16 *Weekly Dig.*, 502.

³ *Humphrey v. Hayes*, 94 *N. Y.*, 594.

⁴ *Mott v. Union Bank*, 38 *N. Y.*, 18.

⁵ *Lapeous v. Hart*, 9 *How. Pr.*, 541.

⁶ Formerly it was held that an arrest of a person by a wrong name could not be justified, though he was the person intended, unless he were as well known by one name as the other. *Griswold v. Sedgwick*, 6 *Cow.*, 456; 1 *Wend.*, 126; *Mead v. Haws*, 7 *Cow.*, 332; *Holley v. Mix*, 3 *Wend.*, 350; *Scott v. Ely*, 4 *id.*, 555; *Gurnsey v. Lovell*, 9 *id.*, 319. See 2 *R. S.*, 274, § 282; *id.*, 347, § 3.

But since the Code it is not necessary that the name of the party to be arrested should be stated, if unknown: he may be designated as the real defendant in the suit or proceeding, and whose name is not known; or by any name. *Pindar v. Black*, 4 *How. Pr.*, 95.

⁷ See Volume I, p. 611.

ground of arrest is actual fraud. A constructive fraud, or fraud in legal effect merely, is not enough.¹

Hence a principal sued on a contract which his agent² made by means of fraud, or a husband sued on one so made by his wife,³ is not liable to arrest unless it appears that he sanctioned the fraud.

So the liability of each of several co-defendants to arrest depends on his own fault.⁴ Though the cause of action be joint, the ground of arrest for fraud in incurring the liability or in disposing of property is several; and while both partners are liable to judgment for the debt, one who is alone chargeable with false representations in contracting it, or fraud on creditors in endeavoring to evade paying it, is alone liable to an order of arrest.⁴

Indirect sanction may, however, be enough, as where the agent used false representations which he had heard the principal use in another transaction,⁵ or where the principal, with knowledge of the fraud, appropriated the fruits of it. But mere participation in the fruits of the fraud, by a principal⁶ or partner⁷ ignorant of the wrong, does not render him liable to arrest in an action on the contract to arrest such an one, there

¹ *Matter of Holdforth*, 1 *Cal.*, 438. Thus a debtor who makes an assignment which, without any actual fraudulent intent on his part, is constructively fraudulent by reason of illegal provisions, is not thereby rendered liable to arrest.

² *Hathaway v. Johnson*, 55 *N. Y.*, 93; s. p., *Clafin v. Frank*, 8 *Abb. Pr.*, 412; *Tracy v. Veeder*, 35 *How. Pr.*, 209, 215.

³ *Stewart v. Strasburger*, 7 *Hun*, 337 (holding husband liable to arrest for fraudulent purchase by wife, it appearing that the goods were bought in his name and by his authority, and that he had the benefit of them; an order vacating his arrest was therefore reversed).

⁴ *Witmark v. Herman*, 44 *Super. Ct. (J. & S.)*, 144 (holding false representations as to the responsibility of a firm, made with intent to defraud, good grounds of arrest of the partner making them).

Bacon v. Kendall, 49 *Super. Ct. (J. & S.)*, 123 (holding partners innocent of the fraudulent representations, not liable to arrest).

Hanover Vulcanite Co. v. Nathanson, 38 *Hun*, 488 (holding one partner liable to arrest, in action on firm debt, where he withdrew and converted assets after injunction).

Contra, *Matter of Benson*, 11 *Weekly Dig.*, 394; s. c., 60 *How. Pr.*, 314.

The principle stated in the text is the now generally accepted rule, though many earlier cases do not make the distinction.

⁵ *Smith v. Frank*, 2 *Robt.*, 626.

⁶ *Hathaway v. Johnson*, 55 *N. Y.*, 93.

⁷ *Hitchcock v. Peterson*, 14 *Hun*, 389.

should be an action for a tort, after demand or notice, or whatever step may be necessary to put him in the wrong.

Form No. 877.

Affidavit to obtain order of arrest, except in replevin. General Form.

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says :

I. That he is the plaintiff [*or, one of the plaintiffs*] above named [*if partners, may add, who at all the times hereinafter mentioned were and still are copartners under the firm name of* , carrying on business in] [*or otherwise identify deponent, and state his relation to the case*].

[*In case of action on contract, state cause of action, as thus :*]

II. That Y. Z., the above-named defendant, is justly and truly indebted to said plaintiff in the sum of dollars, as appears by the complaint herein, verified on the day of , 18 [*and, if any of its allegations material to the application are not positive, add: all of the allegations of which (numbered to) are true to deponent's knowledge; or annex corroborating affidavits. See Forms 878, 891 (below)*].

[*Or when the action is for tort, state cause of action, as thus :*]

II. That on or about the day of , 18 , Y. Z., the above-named defendant, assaulted and beat said plaintiff, as appears by the complaint herein [*referring to it and corroborating it as above; and, if intent, malice, want of probable cause, &c., be alleged in it, add evidence*¹].

[*In an action of either class :*] III. That the above-entitled action is hereupon commenced for said cause [*or may say, upon said contract—or, for said tort—or, to recover possession of said goods*], and the annexed [*or, accompanying*] summons therein has been issued [*or otherwise state the condition of the cause*].

¹ Grimes v. Davison, 2 Abb. N. C., 457.

IV. [*If the complaint has already been served and does not contain the allegations of the ground of arrest required by N. Y. Code Civ. Pro., § 549, say:*] That the summons and complaint in this action were filed [*or, served—or both*] on or about the day of , 18 , and that annexed hereto is a copy of the amended complaint verified the day of , 18 , which plaintiff desires to file and serve, so as to conform to the allegations in respect to the ground of arrest required by law¹ [*and may add, if desired, facts excusing delay*].

V. [*State in detail any facts extrinsic to the cause of action and not already stated, necessary to bring the case within one of the classes in which the statute allows the arrest;² and if any allegation involves intent, malice, want of probable cause, or the like,³ state facts evidencing it. See Forms 878 to 891 (below).*]

VI. [*Whether suing on contract or for tort, may state any circumstances tending to show necessity of bail or proper amount, as thus:* That the defendant is not a resident of this State, but resides at , in , and is about to leave this State for ,—*adding sources of information and grounds of belief. For allegation that he is a transient person whose residence is unknown, see Volume I, p. 664.*]

VII. That no previous application for an arrest of said defendant has been made in this action [*except, &c.*⁴].

[*Jurat.*]

[*Signature.*]

STATEMENTS OF CAUSE OF ACTION AND GROUND OF ARREST SUITABLE TO INSERT IN FOREGOING FORM OF AFFIDAVIT FOR ARREST.

878. *Personal injury*;⁵ *assault*. [*Substitute in Form 877.*]*—II.* That on the day of , 18 , in street, in the village of , in the

¹ Such amendment may be allowed without notice. *N. Y. Code Civ. Pro.*, § 558, last clause.

It should be noted that the power to allow the amendment is expressed as conferred on "the court." If this word were to control, the judge making the order could not give leave for amendment, nor do the provisions of law empowering amendments in pleadings contemplate the giving of leave by a judge out of court; but it seems to me that a fair construction of the statute, in view of the context, "the court before making the order," empowers the judge granting the order of arrest to give the leave to amend.

For order to amend, see Form 901.

² In consequence of the amendments to §§ 549 and 550, by the Act of 1886, the facts extrinsic to the cause of action must now be alleged in the complaint, except when they are merely the grounds of fearing personal evasion of the jurisdiction for which a writ of *ne exeat* might have been granted at common law. See § 550.

³ *Grimes v. Davison*, 2 *Abb. N. C.*, 457.

⁴ For the New York rule requiring this, see p. 2 of this Volume.

⁵ Allowed by *N. Y. Code Civ. Pro.*, § 549, subd. 2. "Personal injury" is defined by § 3343, subd. 9, as including injury to the person either

county of _____, State of _____, the defendant Y. Z., of _____,¹ with force and arms assaulted and violently attacked me without any provocation whatever, and with force and violence laid hold of me and knocked me down and struck, beat, kicked me and wounded and bruised me, by which I was made lame and sick, and disabled for the space of _____ next ensuing from attending to my affairs and doing my business as a _____, and suffered great bodily pain and mental distress, and was also compelled to expend _____ dollars for medicines, medical care and nursing [*may state particulars as to loss in vocation*].

879. *Cruelty*³ (*in action for limited divorce*). [*Commencement and conclusion as in Form 877.*].—I. I am the plaintiff, and the wife of the defendant above named, and an inhabitant of _____, in the State of _____, and have resided there with my said husband for _____ years past.⁴

II. I was married to said defendant on the _____ day of _____, 18____, at _____, in the State of _____, and am now _____ years of age, and my said husband is _____ years of age.

III. [*Allege acts of cruelty complained of, for instance thus:*] On or about the _____ day of _____, 18____, at the house of his cousin, M. N., in _____, after we had retired for the night, he began abusing me about my folks at home; we were in bed at the time, and I was crying and in great distress, whereupon my said husband assaulted me violently, seized me by my hair, and knocked my head with great force and cruelty against the wall of the room, against which the bed stood, thereby inflicting on me severe pain.

IV. [*State other details of cruelty in the same manner.*].—In consequence of such cruel conduct and ill treatment I have been completely broken in spirits, my physical health has been much impaired and my nervous system disarranged, and I have suffered great mental anguish and physical pain by reason thereof [and I verily believe that my husband will kill me if he is allowed an opportunity to do so].

of plaintiff or another. *Contra*, before that definition, *Ryall v. Kennedy*, 41 *Super. Ct. (J. & S.)*, 531; s. c., 52 *How. Pr.*, 517. It includes an action by a wife against one who entices her husband from her. *Breiman v. Paasch*, 7 *Abb. N. C.*, 249; s. p., *Warner v. Miller*, 17 *Abb. N. C.*, 221.

Compare *Groth v. Washburn*, 34 *Hun*, 509 (holding, under Statute of Limitations, that a husband's action for a wife's loss of services is an action for injury to property).

The above Form is sustained by *Pease v. Pendell*, 57 *Mich.*, 315; s. c., 23 *Northwestern Rep.*, 827; *N. Y. Code Civ. Pro.*, § 549, subd. 2; *Chitty's Forms of Pr.*, 387.

In cases of assault and battery, libel, slander, &c., the damages being very uncertain, it is desirable to state fully the circumstances, showing an unprovoked offense, its malicious intent, and its aggravations.

¹ It is desirable to state that defendant is a non resident or transient person, if such be the fact. 1 *Tidd.*,

172; *Davis v. Scott*, 15 *Abb. Pr.*, 127; *Pfuger v. Lescke*, 4 *Monthly L. Bul.*, 87.

By a special rule of the N. Y. City Court, adopted December 3, 1883, orders of arrest in actions for slander or assault and battery will only be granted upon satisfactory proof that the defendant is about to leave the city or State.

² *Ehrgott v. Mayor, &c.*, of N. Y., 96 *N. Y.*, 264; rev'g 66 *How. Pr.*, 161; *McNamara v. Village of Clintonville*, 62 *Wisc.*, 207; s. c., 22 *Northwestern Rep.*, 472.

³ Supported by *Gardiner v. Gardiner*, 3 *Abb. N. C.*, 1; but notice that the action is not literally within the statute. See *Jamieson v. Jamieson*, 11 *Hun*, 38.

For the rule of domicile in divorce, see 10 *Abb. N. C.*, 333, note.

⁴ May also allege facts as to husband's financial resources or "faculties;" but if apprehended evasion of the jurisdiction is the ground of applying for arrest, take order of court. See Form 895.

880. *Injury to real property by withholding possession.*¹ [Substitute in Form 877.]-II. That A. K. M. was, on or about the day of , 18 , in the quiet and peaceable possession of certain lands and tenements situate in , in the county of , and described as follows [description]. That said A. K. M. held said premises by virtue of a lease from the firm of M. & M., former owners of said premises, which lease was dated , 18 , and was for the term of one year, with rents payable thereon the of each and every month, and that said M. continued in possession of said premises after the expiration of said lease.

III. That on or about , 18 , the said A. A. C. purchased the said premises from M. & M., and that on or about , 18 , this deponent had a conversation with said M. in regard to the time he (said M.) expected to require said premises, and that said M. then stated that he wanted to remain until , then ensuing, and an arrangement was then made between deponent and said M. for said premises to be held by M. until the said of , 18 ; that on or about the of , 18 , the said M. came to deponent's store and wanted to make a further arrangement, and stated that his business would detain him longer than he expected, and he (said M.) wanted the privilege of remaining until , then following, which arrangements were agreed to by deponent.

IV. That on the of , 18 , further arrangements were made between said M. and deponent, whereby said M. was to remain in said premises until the day of , 18 , and that said M. then and there agreed with deponent to "get out" on the of ; that said M. at that time wanted to rent the premises for a longer time, but the deponent then and there refused to let said M. have the premises for any longer time, and told said M. that he must "get out" by the of .

V. That in all the said transactions deponent acted as the agent of said A. A. C., and all the arrangements made between her and said M. were made through deponent as such agent, and said M. was cognizant of such agency.

VI. That said M. did not vacate the premises on the day of , and refused to vacate the same at all times after said day of , and said A. A. C. has not, since said day of , accepted any rent for said premises, or in any manner recognized said M. as her tenant.

VII. That said A. A. C., after the said day of , 18 , commenced an action before S. F. L., a justice of the peace for , for the recovery of the possession of said premises, which said action was appealed to the Court for County, and on the trial of said appeal, and on the day of , 18 , the said A. A. C. recovered a judgment, then and there rendered and entered in said court, for the possession of said property, and for the restitution thereof, as more fully appears by the records of said court.

VIII. That said M. remained in possession of said premises continually from the said day of , 18 , until on or about the day of , 18 . Deponent further says, that he verily believes that upon the aforesaid facts the said A. A. C. has a good cause of action against the said A. K. M. in an action for trespass on the case, and the said A. A. C. claims damages in the sum of dollars.²

¹ N. Y. Code Civ. Pro., § 549, subd. 2. This Form is sustained in *Cummer v. Moyer*, 57 Mich., 375; s. c., 24 North-western Rep., 110, against the objection that the affidavit stated a different case from the complaint, in that the affidavit failed to specify the particulars of damages, and to refer to the statute under which plaintiff was entitled to have the actual damages trebled.

² Under the New York Code it is best to add such allegations as show that the wrong is willful, and not a mere technical tort resulting from a difference of opinion as to the right of the parties. It was formerly held that ejectment to try title was not an action for an injury to property. *Merritt v. Carpenter*, 3 Abb. Ct. App. Dec., 285; rev'g 30 Barb., 61.

881. *Injury to personal property; by embezzlement.*¹ [*Substitute in Form 877.*—II. That on the _____ day of _____, 18____, and at other times within the past _____ months, deponent delivered to E. S., the defendant, about \$20,000 in gold certificates, the property of said D. S. & Co., which the said defendant knew to be said property, and which she has converted to her own use, and refuses to surrender to the plaintiffs. That said defendant has stated to him personally that she is about to remove from the State of New York; and that she induced and persuaded the deponent to take the above moneys from his employers and give it to her, and has willfully received and converted the same, in fraud of said plaintiffs, and with the expressed intention of fleeing the country with deponent.

*Another Form; obtaining money on forged securities.*² [*Substitute in Form 877.*—II. That the defendant at _____, on the _____ day of _____, 18____, obtained from plaintiff _____ dollars, under the following circumstances:

At said time and place the defendant exhibited to deponent a document, the original of which will be exhibited to the justice to whom application will be made in this action for an order to arrest defendant, and will be produced on the trial of this action; said document purported to be, and was then and there by the defendant represented to plaintiff to be a first mortgage bond of the L. & F. Railroad Company, State of M., for the sum of \$1,000 and the other of \$500, and the principal payable _____, and the interest payable _____ and _____ of each year, the payment of the principal and coupons of said bonds guaranteed by the M. C. Railroad Company, in pursuance of a contract dated _____, 18____, said guaranty purporting to be signed by J. C., treasurer of the said M. C. Railroad Company.

The said bond was dated _____, had attached to it coupons for the payment of _____ dollars on _____ and _____ of every year until the principal became due.

Said bond purported to be signed by D. W. C., treasurer, H. M. P., president, and R. C., G. E., B. J. and J. W. P., trustees.

IV. At said time and place said defendant stated to plaintiff that said bond was genuine and of the value it purported to be, asked this plaintiff to loan to her said _____ dollars for the payment of a judgment then pressing upon her, and stated to deponent that if deponent would advance said money and extricate her from her trouble arising out of said judgment, she would deposit said bond and coupons, and that deponent should collect such coupons as they became due, and then and there delivered to this defendant said bond and coupons, and made, executed and delivered to this deponent an instrument of

The better opinion now is that it is, under the present statute, if the wrong is willful. See *Welch v. Winterburn*, 14 *Hun*, 518.

¹ Sustained by *N. Y. Code Civ. Pro.*, § 549, subds. 2, 3, 4; *Duncan v. Katen*, 64 *N. Y.*, 625; aff'g 6 *Hun*, 1.

"Injury to property" includes, by *N. Y. Code Civ. Pro.*, § 3343, subd. 10, "any actionable act whereby the estate of another is lessened, other than a personal injury or breach of contract." Hence it includes an embezzlement (*Northern R. R. Co. v. Carpenter*, 3 *Abb. Pr.*, 259; s. c., 13 *How. Pr.*, 222), the boycotting of business (*Old Dominion St. Co. v. McKenna*, 18 *Abb. N. C.*, 262), a purchase by fraud (*Muser v. Miller*, 12 *Abb. N. C.*, 305), or inducing advances on forged

bills (*Bogart v. Dart*, 25 *Hun*, 395), and the like. This affidavit and the next therefore justify arrest even of a female, as showing a willful injury to property. *N. Y. Code Civ. Pro.*, § 553. They would therefore equally justify attachment, under *id.*, § 635. See also *Weiller v. Schrieber*, 11 *Abb. N. C.*, 175.

Faris v. Peck, 10 *Abb. Pr.*, *N. S.*, 55; s. c., 2 *Sweeny*, 689, sustains arrest for obtaining property of another through identity of name, and disposing of it.

² Sustained by *Eypert v. Bolenius*, 2 *Abb. N. C.*, 193; s. p., *Bogart v. Dart*, 25 *Hun*, 395, and *N. Y. Code Civ. Pro.*, § 549, subds. 2, 3, 4. See note 1 to preceding Form.

which the following is a copy, and the original of which this deponent is ready to produce.

And then and there said defendant also asked this deponent, as a further security, to take an assignment of the judgment to be paid by said moneys.

This deponent believed said representations of said defendant, and upon the faith thereof advanced to defendant said dollars, and received said bond and authorization.

Said representations of said defendant were wholly false, said bond was a forgery and counterfeit, and was uttered by said defendant falsely, fraudulently and feloniously.

The coupon thereto attached for \$30, payable , 18 , was by this deponent presented to said company for payment, and pronounced a forgery.

882. *Conversion.*—[*Substitute in Form 877.*—] That on the day of , 18 , said Y. Z., being a note broker, doing business at , offered to deponent to find a purchaser for a promissory note for dollars, made by one M. N., of , payable to the order of deponent.

That at the request of said Y. Z. deponent delivered to him the said note in trust, to sell the same for cash, as a broker aforesaid, and to return the proceeds thereof immediately to this deponent, and for no other purpose whatever.

That deponent did not sell the said note to said Y. Z., nor did he deliver it to him in any other manner, or for any other purpose, than as a broker aforesaid, but has converted the same to his own use.

That the said Y. Z. informed deponent on the same day that he had pledged the said note for dollars, but refused to state to whom he had pledged it.

That the said Y. Z. has neglected and refused to return said note to deponent, or to pay any part of its amount to deponent.

883. *Breach of promise to marry.*¹ [*Substitute in Form 877.*—] II. That on the day of , at , in consideration that the plaintiff was then unmarried, would, at the request of the defendant, marry him, on request, the defendant promised to marry the plaintiff within a reasonable time [or, on the day of —*or, on request.*]

That the plaintiff, confiding in said promise, has always since remained and now is ready and willing to marry the defendant.

That the defendant [on or about the day of] refused to marry the plaintiff, although a reasonable time has elapsed. [*Here add details, such as that he has married a third person.*]

884. *Fraud; in obtaining advances.*² [*Substitute in Form 877, p. 359.*—] II. That on , 18 , the defendant mailed a letter to this deponent, which was received by him on , 18 , stating that he would ship to the deponent hogs and calves, to be sold upon commission, and requested the deponent to send in return his check for the sum of dollars on the aforesaid, without fail, as an advancement upon the said shipment.

Defendant then resided, and still resides, at , county, State of , and he informed the deponent by said letter that he would make said shipment by way of the D. and L. R. Co., and that the deponent might expect

¹ *N. Y. Code Civ. Pro.*, § 549, subd. 2.

A female, sued for breach of promise to marry, cannot be arrested. *Siefke v. Tappey*, 3 *Code R.*, 23; *N. Y. Code Civ. Pro.*, § 553.

² Or the action may be brought on the contract—see Form 890 (*below*)—

(in which case there can be no question as to the right of attachment in case of non-residence, &c.); and then the fraud here alleged would avail as ground of arrest, as fraud in contracting the liability; but to render it so available it must be alleged in the complaint.

the delivery of said shipment on day, 18 , a copy of which letter is hereto annexed and marked Exhibit A.¹

That upon receipt of such letter from the defendant on , 18 , relying upon the belief that said property had been shipped upon that day, the deponent mailed to him a check upon the Bank for said sum of dollars, which check was received by the defendant, and the amount thereof, to wit, dollars, was paid to him by the said bank as appears by a copy of said check, and of deponent's indorsement thereon, hereto annexed.

That in the ordinary course of transportation said property, if shipped by defendant on said day of , 18 , would have reached , on the morning of the , and the deponent in making such payment fully trusted and believed, upon the faith of defendant's letter, that said property had been shipped to them on said , , 18 , the date on which they forwarded their check.

Deponent further alleges that the defendant never made said shipment to the deponent,² but made such statement or representation with intent to defraud deponent out of dollars.

Deponent therefore alleges that the defendant, by means of such false and fraudulent representations, induced the deponent to part with said sum of dollars, which sum defendant has received by virtue of the deceit above stated.

885. *Deceit; through mercantile agency.*³ [*Substitute in Form 877.*].—
II. That, knowing the Agency to be a concern in city where the merchants in trade would inquire concerning the financial and pecuniary responsibility of a dealer who sought to buy goods of them on credit, the said defendant intending to buy goods on credit and not pay therefor, made the following representation to said agency concerning his financial and pecuniary responsibility, well knowing the material parts thereof to be false. [*Copy of statement.*]

That thereafter, and upon receiving defendant's order for the goods so sold as aforesaid, and before he sold or delivered any part of the same, and in order to ascertain what credit, if any, might be safely allowed defendant for payment therefor, the plaintiff inquired of said Agency, in , what was the financial standing and responsibility of the defendant; and in reply the said agency furnished plaintiff with the statement aforesaid.⁴

Thereupon the plaintiff, believing said representation to be true, and relying thereon, and deceived thereby, was induced to comply with said order of the said Y. Z., and in consequence thereof sold and delivered to him on credit [*designating goods*].

Said representations to said agency were false and known to defendant when he made them to be false; and in particular [*here specify details, stating in what respect each was untrue*].

885a. *Replevin.* [*See Form 897.*]

886. *Fiduciary capacity; money received in trust, to pay over.* [*Substitute*

¹ The representations, if oral, must be stated.

² It is better to support such an allegation as this with grounds for belief.

³ In perhaps the larger classes of cases of deceit, the cause of action itself, as alleged in the complaint, furnishes the ground of arrest. See note to last Form and compare Forms 890 to 897 (*below*).

⁴ In *Schulz v. Harris* (*N. Y. Daily Reg.*, May 12, 1884; abstr. s. c., *Abb.*

An. Dig., 1884, Arrest, 3; Gen. Term opinion by Brady, J.), from which the above Form was taken, it was held that a merchant who furnishes to a commercial agency a statement of his affairs for the use of the company, is responsible to those whom it reached in due course, and who were influenced by it to sell to him on credit; and if these representations were false, an order of arrest founded upon them should be sustained. See *Abb. Tr. Ev.*, 615, par. 2, n. 7, and *cas. cit.*

in Form 877¹.—II. That heretofore, and about the day of , 18 , at , the deponent intrusted to the defendant, as agent of the plaintiff, and defendant received from deponent as such agent, the sum of , belonging to the plaintiff, to be by defendant forwarded and paid to the plaintiff in ; which said defendant promised and agreed so to forward and pay to the plaintiff.

That the said defendant has wholly neglected and refused to pay to the plaintiff, or to forward to him, said sum so intrusted to the defendant, or any part thereof, although the same has been demanded by the plaintiff from the defendant; and that said defendant has applied and converted the same to his own use [*add evidence if practicable*].

887. *The same; money received by a collecting agent.* [*Substitute in Form 877.*]—II. That this plaintiff is engaged in business in the city of New York; that in the spring of 18 , there being a large number of persons in various parts of this State indebted to this plaintiff in divers sums of money for goods theretofore sold and delivered to them by this plaintiff, this plaintiff employed the defendant to collect the same in the name and for the benefit of this plaintiff, and upon the agreement that he should pay the same over to this plaintiff upon collection [*specifically as received, less only his commission of per cent.*].

That the defendant entered upon such employment, and proceeded to the collection of said sums of money; and has in fact collected a considerable portion thereof, as deponent is informed by several of said creditors; and by receipts therefor in the handwriting of said defendant, and in the possession of such creditors.

That, in particular, he has collected dollars from M. N.; who was indebted to this plaintiff in that amount, and has given to him a receipt therefor in the name of this plaintiff, as more fully appears by the annexed affidavit of the said M. N.² And also, in like manner, the following sums of money from the following persons, who were, at the time of such collection, creditors of this plaintiff in such amounts, viz., from O. P. dollars [*&c., specifying amounts and those paying as far as possible*]. That this plaintiff believes that he has collected other moneys from other creditors of this plaintiff; but exactly what amounts, and from whom, he is not able definitely to state.

That this plaintiff, on the day of , 18 , demanded of the defendant that he account to him for the money so collected, and pay the same over to him; but hitherto the defendant has wholly neglected so to do.³

¹ This form is sustained by *Bull v. Mann v. Sands*, *N. Y. Daily Reg.*, May 25, 1883. *Melliss*, 9 *Abb. Pr.*, 58. See also the following cases.

Receipt of draft by banker for collection, not ground for arrest. *Bus-sing v. Thompson*, 15 *How. Pr.*, 97.

Nor where credit is given to the agent as debtor. *Robbins v. Falconer*, 43 *Super. Ct. (J. & S.)*, 363, 372; *s. p.*, *Goodrich v. Dunbar*, 17 *Barb.*, 644.

Nor where money is deposited from time to time in the course of ordinary banking business. *Buchanan Farm Oil Co. v. Woodman*, 1 *Hun*, 639.

Nor where defendant has a right to control the fund independently of any appropriation of it according to the instructions of the owners. *McBurney v. Martin*, 6 *Robt.*, 502, 508;

But remittance to banker, with instructions to send a draft for the amount to a third person, is sufficient ground for the arrest. *Johnson v. Whitman*, 10 *Abb. Pr.*, *N. S.*, 111.

² This affidavit is sustained by *Stoll v. King*, 8 *How. Pr.*, 298. See, also, *Ridder v. Whitlock*, 12 *id.*, 208.

³ In an action for money received in a fiduciary capacity, it is not necessary that the affidavit state that the defendant had embezzled or fraudulently misapplied the sum. To render an agent liable to arrest, all that is necessary to be shown is that he received the moneys of his principal, for the recovery of which the action is brought, in "a fiduciary capac-

888. *The same; proceeds of property sold on commission.*¹ [Substitute in Form 877.]—II. That in the _____, of the year 18____, deponent was the owner of a quantity of machinery, &c., and other personal property, then contained in a building owned by the deponent, and known as the _____ Mill, situated in the town of _____, county of _____, and State of New York, and the defendant, Y. Z., was engaged in business at said city of _____, as a _____, and dealer in machinery and property of the kind so owned by deponent.

That deponent desired to sell the aforesaid personal property, and said Y. Z. called upon this deponent, at some time in the spring of the year 18____, and requested this deponent to authorize him, as deponent's agent, to sell and dispose of the aforesaid property, upon commission.

That, at the request of said Y. Z., deponent delivered to him a portion of the said property, to wit: [designating articles] to sell the same for cash, as a commission merchant, and as deponent's agent, and to return the proceeds thereof immediately to this deponent, and for no other purpose whatever.

That said Y. Z. took and received said property for the purpose, and upon the agreement aforesaid, and for no other purpose, and faithfully promised

ity;" and he must be deemed to have received them in that capacity, when it appears that he had no authority to disburse them on account of his principal, but was bound to pay them over on request. *Republic of Mexico v. De Arangoiz*, 5 *Duer*, 634, aff'g 11 *How. Pr.*, 1.

In this rule later authorities emphasize the requirement that it should be shown to have been his duty to pay over the specific sums, not merely to credit them in general account. See the following cases. Receipt by agent of specific sum for specific purpose, is ground for order. *Schadle v. Chase*, 16 *How. Pr.*, 413; *Obregon v. De Mier*, 52 *How. Pr.*, 356; *Noble v. Prescott*, 4 *E. D. Smith*, 139; *Burhans v. Casey*, 4 *Sandf.*, 707; *Lambertson v. Van Boskerk*, 49 *How. Pr.*, 266.

¹ Sustained against a motion to vacate the order of arrest, in *King v. Arnold*, 84 *N. Y.*, 668.

Compare the following cases: Receipt of goods by a commission merchant—order sustained. *Schudder v. Shields*, 17 *How. Pr.*, 420; *Duguid v. Edwards*, 50 *Barb.*, 288, rev'g 32 *How. Pr.*, 254. (Mingling proceeds.) *Turner v. Thompson*, 2 *Abb. Pr.*, 444. Compare *Donovan v. Cornell*, 8 *Civ. Pro. R.*, 283.

But not when he guarantees the payment of the debt. *Sutton v. De Camp*, 4 *Abb. Pr.*, *N. S.*, 483. Unless he has in fact been paid by the debtor. *Wallace v. Castle*, 14 *Hun*, 106. See *Nagle v. McFeeters*, 9 *N. Y. Weekly Dig.*, 129.

Deposit with auctioneer. *Holbrook v. Homer*, 6 *How. Pr.*, 86. s.

P., *Barret v. Gracie*, 34 *Barb.*, 20 (order of arrest sustained).

As to deposit of money with broker to cover losses in dealing in stocks, compare *Mann v. Sands*, 2 *City Ct.*, 25; *Clark v. Pinckney*, 50 *Barb.*, 226; *Graeffe v. Currie*, 52 *Super. Ct. (J. & S.)*, 554.

Inducing the plaintiff to intrust defendant with bill of lading will render him such factor. *Standard Sugar Refinery v. Dayton*, 70 *N. Y.*, 486 (order sustained).

Conversion of proceeds of promissory note by note-broker. *Robbins v. Seithel*, 20 *How. Pr.*, 366. s. *P.*, *Wolfe v. Brouwer*, 5 *Robt.*, 601. See, also, *Continental Bank v. De Mott*, 8 *Bosw.*, 696; *German Bank v. Edwards*, 53 *N. Y.*, 541; *Prouty v. Swift*, 51 *id.*, 594; *Morange v. Waldron*, 6 *Hun*, 529; *Buchanan Farm Oil Co. v. Woodman*, 1 *id.*, 639; *Standard Sugar Refinery v. Dayton*, 70 *N. Y.*, 486; *Roberts v. Prosser*, 53 *N. Y.*, 260, rev'g 4 *Lans.*, 369.

But where the character of the liability has been changed, as by a settlement and the giving of a note, the agent is no longer liable to arrest. *Alliance Ins. Co. v. Cleveland*, 14 *How. Pr.*, 408; *Shipman v. Shafer*, 14 *Abb. Pr.*, 449; *Kelly v. Scripture*, 9 *Hun*, 283; *Nelson v. Blanchfield*, 54 *Barb.*, 630.

Unless such settlement is procured through fraud. *Spence v. Baldwin*, 59 *How. Pr.*, 375.

But acceptance of bonds merely as security for a demand against such agent, does not preclude arrest. *Dubois v. Thompson*, 1 *Daly*, 309.

the plaintiff to sell the same for the best price that could be obtained therefor, and to pay the avails of the same immediately to the deponent, after deducting his reasonable commission for such sale.

That afterwards, and before the day of , 18 , but upon what particular day or days he is not able to state, the said , the defendant, sold said property, and received therefor, as deponent is informed and believes, the sum of dollars.

That deponent subsequently, and on several different days, between the day of , 18 , and the day of , 18 , demanded of said Y. Z. the moneys he had so received for the said property; but the said defendant refused to pay the same or any part thereof, and has never paid the same or any part thereof to this deponent, but has converted the same to his own use.

889. *The same; in action on a foreign judgment.*¹ [Substitute in Form 877, with allegations showing the sources of deponent's knowledge and information.]—II. That the said bank, between the day of , 18 , and the day of , 18 , both inclusive, delivered, or caused to be delivered, to said firm of , at , aforesaid bonds of the , of the par value of dollars each, with coupons attached thereto, to be sold on commission for the account of said bank; that said accounted to said bank for all of them, except eighteen bonds which were duly demanded of them by said bank, but which said firm refused to return to said bank; that said firm also, upon request of said bank, refused to account to and with said bank for the value thereof, but kept and converted them to their own use; that said bank thereupon and thereafter commenced suit against the said [name of defendant], as defendant, in the Court of the county of , in the State of , to recover damages for the conversion of the said bonds and process therein, was duly served personally on the said , who appeared in said action, and defended the same upon its merits. [Here followed allegations of the removal of the cause into the United States Circuit Court.] And that thereafter, and after a trial by jury upon the merits thereof, on or about the day of , 18 , the said bank duly recovered judgment against the said in said action, in said Court, then and there having jurisdiction, both of the parties and of the subject-matter thereof, for the sum of dollars, exclusive of and over and above plaintiff's costs of suit in that behalf as damages for the said conversion [here followed an allegation of affirmation on error]; and the said judgment is unreversed and unsatisfied [here followed an allegation of the assignment of the cause of action and claim for damages, and of the judgment].

890. *Fraud in contracting or incurring the liability.*² [Substitute in Form

¹ Adapted from *Baxter v. Drake*, 85 N. Y., 502; s. c., 61 How. Pr., 365; 1 Civ. Pro. E., 225; aff'g 22 Hun, 565, where an order of arrest, granted upon this affidavit, and another by the plaintiff's attorney stating substantially the same facts alleged in the complaint, was sustained. The complaint seems also to have been sustained. See note in 20 Abb. N. C., 221.

This allowance of arrest on facts relating to the original cause of action, in an action brought after recovery of a foreign judgment, was much contested before it was settled by this case and by *N. Y. Code Civ. Pro.*, § 552. See conflicting cases in *Abb. N. Y. Dig.*, 2d ed., vol. I, p. 268; *Wan-*

zer v. De Baun, 1 *Edw. Smith*, 261; s. c., 1 *Code R.*, N. S., 280; *Greenbaum v. Stein*, 2 *Daly*, 223; *Arthurton v. Dalley*, 20 *How. Pr.*, 311 (allowing arrest); and *Goodrich v. Dunbar*, 17 *Barb.*, 644; *Mallory v. Leach*, 14 *Abb. Pr.*, 449, note; s. c., 23 *How. Pr.*, 507, *contra*.

N. Y. Code Civ. Pro., § 1940, provides that, for the purpose of obtaining an order of arrest in an action against joint debtors, of the joint debtor not served in the previous action, the action is regarded as founded on the contract on which the original judgment was recovered.

² The complaint in *Morrison v. Watson*, 23 *Weekly Dig.*, 236, setting

877].—II. Deponent verily believes said defendant has been guilty of a fraud in contracting the said indebtedness. [*Here state facts relied on to show*

up these facts, it was held, that the action was one to recover money loaned, and was therefore within *N. Y. Code Civ. Pro.*, § 635; providing for the issuing of an attachment. That it was not deprived of its legal character as an action upon contract by the averments made in the complaint that the money loaned was obtained by fraudulent representations [25 *Hun.*, 395]. That the object of these allegations was to meet the objection that the action had been brought prematurely, and to render the debt immediately due, if supported by proof, and that they were sufficient for that purpose. [*Distinguishing Wittner v. Von Minden*, 27 *Hun.*, 234.]

For other Forms, see Nos. 884, 885.

To sustain an order of arrest for fraud in incurring an obligation, three things must appear: 1. That the defendant has made representations which were false. 2. That he knew them to be false. 3. That the plaintiff relied upon, and was in point of fact, deceived by them.

1. It must appear that the defendant has made representations which were false.

The mere omission of a purchaser of goods to disclose his insolvency to the vendor, is not a fraud for which the sale may be avoided.

When no inquiries are made of the vendee on the subject, and he makes no false statements, nor resorts to any artifice to mislead the vendor, it is not in general fraudulent in him to remain silent in respect to his pecuniary condition.

An honest, though abortive purpose to continue business, and pay for the goods, is consistent with the vendee's knowledge of his own insolvency; and the purchase is not fraudulent when made with such intent, though founded in delusive and unreasonable expectations. *Nichols v. Pinner*, 18 *N. Y.*, 295. Compare *Mitchell v. Worden*, 20 *Barb.*, 253, in which it was held that the law does not in ordinary cases impose upon a purchaser of property the duty of disclosing to the seller, at or before the sale, the state of his pecuniary circum-

stances, however desperate they may be, and known to him to be; and this, although there has been a long course of dealing between the parties, in the course of which credit has been given to the purchaser, and he has punctually performed his engagements, and his insolvency has occurred during those dealings. So that although a purchaser at the time of making an additional purchase from one with whom he had been in the habit of dealing, is insolvent, and well knows his insolvency, and intentionally conceals it from the vendors by simply withholding his knowledge on the subject, without otherwise saying or doing anything to mislead, and he still retains possession of property, and is pursuing his business as before, he is not thereby guilty of a fraud entitling the vendor to avoid the sale. But it is in that case suggested that the rule would be otherwise if he had performed an open and notorious act of insolvency, such as breaking up his business and making a general assignment for the benefit of creditors; in which case he would be bound to communicate the fact to them, if they were in ignorance thereof. In short, it is not enough that the plaintiff has been deceived; the defendant must have intentionally deceived him, to justify an arrest. Such a deception may, however, sometimes be practiced without a direct false representation. The intention to deceive may be shown by other circumstances. See *Morrison v. Garner*, 7 *Abb. Pr.*, 425; *Brown v. Montgomery*, 20 *N. Y.*, 287.

2. It must appear that the defendant knew the representations to be false. When the affidavit fails to show this, it is insufficient, and the order of arrest will be set aside. *Gaffney v. Burton*, 12 *How. Pr.*, 516; see *Freeman v. Leland*, 2 *Abb. Pr.*, 479; *Young v. Covell*, 8 *Johns.*, 23; s. c., 5 *Am. Dec.*, 316; *Addington v. Allen*, 11 *Wend.*, 374.

3. The plaintiff must have, in fact, relied upon, and been deceived by the plaintiff's representations. This is the very gravamen of the charge, the deceit or fraud practiced upon the

fraud, as thus:] The said defendant, at the time of obtaining said money, at an interview on or about the _____ day of _____, falsely and fraudulently represented to this plaintiff that he was solvent, and that his assets exceeded his liabilities \$ _____; and that the money which he was about to borrow from plaintiff would be used in pushing his business; ¹ that relying upon these statements, and only on account thereof and not otherwise, this plaintiff loaned the said money and took from the said defendant his promissory notes for \$ _____ each, with interest payable on the _____ note on the _____ inst., and each of the other notes payable _____ months apart; that the said representations, as to the said defendant's solvency, were false and untrue, and were made with a preconceived design and intent of defrauding this plaintiff, and as a matter of fact at said time, the said defendant was insolvent, and his liabilities exceeded his assets more than \$ _____. ² [State means of knowledge; or name informant and reason why his affidavit is not presented.]

891. *Abandoning, or intent to defraud creditors by transfer or secreting of property.*³ [Substitute in Form 877.]—II. That said work and materials were

plaintiff. See *Freeman v. Leland*, 2 *Abb. Pr.*, 479; *Wanzer v. De Baun*, 1 *E. D. Smith*, 261; s. c., 1 *Code R., N. S.*, 280. Compare Vol. I, *ante*, pp. 420–433.

For illustrations of the principles upon which orders of arrest may be granted under this provision, see *Bean v. Renway*, 17 *How. Pr.*, 90; s. c., as *Bean v. Wells*, 28 *Barb.*, 466; *Freeman v. Leland*, 2 *Abb. Pr.*, 479; *Bell v. Mali*, 11 *How. Pr.*, 254; *Union Bank v. Mott*, 6 *Abb. Pr.*, 315.

For the application of these rules, see, as to false representations generally, *Whitcomb v. Salsman*, 16 *How. Pr.*, 533; *Byrd v. Hall*, 1 *Abb. Ct. of App. Dec.*, 285; *Morris v. Talcott*, 96 *N. Y.*, 100; rev'g 29 *Hun*, 426; *Thorpe v. Waddingham*, 3 *Daly*, 275; *Gaffney v. Burton*, 12 *How. Pr.*, 516; *Marsh v. Falker*, 40 *N. Y.*, 562; *Solomon v. Crosby*, *N. Y. Daily Reg.*, Jan. 20, 1883; *Dieckerhoff v. Brown* (Md., 1886), 2 *Atlantic Rep.*, 723; *Prichard v. Owen*, 6 *Weekly Dig.*, 247; *Wanzer v. De Baun*, 1 *E. D. S.*, 261; s. c., 1 *Code R., N. S.*, 280; *Draper v. Beers*, 17 *Abb. Pr.*, 163; *Van Kleeck v. Leroy*, 4 *Abb. Pr., N. S.*, 431; aff'g 37 *Barb.*, 544; *Hathaway v. Johnson*, 55 *N. Y.*, 93.

As to false representations of solvency, *Anderson v. Callahan*, 4 *Weekly Dig.*, 51; *Freeman v. Leland*, 2 *Abb. Pr.*, 479; *Scudder v. Barnes*, 16 *How. Pr.*, 534; *Birchell v. Straus*, 8 *Abb. Pr.*, 53.

As to concealment of insolvency, *Nichols v. Pinner*, 18 *N. Y.*, 295; s. c., *sub nom. Nichols v. Michael*,

23 *N. Y.*, 264; *Jaffray v. Cunningham*, *Daily Reg.*, April 17, 1887; *Talcott v. Henderson*, 31 *Ohio St.*, 162; s. c., 27 *Am. R.*, 501, and note; *Byrd v. Hall*, 1 *Abb. Ct. of App. Dec.*, 285; *Wright v. Brown*, 67 *N. Y.*, 1; *Hennequin v. Taylor*, 24 *N. Y.*, 139; *Johnson v. Monell*, 2 *Abb. Ct. App. Dec.*, 470; s. c., *Keyes*, 655; *Anon.*, 67 *N. Y.*, 598; aff'g 8 *Hun*, 502; *Sheldon v. Clews*, 13 *Abb. N. C.*, 40; *Manning v. Solis*, 50 *Barb.*, 224; *Levy v. Salomon*, 102 *N. Y.*, 741; *Fitch v. McMahon*, 103 *N. Y.*, 690; s. c., 5 *Centr. Rep.*, 618; *Smith v. Frank*, 2 *Robt.*, 626; *Dale v. Jacobs*, 10 *Abb. Pr., N. S.*, 382; *Stewart v. Strasburger*, 7 *Hun*, 337; *Wells v. Selling*, 63 *How. Pr.*, 35; *Wilmerding v. Mooney*, 11 *Abb. Pr.*, 283; *Lovell v. Martin*, 11 *id.*, 126; *Morrison v. Garner*, 7 *id.*, 425; *Harding v. Shannon*, 20 *How. Pr.*, 25; *Wallace v. Murphy*, 22 *id.*, 414; *Morris v. Talcott*, 96 *N. Y.*, 100; rev'g 29 *Hun*, 426.

¹ An affidavit stating false representations, and adding that they were made to induce credit, is not sufficient. A recital of the interview should be given to show that they were made for that purpose. *Phelps v. Maxwell*, 2 *Abb. N. C.*, 459.

² The false representations should be set forth, and the respects in which they are false pointed out. A general allegation of falsity will not suffice. *Draper v. Beers*, 17 *Abb. Pr.*, 163; *Thorpe v. Waddingham*, 3 *Daly*, 275. For example of allegations sufficiently specific, see *Hecht v. Levy*, 20 *Hun*, 53; *Cummings v. Woolley*, 16 *Abb. Pr.*, 297 *n.*

³ For other affidavits suitable to

done and furnished in the month of _____, and upon the defendant's promise to pay for the same as soon as completed.

various cases of fraud on creditors, see Forms 777 to 785.

This form is sustained by *Potter v. Sullivan*, 16 *Abb. Pr.*, 295 *n.*

An affidavit simply stating, in the words of the Code, that the defendant has removed or disposed of his property, or is about to do so, with the intent to defraud his creditors, is quite insufficient. The affidavits must state the facts and circumstances which justify such a conclusion, so that the court may be able to draw it from the evidence detailed in the affidavit. See *Smith v. Luce*, 14 *Wend.*, 237, and cases there cited in note *a*; *Exp. Robinson*, 21 *Wend.*, 672; *Frost v. Willard*, 9 *Barb.*, 440; *Castellanos v. Jones*, 5 *N. Y.*, 164; compare *Donnelly v. Corbett*, 7 *N. Y.*, 500; *Van Alstyne v. Erwine*, 11 *N. Y.*, 331.

It has been held that the mere fact that defendant is about to depart, although he owes debts to a large amount, is not enough. It must appear that he has removed or disposed of his property, or is about to do so, *secretly*. It is the *secrecy* which evinces the fraudulent intent. *Anonymous*, 2 *Code R.*, 51. This, however, must be taken with qualifications. Compare *Courter v. McNamara*, 9 *How. Pr.*, 255.

The following recent cases on the question what circumstances in transfers of property show an intent to defraud creditors, may aid the petitioner in drawing or testing affidavits.

Compare, also, cases for attachment on the same ground, p. 286, note.

In the following the order was sustained.

Wells v. Selling, 53 *How. Pr.*, 35 (transfer in payment of pretended debt to relative).

McButt v. Hirsch, 4 *Abb. Pr.*, 441 (an omission to deliver all the property embraced in a voluntary assignment for benefit of creditors, and a sale of part of it).

Kern v. Rachow, 34 *Super. Ct. (J. & S.)*, 239; *s. c.*, 12 *Abb. Pr.*, *N. S.*, 352 (sale of property for much less than its value, just before the maturity of the debt, to be paid for conditionally).

Brooklyn Daily Union v. Hayward,

11 *Abb. Pr.*, *N. S.*, 235 (destruction of premises, heavily insured, by fire after removal of goods therefrom and just before the maturity of the debt, unexplained).

Untermeyer v. Hutter, 26 *Hun.*, 147 (concealment or carrying away of property just before or just after making an assignment for creditors).

Courter v. McNamara, 9 *How. Pr.*, 255 (where defendant admitted that he had money in his house, but declared that he was going to leave the State and take it with him).

Hinck v. Dessar, 3 *N. Y. St. Rep.*, 349 (sale of unusual amount of stock at auction, followed by confession of judgment and seizure of the balance under execution).

Hanover Vulcanite Co. v. Nathan, 38 *Hun.*, 488 (sale by partner of partnership assets and appropriation of the proceeds, pending an action to dissolve, and while under an injunction restraining interference with the firm property).

Arnold v. Shapiro, 29 *Hun.*, 478 (fraudulent disposition of goods will avoid the credit).

In the following cases the circumstances were held insufficient to sustain the order:

Sherill Roper Air Engine Co. v. Harwood, 36 *Hun.*, 9 (where partner with knowledge of firm's insolvency paid individual debts with firm assets).

Scott v. Reed, 2 *How. Pr.*, *N. S.*, 521 (mere withdrawal by partner of a sum from the business because it had suffered loss).

Spies v. Joel, 1 *Duer*, 669 (preferential assignment with no probability of a surplus).

Isaacs v. Gorham, 1 *Hill.*, 479 (withdrawal from bank of funds of defendant's wife deposited therein as collateral security to the plaintiff's note).

Hoyt v. Godfrey, 88 *N. Y.*, 669; *s. c.*, 15 *Weekly Dig.*, 45 (cancellation by debtor on eve of general assignment of an old account against an insolvent, and giving of mortgage to secure debt to mother).

Pacific Mut. Ins. Co. v. Machado, 16 *Abb. Pr.*, 451 (misappropriation by

That at the time the same were completed, and theretofore, the defendant was carrying on business at No. _____, street, in _____, as a grocer; and on the _____ day of _____, after said debt became payable, the defendant promised the plaintiff that he would pay the same on the _____ day of _____, 18____, on which day the plaintiff called on him at his store for payment; but he put the plaintiff off, telling him to call again in three days, viz., on the _____ day of _____, and get his money.

That on said last-mentioned day plaintiff called again as requested, and found one M. N. in possession of said store, who then stated to this deponent that on the preceding day the defendant had sold the store and all the goods therein to said M. N., for which M. N. had paid him _____ dollars; and said M. N. exhibited to deponent the bill of sale thereof, executed by the defendant.

That defendant was not then present at said store, but kept away therefrom, and, as this deponent is informed by said M. N., has not been there since said sale.

That deponent has made diligent search for defendant at his recent abode at _____, and elsewhere, but is unable to find him, and believes that with intent to defraud his creditors, he has disposed of his property, and has departed, or is about to depart, or conceals himself [*state more fully what inquiries made, and of whom, and answers*].

Form No. 892.

Undertaking on arrest¹ (except on replevin).

[*Title of court and action.*]

WHEREAS, the above-named plaintiff has applied or is about to apply in the above-entitled action for an order of arrest against the above-named defendant Y. Z., in one of the cases provided by law :

Now, THEREFORE, the undersigned² C. D., of No. _____ street, in the city and county of _____, and State of New York [merchant], and E. F. [*stating residence and occupation, as above*], hereby undertake, jointly and severally, pursuant to the statute, that if the above-named defendant Y. Z. recovers judgment herein, or if it is finally decided that the plaintiff

defendant's assignee for creditors, of the estate, with the latter's knowledge).

Moller v. Aznar, 11 Abb. Pr., N. S., 233 (affidavits not specifying the property about to be removed).

¹ Security is indispensable (Newell v. Doran, 21 How. Pr., 427), except in case of public action for breach of official trust (N. Y. Code Civ. Pro., § 559), or in case of apprehended evasion of jurisdiction such as would formerly be the ground for *ne exeat*. *Id.*, § 560. For the general principles

applicable to undertakings, see Vol. I, pp. 62, 469. A defect is amendable. Irwin v. Judd, 20 Hun, 562; Pember v. Schaller, 58 How. Pr., 511.

² There must be two or more sureties (N. Y. Code Civ. Pro., § 559), unless one is a fidelity or guaranty company. Volume I. p. 468.

It is not essential that plaintiff also sign. N. Y. Code Civ. Pro., § 811; Volume I, p. 469. His signature does not vitiate, but he cannot sign in place of a surety.

was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant [*or, to each or any of the defendants*¹], and all damages which he [*or, which they, or each or any of them*] may sustain by reason of the arrest, not exceeding the sum of [*at least one-tenth the aggregate*² *amount of bail required by the order, and not less than \$250*].

[*Date.*]

[*Signatures.*]

[*Acknowledgment or proof, as in Form 495, p. 6; Approval indorsed,*³ *as in Form 499,*⁴ *p. 7; Affidavit of sufficiency, as in Forms 496–498, pp. 6 and 7; Justification, if required, see Volume I, p. 487, et seq.*]

Form No. 893.

Order (by judge⁵) for arrest (for all cases except replevin and *ne exeat*).

[*Title of court and action.*]

To the sheriff⁶ of the [city and] county of _____ :

[*Or, except in the city court of New York: To the sheriff of any county of the State of New York:*]

It appearing to me [*in quo warranto may say, to the court, if a court order is preferred*] by the affidavit of A. B., verified the _____ day of _____, 18 _____,⁷ and by the verified complaint in this action,⁸ that a sufficient cause of action exists in favor of the above-named plaintiff * against the above-named defendant Y. Z., and that the case is one mentioned in section 549⁹ [*or, in quo warranto as to office, say, section 1949*] of the

¹ *Bauer v. Schevitch*, 11 *Civ. Pro. R.*, 433.

² *Id.*

³ *Newell v. Doran*, 21 *How. Pr.*, 427.

⁴ But see *Casiero v. Demartino*, 6 *Weekly Dig.*, 55.

⁵ This Form is sustained by the *Continental Bank v. Mott*, 8 *Bosw.*, 696; *Duncan v. Katen*, 64 *N. Y.*, 625; aff'g, it seems, but without opinion, 6 *Hun*, 1; *People v. Tweed*, 63 *N. Y.*, 202; s. c., less fully, 50 *How. Pr.*, 26, confirming 5 *Hun*, 382; and *N. Y. Code Civ. Pro.*, § 561.

Application is to be made to a judge of the court in which the action is brought or to any county judge.

N. Y. Code Civ. Pro., § 556; for the construction of which requirement see note 1 on p. 292.

⁶ The order should be directed to a sheriff (*N. Y. L.* 1880, c. 398, and see Volume I, p. 392); either that of a specified county, or generally to the sheriff of any county. *N. Y. Code Civ. Pro.*, § 561.

⁷ It is best to recite all the papers on which the order is made.

⁸ As to the necessity of presenting a complaint, see p. 356.

⁹ It is convenient practice, but not essential, to cite the section of the statute and its subdivision relied on. *Tracy v. Veeder*, 35 *How. Pr.*, 209; s. c., as *Tracy v. Griffin*, 50 *Barb.*, 70.

Code of Civil Procedure; and that † [*here concisely indicate the ground of arrest,¹ as for instance by either of the following clauses, or by two or more combined*] the action is to recover a fine [*or, a penalty*].

[*Or, and that the action is to recover damages for a personal injury—or, an injury to property.*]

[*Or, and that the action is to recover damages for a breach of promise to marry.*]

[*Or, and that the action is to recover damages for misconduct or neglect in office—or, in a professional employment.*]

[*Or, and that the action is to recover damages for fraud or deceit.*]

[*If the action is to recover a chattel, see Form 900.*]

[*Or, and that the action is to recover for money received by defendant as a public officer—or, in a fiduciary capacity.*]

[*Or, and that the action is to recover property—or, damages for the conversion or misapplication of property embezzled or fraudulently misapplied by a public officer—or mention other person in a fiduciary capacity.*]

[*Or, if a public action for speculation, as in N. Y. Code Civ. Pro., § 549, subd. 3.*]

[*Or, and that the action being on contract, express or implied, other than a promise to marry, the ground of arrest is fraud in contracting or incurring the liability—or, is that the defendant has since the making of the contract, or in contemplation of making the same, removed or disposed of his property—or, is about to remove or dispose of the same—with intent to defraud his creditors.*]

And the plaintiff having given the undertaking required by law² [*if amendment of complaint was asked for,³ add, and plaintiff having been directed by an order of even date herewith, made before the granting of this order, to serve an amended complaint herein;*

YOU ARE REQUIRED forthwith to arrest said defendant [*naming him or them*] in this action, and hold him [*or, hold each of them*] to bail⁴ in the sum of dollars,⁵ and return

¹ This is required by *N. Y. Gen. Rules*, No. 13, of 1888.

Statement in the language of the statute is sufficient, as for instance, that it is for the appropriation of money received in a fiduciary capacity. *Bowman v. Gates*, 11 *Reporter*, 744.

² Omit this clause in an action by the people, they not being required to give security.

³ See Form 877, p. 360, IV, n. 1, and Form 901.

⁴ Prescribing the form of undertaking which the sheriff is to take, is unnecessary, but not improper. *Boucicault v. Boucicault*, 21 *Hun*, 431; s. c., 59 *How. Pr.*, 131.

⁵ It is proper that the amount of bail should approximate the probable recovery. *People v. Tweed*, 5 *Hun*, 382, confirmed in 63 *N. Y.*, 202; s. c.,

this order, with your proceedings thereunder, as prescribed by law.¹

[*Date.*] [*Signature of judge, with initials of title.*²]

[*Signature and office address of*],
Plaintiff's attorney.

[*Deliver to the sheriff the original order—or, if court order, a certified copy—annexed to the papers on which it was granted and the undertaking; and furnish the sheriff a copy of all these papers for service on each one to be arrested.*]

Form No. 894.

Alias order of arrest.

[*As in last Form, adding at the end, before date and signature*] and you are required forthwith to return the original order heretofore made for such arrest.

Form No. 895.

Affidavit to obtain order of arrest by reason of apprehended evasion of the jurisdiction. (Ne exeat.)³

[*As in Form 877, alleging cause of action by reference to the complaint, and corroborating details with sources of information, &c.*⁴]

less fully, 50 *How. Pr.*, 26 (refusing to reduce bail from three millions where the action was for six millions).

Under the former practice in actions for a money demand on contract, bail was required in double the claim, unless the amount was large. *Cromelines v. Beldens*, 1 *Wend.*, 107; *Ballingall v. Burnie*, 1 *Hall*, 237. In other actions, the bail is altogether in the discretion of the court, and depends upon the character of the action and the position of the defendants; whether, for example, residents or transient persons, &c. *Baker v. Swackhamer*, 3 *Code R.*, 248.

¹ The return is prescribed by *N. Y. Code Civ. Pro.*, §§ 577 and 578, under which the time may vary somewhat according to the proceedings. See also *id.*, § 102.

² Or, in *quo warranto*, if a court order, "Enter," followed by judge's signature, by initials of name and title.

³ In general, arrest in cases formerly affording ground for *ne exeat*, namely, anticipated evasion of the jurisdiction, is not allowed except in cases for equitable relief. *Allen v. Hyde*, 2 *Abb. N. C.*, 197; *Bonesteel v. Bonesteel*, 28 *Wis.*, 245; *Drover v. Bayer* (*Eng. Ct. of App.*), 28 *Weekly Rep.*, 110. Or divorce, alimony, &c. (*Denton v. Denton*, 1 *Johns. Ch.*, 364); or for account, where defendant admits less than plaintiff claims. *Story Eq. Jur.*, § 1471.

Wherever there is concurrent jurisdiction, the remedy is clearly proper. *Mitchell v. Bunch*, 2 *Paige*, 606, 619; *s. c.*, 22 *Am. Dec.*, 669. And the better opinion is that under the new procedure, if in any case a judgment in what is called a common-law action can be enforced by proceedings for contempt, it is within the power of the court to grant the order.

⁴ It is not necessary to re-state facts sufficiently proven by the com-

III. [*Allege ground for apprehending evasion of jurisdiction for instance, thus: in action for accounting:*] That the said Y. Z. has declared his intention to leave the State of New York, and to proceed to England, where he intended to settle and reside; and that the said Y. Z., on or about the day of last, informed one M. N. to that effect, as by the annexed affidavit of the said M. N. appears. And this deponent verily believes that if the said Y. Z. goes out of this State of New York, he will not return, but will evade his duty to account and the power of the court to compel him to do so, and thereby this deponent will be in great danger of losing his said debt.

III. [*In action for divorce:*¹] That this action is brought to obtain a divorce from the defendant by reason of [the adultery alleged in said complaint;] that the defendant is about to depart from this State, and that he has, as deponent is informed and believes, no present intention of returning to this State, except, possibly to pass through it; that it is announced that his engagement as an actor, at theatre in this city, will close this evening, and that he is announced to appear at one of the theatres in , in the State of , on evening next, and that he is to sail for Europe on , 18 , to be gone indefinitely.

That deponent is wholly without income or present means of support, though she owns a house in this city which is mortgaged to about two-thirds of its value, which is less than dollars, and which has produced no income for a year past. That she has by defendant five children living, of whom three are minors, and two of whom are dependent upon her for support; that they are aged respectively years, years, and years; and that the eldest of the three is a permanent invalid, and is supported by deponent. That in the endeavor to support them she has incurred debts and exhausted what means she had. That the defendant has from time to time paid her sums of money towards her support, and that of her children, but has done so irregularly, and in amounts inadequate to her reasonable support and the support

plaint. *Clayton v. Mitchell*, 1 *Del. Ch.*, 32.

The new procedure does not require the complaint to ask for arrest as a part of the relief. The practice adopted in chancery in respect to matters of account (1 *Hoffm. Ch. Pr.*, 90, 91) being now properly extended to all cases. But in those jurisdictions where it is thought necessary to ask it in the complaint, amendment

may be allowed for the purpose. *Lube, Eq. Pl., Sumn. & W. ed.*, p. 66.

¹ From *Boucicault v. Boucicault*, 21 *Hun.*, 431; s. c., 59 *How. Pr.*, 131.

² In *Loewenstein v. Beimbaum* (9 *Reporter*, 402) the U. S. Cir. Ct., E. Distr. of Penn., held that the design of a defendant to leave the State to go into another is not ground for issuing *ne exeat* in a court of the United States.

and education of her children; that the last such payment was made in _____ last, when he deposited to her credit dollars. [*An allegation of contract to provide support proposed by him was added, as further evidence of liability.*¹]

[*Undertaking, if required by the court, as in Form 892.*]

Form No. 896.

Order of arrest; by the court. (Ne exeat.)²

At a special term [*&c., as in Form 493, p. 4, of this Volume*].³

[*Title of action.*]

To the sheriff of the [city and] county of _____ :

[*Or, except in the city court of N. Y.:* To the sheriff of any county of the State of New York:]

It appearing to the court by the affidavit of A. B., verified the _____ day of _____, 18____, and by the verified complaint in this action, that a sufficient cause of action exists in favor of the above-named plaintiff, and against the above-named defendant Y. Z., for the judgment demanded in the complaint, which [among other things] requires the performance of an act, to wit [*specifying it*] the neglect or refusal to perform which would be punishable by the court as a contempt, and that said defendant is not a resident of the State [*or, said defendant being a resident, is about to depart from the State*], by reason of which non residence [*or, departure*] there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual; and an undertaking on the part of the plaintiff having been given as required by the court [*or, being hereby dispensed with*]:

YOU ARE REQUIRED forthwith to arrest said defendant Y. Z., in this action, and hold him [*or, hold each of them*] to bail in the sum of _____ dollars [by a written undertaking executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that he will obey the direction of the court or of an appellate court, contained in an order or a judg-

¹ Allegations rehearsing the nature of the relief demanded in the complaint and stating the residence necessary to show jurisdiction were added; but are here omitted because the complaint is sufficient, if

corroborated, so far as may be necessary.

² In the first district a judge's order is valid; see Vol. I, p. 123.

³ *N. Y. Code Civ. Pro.*, § 561; see *N. Y. Gen. Rules*, No. 3, of 1884.

ment, requiring him to perform the act above specified; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission;¹ and return this order, with your proceedings thereunder, as prescribed by law.

Enter: [*signature of judge by initials of name and title.*]

[*Signature and office address of*],

Plaintiff's attorney.

[*Deliver to sheriff a certified copy annexed to the papers on which it was granted, and the undertaking, if any; and furnish him with a copy of all these papers for service on each one to be arrested.*]

Form No. 897.

Affidavit to obtain arrest, in replevin, for goods fraudulently disposed of with intent to deprive plaintiff thereof.²

[*Title of court and action.*]

[*Venue.*]

J. F. De B., being duly sworn, says:

I. I have been book-keeper and confidential clerk of the plaintiff S. B. for over a year past, and have had general charge of his business.

II. On the day of , 18 , H. S., the defendant, called at the place of business of the plaintiff, in the absence of said plaintiff, and applied to me, as his salesman and agent, to purchase of the said S. B. twelve bales of leaf tobacco on credit; and, to induce me on behalf of the plaintiff to sell him such goods on credit, stated to me that he, the said defendant, was perfectly solvent, and that he did not owe anybody a cent in the world, and that he always paid cash for all the goods that he bought elsewhere, but that he was a little short of money at that time, and he must have these goods, as he had already sold them to a customer of his on a credit of ninety days. Said defendant also then stated that he wanted the said twelve bales of tobacco charged to him on a credit of sixty days; but that he would soon be getting in money from customers of his who owed him money, and that in less than two weeks he would discount this bill, and pay the cash for it.

¹ This direction, as to the substance of the undertaking, is not required, but is convenient. *Boucicault v. Boucicault*, 21 *Hun.* 431; s. c., 59 *How. Pr.*, 131.

² Sustained (with corroborating affidavits) by *Barnett v. Selling*, 70 *N. Y.*, 492; s. c., 3 *Abb. N. C.*, 83; *aff'd* 9 *Hun.*, 236.

III. Believing the said statements of said defendant to be true, I, as such agent of the said plaintiff, sold and delivered to the said defendant the said twelve bales of leaf tobacco at the price, and which were together of the value of dollars, on a credit of sixty days.¹

IV. Since the sale and delivery of the said tobacco the said defendant has stated, in my presence, that at the time he made the said statements he had not sold the said goods to a customer of his on credit as represented; but that immediately after obtaining the said goods he exchanged them for a large quantity of cigars, which he immediately thereafter sold for cash.²

Form No. 898.

Affidavit accompanying the foregoing, to inability to replevy goods.³

W. R. N., being duly sworn, says:

I. I am an attorney at law and managing clerk of R. W. T., plaintiff's attorney herein.

II. This action is for the recovery of possession of the specific personal property mentioned in the annexed affidavits, and was commenced , 18 , by service upon defendant by the sheriff of , of the summons and complaint, which were delivered to him for service, on , 18 , with affidavit of plaintiff and requisition, of which a copy is annexed, marked "A," and an undertaking, of which a copy is annexed, marked "B."

III. The sheriff has returned the said affidavit and requisition with his certificate, of which a duplicate is annexed hereto, marked "C."

IV. No part of the property described in said affidavit has been taken by the sheriff or delivered to the plaintiff.⁴

[*Jurat.*]

[*Signature.*]

[*Copy affidavit and undertaking to be annexed and marked as referred to.*]

[*Undertaking as in Form 892.*]

The cause of action being within the term "an injury to property," and the injury being willful, a female can be arrested. *N. Y. Code Civ. Pro.*, § 553; *Starr v. Kent*, 2 *Code R.*, 30; *s. p.*, *Muser v. Miller*, 12 *Abb. N. C.*, 305, note; *s. c.*, 65 *How. Pr.*, 283; 3 *Civ. Pro. R.*, 388; 2 *id.* (*McCarty*), 444; and 5 *Month. L. Bul.*, 67.

¹ See for other forms of deceit on inducing sale, Forms 884, 885.

² Such a sale does not preclude replevin. *Barnett v. Selling*, 9 *Hun.*, 236; *aff'd* in 70 *N. Y.*, 492; *s. c.*, 3 *Abb. N. C.*, 83.

³ Sustained in *Barnett v. Selling* (*above*).

⁴ After plaintiff has actually arrested the defendant, he is not entitled to

Form No. 899.

Return by sheriff, that chattel was concealed, &c., annexed to foregoing affidavits.¹

I certify and return :

I. That on the day of , 18 , at , I served upon H. S., the defendant within named, a copy of the summons² and complaint in the within entitled action, together with a copy of the undertaking given by the plaintiff, approved by me, and a copy of the annexed [*or, within*] affidavit and requisition.

II. [*If any of the chattels were taken, say:*] That by virtue of said affidavit and requisition I did at the same time take from said defendant a portion of the property therein described, to wit [*specifying the part taken*], said property so taken being all of the property mentioned in said affidavit which I could find after diligent search [*in the possession of the defendant or any agent of his*].

III. [*If part had been eloiigned:*] That before the coming of this requisition to me, the property within described [*except the part herein before specified*] had been eloiigned, removed, concealed or disposed of, so that I could not take the same, as by said requisition I am commanded.³

IV. [*If there has been a delivery to plaintiff, add:*] That no notice of exception to the sufficiency of the sureties to the

have the property delivered to him before judgment. This would be oppressive. *Chappel v. Skinner*, 6 *How. Pr.*, 338; s. r., *N. Y. Code Civ. Pro.*, § 1714.

If he has only obtained part of the property, he does not waive his right to an order of arrest for the residue. *Tracy v. Veeder*, 35 *How. Pr.*, 209; s. c., 50 *Barb.*, 70. But a subsequent return of the residue supersedes an unexecuted order of arrest. *N. Y. Code Civ. Pro.*, § 1714.

¹ Sustained also by *Manley v. Patterson*, 3 *Code R.*, 89; *Acker v. Hautemann*, 27 *Hun.*, 48. For the general rules applicable to returns, see Volume I, p. 392.

² The omission of the sheriff to serve a copy of the summons before replevying the chattels is no ground for vacating the arrest. The seizure must be deemed an equivalent to the granting of a provisional remedy, and by *N. Y. Code Civ. Pro.*, § 1693, the court acquires jurisdiction from the time of granting a provisional remedy. *Acker v. Hauteman*, 27 *Hun.*, 48; s. c., 63 *How. Pr.*, 280.

³ *Fitch v. McMahon*, 103 *N. Y.*, 690. Fraud in the purchase will sometimes justify the inference that the inability of the sheriff to take them is due to fraudulent disposition or concealment. Allegation of wrongful taking insufficient. *Id.*

said undertaking was given to me by said defendant; and no person made claim to said property taken by me as aforesaid; and therefore I delivered the same to said plaintiff; and I delivered to said defendant the original undertaking on the part of the plaintiff herein mentioned.

[Date.]

[Signature.]

Form No. 900.

Order of arrest in replevin.

[As in Form 893 to the †, continuing:] to recover a certain personal property of the plaintiff, and the ground of arrest is, that [a part of] the same has been concealed, removed or disposed of by the defendant Y. Z., so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof:

And the plaintiff having given the undertaking required by law [if amendment of complaint was asked for, add,] and plaintiff having been directed by an order of even date herewith, made before the granting of this order, to serve an amended complaint herein;

YOU ARE REQUIRED forthwith to arrest said defendant [naming him or them] in this action, and hold him [or, hold each of them] to bail in the sum of dollars¹ [agreeably to the requirements of subd. 2 of section 575 of the Code of Civil Procedure²], and return this order, with your proceedings thereunder, as prescribed by law.

[Date.]

[Signature of judge, with initials of title.]

[Signature and office address of],

Plaintiff's attorney.

[Directions as in Form 893.]

¹ See notes to Form 893.

² This clause is convenient, but not necessary. As to whether it is proper or necessary to mention a sum which shall limit the liability of the bail, compare (in the affirmative) Tracy v.

Veeder, 7 Abb. Pr., N. S., 23, note; s. c., 50 Barb., 70; 35 How. Pr., 209. (In the negative) Sherlock v. Sherlock, 7 Abb. Pr., N. S., 22; Elston v. Potter, 9 Bosw., 636; Josuez v. Murphy, 6 Daly, 324.

III. AMENDING COMPLAINT.

FORM No. 900a. [*Affidavit. See Form 877, paragraph IV.*]

Form No. 901.

Order allowing amendment of complaint by adding allegation of ground of arrest.¹

[*Title of court and action.*²]

Upon the affidavit of A. B., verified the day of , 18 , and the verified complaint heretofore filed [*or, served—or both*] herein, and the proposed amended verified complaint, a copy of which is thereto annexed; and on motion of A. T., attorney for plaintiff, now applying for an order of arrest against the defendant Y. Z.,

ORDERED, that plaintiff file and serve said amended verified complaint, such service to be made with or before the service of the order of arrest now asked for.

[*Date.*] [*Signature of judge, with initials of title.*]

SECTION II.

VACATING ORDER; DISCHARGING FROM ARREST; AND MODIFYING SECURITY.

- | | |
|---|---|
| I. VACATING ARREST, REDUCING BAIL, OR INCREASING SECURITY. | (910.) Affidavit to move to discharge person of unsound mind, or infant under fourteen. |
| (902.) Affidavit to move to vacate arrest. | (911.) Order to show cause thereon. |
| (903.) Order to show cause why order of arrest should not be vacated or bail reduced. | (912.) Order discharging from arrest privileged person, infant, idiot, or person of unsound mind. |
| (904.) Notice of motion to vacate order of arrest, or to reduce bail, or increase security. | III. DISCHARGE ON BAIL, OR DEPOSIT. |
| (905.) Order vacating order of arrest. | (913.) Undertaking of bail. |
| (906.) Order denying motion to vacate order of arrest; on terms. | (914.) Notice of exception to bail or undertaking. |
| (907.) Order reducing amount of bail. | (915.) Notice of bail justifying. |
| (908.) Order for increase of security on part of plaintiff. | (916.) Examination of bail. |
| II. DISCHARGE FOR PRIVILEGE, INFANCY, ETC. | (917.) Allowance of bail. |
| (909.) Affidavit to move to discharge person privileged from arrest. | (918.) The same; as to one bail, and for time for the other to justify. |
| | (919.) The same; with the direction that the money be refunded. |
| | (920.) Allowance of added bail. |

¹ *N. Y. Code Civ. Pro.*, § 558, last clause. See note to Form 877.

² In *quo warranto* it may be a court order.

(921.) Certificate of deposit in lieu of bail.

(922.) Notice to protect deposit in lieu of bail.

(923.) Certificate that bail has been given instead of deposit.

IV. SUPERSEDEAS.

(924.) Affidavit to move for superseas.

(925.) Certificate of sheriff that defendant is in custody.

(926.) Order to show cause for superseas of arrest.

Defendant's course.—If defendant questions the jurisdiction of the court, he may, in a clear case,¹ move to dismiss the action for want of jurisdiction of the subject-matter, or move to set aside the proceedings therein for want of having acquired jurisdiction of his person; and in such case, if he appears specially, the court have power to extend his time to appear generally and plead, until the jurisdictional question is settled.²

Where jurisdiction is not questioned, he may (without, however, waiving any objection that the court has not jurisdiction of the subject-matter) move to vacate the order of arrest, or to reduce the amount of bail, or to increase the security given by plaintiff and may combine these objects in one motion, asking them if he choose in the alternative.³

Even if the validity of the order is not questioned, defendant can move to be discharged from the arrest made under it, on the ground that it was effected by artifice, or irregularly made, or that he was privileged from arrest.

Even if the regularity of the arrest is not questioned, defendant may give bail, which will set him at liberty, his bail being only liable that he will at all times render himself amenable to final process,⁴ or, in the case of arrest for apprehended evasion of the jurisdiction, that he will obey such order or judgment for specific relief as the court may make;⁵ except, however, in replevin, in which case bail are responsible for delivery of the chattel, if adjudged, and payment of any money recovery in the action.⁶ He may, if he prefer, in lieu of bail, deposit money to be held on the same conditions.

If he is held for want of bail or deposit, he has a right to be admitted to the liberties of the jail—which, in the most

¹ Vol. I, p. 114.

² Vol. I, pp. 710, 715.

³ *N. Y. Code Civ. Pro.*, § 567 (the time for so moving is, however, in some cases, limited by this statute).

⁴ *Id.*, § 565, subd. 3.

⁵ *Id.*, subd. 1.

⁶ *Id.*, subd. 2.

populous counties, extend to the whole of the county or city--on giving security, simply, that he will not go beyond the liberties until discharged by due course of law;¹ and this enlargement, he may have in all cases of arrest whatever, including replevin and *ne exeat*, whether on execution or on order, but not, however, when committed after conviction for contempt.

The recent statute² limiting the term of imprisonment in civil actions for the recovery of money, does not apply to prisoners held under an order of arrest granted as a provisional remedy;³ but plaintiff cannot temporize by delaying to enter final judgment, or issue execution against the person, and thus postpone the limit. If plaintiff unreasonably delays trial, or neglects for ten days to enter judgment when he can, or to issue a body execution, either within ten days after return of a property execution, or, in any event, within three months after entry of judgment; or delays his remedy by collusion, or for the purpose of effecting extended imprisonment under different processes, defendant may move for a discharge, and the court in its discretion may grant it.⁴

I. VACATING ARREST, REDUCING BAIL, OR INCREASING SECURITY.

Form No. 902.

Affidavit to move to vacate arrest.⁵

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is the defendant above named [appearing herein only for the purposes of this motion. See *Vol. I*, pp. 711, 717].

¹ *N. Y. Code Civ. Pro.*, § 750.

² *Id.*, § 111, as amended in 1886.

³ *Levy v. Salomon*, 19 *Abb. N. C.*, 52, rev'g 18 *id.*, 220.

⁴ *N. Y. Code Civ. Pro.*, § 572. Even if out on bail. *Havemeyer Sugar Refin. Co. v. Taussig*, 19 *Abb. N. C.*, 57. And see EXECUTION.

⁵ The motion may be made on the original papers, (see note 2 to Form 905,) in which case no affidavit is necessary, unless it is *ex parte*, or an order to show cause is asked. See p. 2, of this Vol.

II. That on the day of last, he was arrested by the sheriff of the [city and] county of , by virtue of the order of arrest of which a copy with a copy of the papers whereon it was made, is hereto annexed.

III. [*State facts as to bail, as thus:*] That he has not yet given security as allowed by law to obtain his discharge [*and, if an order to show cause is asked for, state that he is in actual custody,¹ as thus:*] but is now actually confined by said sheriff in the county jail of county, and is unable as yet to find bail or to make any deposit in lieu thereof.

IV. [*If motion is not merely on the original papers, insert denials of plaintiff's affidavits, or allege new matter relied on in avoidance, or both.²*]

V. [*If order to show cause is asked for, add reason, as thus:*] Deponent asks an order to show cause, instead of giving the usual notice of motion in order that he may not be held in custody until the day of , which is the earliest day that a motion could be made on notice. [*Also state condition of cause, and as to previous application: see Form 498, p. 2.*]

[*Jurat.*]

[*Signatures.*]

Form No. 903.

Order to show cause why order of arrest should not be vacated or bail reduced, or security increased.³

[*Title of court and action.*]

On [the annexed affidavit and the pleadings herein and] the order of arrest herein, and the papers on which the same was granted: Let the plaintiff show cause before this court, at a special term thereof, to be held [at chambers], at the County Court-House, in the city of , on the first Monday of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard [*or, before Hon. J. K., at , on the day of , at o'clock in the noon*], why the said order of arrest should not be vacated, or, if that be refused, why the amount of bail should not be reduced, or the security given by plaintiff be increased, or such

¹ Garrett v. Humiter, 1 *Monthly L. Bul.*, 42.

² On a motion to reduce the bail, defendant should show the facts constituting the defense or going in mitigation. Britton v. Richards, 13 *Abb. Pr.*, N. S., 258.

³ Adapted from the Form used in People v. Tweed, 63 *N. Y.*, 202.

Compare, however, for certain restrictions under *N. Y. Code Civ. Pro.*, §§ 719 and 772 of that act.

other or further order made as may be just [with costs of this motion—*may add grounds, and if irregularity is relied on, must specify it as thus:*] upon the following grounds¹ [and see *Forms* 846–858]:

1. That the defendant has been already arrested and held to bail in dollars, at the suit of the same plaintiff for the same cause of action.

2. That the order of arrest was made while other actions for the same cause were pending, and that a similar suit, between the same parties for the same cause of action, was and is now pending, wherein the defendant was and is still under bail to the amount of dollars.

3. That the papers on which the order was granted were not sufficiently or properly verified.²

4. That no cause of action in favor of the plaintiff is shown by the complaint or the papers on which the order was granted.

5. That no ground of arrest is alleged in the complaint.

6. That the defendant should not be held to bail, and his property attached, at the same time and in the same action.³

7. That the bail would be excessive, supposing a good cause of action to be shown, and no constitutional provision to exist in respect to bail.

8. That the amount of bail is excessive and prohibited by the Constitution.

9. That the bail should not exceed an amount which the defendant is supposed able to give.

[And it is further ordered, that service of this order, with a copy of said affidavit, shall be sufficient if made days before it is returnable.⁴

[*Date.*] [*Signature of judge, with initials of title.*]

Form No. 904.

Notice of motion to vacate order of arrest,⁵ or to reduce bail, or increase security.

[*Title of court and action.*]

Please take notice, that on the [*specifying the papers*] in

¹ *Dieckerhoff v. Ahlborn*, 2 *Abb. N. C.*, 372, 374. *Lalor v. Fisher*, 2 *Robt.*, 669. Vol. I, of this work, p. 152, &c.

² See *N. Y. Code Civ. Pro.*, §§ 524, 557.

³ This objection is not ordinarily sustainable. It should be shown that

both are not reasonably necessary for plaintiff's security. § 719.

⁴ Such a clause as this is now required. *N. Y. Code Civ. Pro.*, § 780.

⁵ If appearance is special (Volume I, p. 711), qualify signature as on p. 336, Volume II.

this action [and on the affidavits, copies of which are hereto annexed, the undersigned will move the court, at a special term to be held [at chambers] at the City Hall [*or*, the County Court House], at , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard [*or*, will move before Hon. J. K., , at , at , on the day of next, at - o'clock in the noon], to vacate the order of arrest heretofore granted in this action, or reduce the amount of bail required of defendant,¹ or increase the security given by the plaintiff on applying for said order of arrest, with costs, and for such other or further relief as may be just [*and if the order moved for is asked, in any part, on the ground of irregularity, specify it, for instance, thus:*] and that such relief will be asked upon the grounds, among others, of irregularity, in that all the papers on which the said order of the court was granted, were not specified in said order, and that a copy of the order, with the papers upon which the order was granted, was not delivered to the defendant upon his arrest, nor filed as prescribed by law [*and see last Form for other grounds*].

[*Date.*][*Signature and office address of*],

Defendant's attorney.

To [*address*],

Plaintiff's attorney.

Form No. 905.

Order vacating order of arrest.²

[*Title and recitals,*³ as in Form No. 492 or 493, p. 4, of this Volume.]

ORDERED, that the order of arrest granted herein, dated [*or*, entered] the day of , 18 [against the defendant Y. Z.],

¹ Under notice of motion to vacate order of arrest, and for general relief, to reduce bail would be irregular. *Smith v. Spalding*, 3 *Robt.*, 615; s. c., 30 *Hov. Pr.*, 339. See Volume I, p. 185.

² Under *N. Y. Code Civ. Pro.*, § 568, if the order to be vacated was made by the court, this order vacating it must also be by the court. If it was made by a judge out of court, then, where the application to vacate is made on the original papers, it must

be to the same judge in court or out of court, and may be with or without notice. Where it is made on proof by affidavit on the part of the defendant, it may be made to the court, or to any judge of the court, upon notice.

³ In accordance with *N. Y. Gen. Rules of Practice*, No. 3, of 1884, an order vacating an arrest on motion founded on new papers, must specify all the papers; and all must be filed unless otherwise ordered by the court.

be and hereby is vacated, and that the undertaking executed by to the sheriff of on such arrest be delivered up to be cancelled.

[*If desired, state ground of vacatur*;¹ see *Forms* 903-4 and 846-858.]

[*If the vacatur is upon a stipulation not to sue, state terms, for instance thus*:²] upon the execution of and delivery to the plaintiff's attorneys of a stipulation by the defendant relinquishing all claim for damages, and also all supposed rights of action arising from the arrest on said order. And in case the plaintiff shall give notice of an appeal from this order on or before the day of , instant, it is ordered that all proceedings under this order for the discharge of the defendant from such arrest, or for the delivery up of said bond, be stayed until the said appeal be heard and decided; and it is further ordered, that no action shall be brought or proceeding had against the defendant, or his sureties in his undertaking, upon said undertaking or otherwise, or against the said sheriff or otherwise, for or by reason of any absence of the defendant from this State between this time and the decision of the general term of this court on said appeal, provided that the defendant shall be within this State and present at the settlement of the order of the general term on said appeal.

[*Authentication, as in Form 492 or 493.*]

¹ An appellate court will presume that the ground of vacating was discretionary unless it be otherwise stated in the order itself. *Clarke v. Lourie*, 82 *N. Y.*, 580; *s. p.*, *Edgerton v. Ford*, 11 *Abb. Pr.* 415.

² This Form, appropriately modified in phraseology, is from the order entered in *Forrest v. Forrest*.

Where, upon vacating an order of arrest, upon the ground that, upon the whole case, as presented upon the motion to vacate, there is not evidence to charge the defendant with the wrong complained of, the court is satisfied that there was no malice in causing the arrest, and that there was probable cause for procuring it, the discharge may be granted conditionally, upon the defendant's stipulating not to bring an action for the arrest. *Northern Railway Co. v. Carpentier*, 4 *Abb. Pr.*, 47; *s. p.*, *Hoguet v. Levy*, 1 *Monthly L. Bul.*, 10. So where the question involved in the motion to discharge the defendant is one involved in uncertainty, and about

which there has been much diversity of opinion. *Alden v. Sarson*, 4 *Abb. Pr.*, 102. Compare *Merchants' Bank v. Dwight*, 13 *How. Pr.*, 366; and *Croden v. Drew*, 3 *Duer*, 652.

Where defendant is entitled to have an order of arrest vacated as a matter of right, the court has no power to impose as a condition that defendant shall stipulate not to sue, and where it has vacated the order of arrest, it cannot subsequently resettle the order by imposing such condition. *Crotty v. Kimball*, 22 *Weekly Dig.*, 433; *Wilder v. Guernsey*, 19 *Abb. L. J.*, 401; *s. c.*, 8 *Weekly Dig.*, 107.

If defendant is entitled to have the order vacated on plaintiff's own papers, because the action is not one in which an order of arrest can be issued, the court has no power to require the stipulation. *Tompkins v. Smith*, 1 *Civ. Pro. R.*, 398. See also *Chapin v. Foster*, 101 *N. Y.*, 1; *s. c.*, 3 *Eastern Rep.*, 208, modifying mem. 31 *Hun*, 88.

Form No. 906.

Order denying motion to vacate order of arrest; on terms.

[*Title and recitals; see Form No. 492 or 493, p. 4, of this Volume.*]

ORDERED, that the said motion to vacate the said order of arrest [so far as the same relates to the defendant Y. Z.] be and hereby is denied [with ten dollars costs to the plaintiff—to abide the event of this action—or, on the plaintiff amending—or, serving the summons herein] [but without prejudice to the right of the defendant Y. Z., to make such new motion for the same relief or any part thereof,¹ and on the same or fresh papers, or both, as he may be advised—provided he notices his motion within days from the entry of this order²—upon payment of the costs of this motion—and meanwhile, and until ten days after the hearing and decision of the general term of this court, on any appeal³ to be taken from this order within days after the date, all the proceedings on the part of the plaintiff and his attorney are stayed as to the said defendant].

[*Authentication as in Form 491, p. 3.*]

Form No. 907.

Order reducing amount of bail.

[*Title and recitals; see Form 492 or 493, p. 4, of this Volume.*]

ORDERED, that the motion of the defendant to reduce his bail herein be and is hereby granted, and accordingly that the liability of the sureties on the undertaking of bail herein for the sum of dollars be and is hereby reduced to the sum of dollars (\$), and that the said sureties be and are at liberty to execute and file a new undertaking in said sum of dollars, and that in such case said original undertaking be surrendered to them to be cancelled [and that defendant have ten dollars costs of this motion to abide the event of this action].

[*Authentication as in Form 491.*]

¹ Leave is necessary in order to secure the right to renew. Volume I, p. 190. *Lovell v. Martin*, 12 *Abb. Pr.*, 178; s. c., 21 *How. Pr.*, 238.

But an order to show cause why the order should not be vacated, if granted by the same judge, is equivalent to leave to renew.

² Express leave to renew does not

imply an extension of time to make the motion. *Wheeler v. Brady*, 2 *Hun*, 347; s. c., 4 *Supm. Ct. (T. & C.)*, 547; *Mills v. Rodewald*, 13 *Hun*, 439.

³ Actual renewal is a waiver of the right to appeal from the first denial. Volume I, p. 394; *Harris v. Brown*, 93 *N. Y.*, 390.

Form No. 908.

Order for increase of security on part of plaintiff.

[*Title and recitals; see Form 492 or 493, p. 4, of this Volume.*]

ORDERED, that defendant's motion that the security given by plaintiff on granting the arrest herein be increased is hereby granted; and that unless plaintiff, within days after service of a copy of this order, shall give security as provided by law, in the sum of dollars, said order of arrest shall be vacated.¹

II. DISCHARGE FOR PRIVILEGE, INFANCY, &c.

Form No. 909.

Affidavit to move to discharge person privileged from arrest.²

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is the defendant above named [*or, otherwise state his relation to defendant, and reason why defendant does not make the affidavit*].

II. That on the day of last, said defendant was arrested [in the city of ³] by the sheriff of the [city and] county of , under color of an order of arrest, a copy whereof is hereto annexed; and was taken [*here state how the defendant is held*].

III. [*Here state grounds of privilege.*]

IV. [*If order to show cause is asked for, state circumstances requiring it; and the condition of the cause; see Form 489, p. 2; and that no previous application has been made, &c., as in Form 490, p. 2.*]

V. That deponent is advised and believes that said defendant should be discharged from arrest as a privileged person [*and here add, if desired, circumstances disclosing a defense,*

¹ As to orders upon condition, see Volume I, p. 259.

² *N. Y. Code Civ. Pro.*, § 564.

³ Necessary if the application is to a judge of a superior city court in an action in another court.

with oath to merits—see paragraph III in Volume I, p. 732, substituting “deponent” for “petitioner”—together with any circumstances showing that arrest is not necessary to the security of the plaintiff in the action; and if irregularities are also relied on, statements of any such which do not appear on the face of the papers].

[*Jurat.*]

[*Signature.*]

[*Order to show cause as in next Form but one; order to discharge as in Form 912.*]

Form No. 910.

Affidavit to move to discharge person of unsound mind, or infant under fourteen.¹

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says:

I. [*State his relation to the defendant, or the case, as thus:*] That deponent is the father of the defendant Y. Z., who is an infant under the age of fourteen years, to wit, of the age of , hitherto residing with the deponent [*or, if of unsound mind, state it; see Volume I, p. 579, for allegation of inquisition*].

II. That, on the day of last, said infant was arrested [in the city of]² by the sheriff of the [city and] county of , under color of an order of arrest, a copy whereof is hereto annexed; and was taken [*here state how the defendant is held*].

III. That said defendant [*here state circumstances, if any, which necessitate the application being made by a person not a party to the cause*].

[*IV and V as in last Form.*]

[*Jurat.*]

[*Signature.*]

Form No. 911.

Order to show cause thereon.

[*Title of court and action.*]

Upon the annexed affidavit of M. N., and on the order of

¹ N. Y. Code Civ. Pro., § 554.

² See note to last Form.

arrest and papers on which the same was granted in this action, let the plaintiff's attorney show cause before me¹ [*or, this court, at a special term to be held—at chambers—on the day of , 18 ,*] at the court house [*or, at the city hall*], in , at o'clock in the noon, or as soon thereafter as counsel can be heard, [*if the application is on the ground of infancy or idiocy, say: why the said M. N. should not be permitted to represent the defendant Y. Z. for the purpose of moving for his discharge from arrest as a privileged person and*] why said Y. Z. should not be discharged from arrest in this action, with such other relief as may be just [*if irregularity is objected to, add: and on the ground—among others—of irregularity in this—specifying it*]. [And service of this order upon plaintiff's attorney, and upon said sheriff, days before it is returnable, shall be sufficient.²]

[*Date.*]

[*Signature with initials of title of judge.*]

Form No. 912.

Order discharging from arrest privileged person,³ infant, idiot, or person of unsound mind.⁴

[*Caption (court or judge's order⁵) and recitals; see Form 493, p. 4, of this Vol.*].

ORDERED, that said defendant be discharged from arrest under the order issued herein dated the day of , 18 , and that the sheriff of discharge him from custody upon service on said sheriff of [a certified copy of] this order.

¹ Under *N. Y. Code Civ. Pro.*, § 554, which allows the order, if on the ground of infancy, idiocy, or unsoundness of mind, to be made in the discretion of the court on application of a "relative or any other person whom the court or judge permits to represent him for the purpose," it may be better to take a court order; or if a judge's order, to apply, if practicable, to the one who ordered the arrest. But the better opinion is that, as the statute allows the infant, idiot, &c., to be discharged "as a privileged person," and as the statute, § 564, allows a privileged person to be discharged "by the

court or a judge thereof; or by the county judge of the county, or a judge of a superior city court of the city where the arrest was made; the order may be made by any such judge; and this construction is confirmed by the clause of § 554 allowing the court or judge to permit a third person to represent the party.

² Notice to either or both is discretionary with the court or judge. § 564, last clause.

³ *N. Y. Code Civ. Pro.*, § 564.

⁴ *Id.*, § 554.

⁵ A court order may perhaps be preferred in the case of infant, idiot, or person of unsound mind, see note 1.

And that the plaintiff pay to defendant dollars costs of this motion.¹

[*Authentication, as in Form 491, p. 3, of this Vol.*]

III. DISCHARGE ON BAIL, OR DEPOSIT.

Form No. 913.

Undertaking of bail.

[*Title of court and action.*]

The above-named defendant Y. Z., having been arrested by the sheriff of the [city and] county of , upon an order of arrest, dated the day of , 18 , granted by this court [*or, by Hon. J. K.*], in the above entitled action:

Now, THEREFORE, we [*stating names of at least two sureties, with residences and vocations ;*] hereby jointly and severally undertake, in the sum of [*sum mentioned in the order of arrest*] dollars, that the said defendant Y. Z. will at all times render himself amenable to any mandate which may be issued to enforce a final judgment against him in the action.

[*Or, in arrest by court order for apprehended evasion of jurisdiction (ne exeat), say :*] undertake in the sum of dollars, that the said defendant, Y. Z., will obey the direction of the court, or of an appellate court, contained in an order or a judgment requiring him to perform any act specified in the order of arrest, or, in default of his so doing, that he will at all times render himself amenable to proceedings to punish him for the omission.

[*Or, in replevin, say :*] undertake, in the sum of dollars, that the defendant will deliver the chattel, for the recovery of which this action is brought, to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action.

[*Date.*]

[*Signatures.*]

Form No. 914.

Notice of exception to bail or undertaking.²

[*Title of court and action.*] .

Please take notice, that the plaintiff does not accept the

¹ See Vol. I, p. 264, and p. 288, for special directions as to costs.

² See Vol. I, p. 482, &c.

The notice must be served on the sheriff within ten days after delivery

by the sheriff, to the plaintiff's attorney, of certified copies of the order of arrest, return, and undertaking. *N. Y. Code Civ. Pro.*, § 577.

bail offered by the defendant Y. Z., in this action [*and where there is objection to the undertaking itself, it may be well to add*], and further, that he excepts to the form and sufficiency of the undertaking.¹

[*Date.*]
To [*address*],
Sheriff of county.

[*Signature and office address of*],
Plaintiff's Attorney.

Form No. 915.

Notice of bail justifying.²

[*Title of court and action.*]

Please take notice, that the bail in this action [*or, that—giving names, residences and vocations—who are hereby proposed as bail in the place of the bail already put in*], will justify * before Hon. J. K., a justice of this court [*or, the county judge of county*], at [*naming some place within the county where one of the bail resides, or where the defendant was arrested*], on the day of next, at o'clock in the noon.

[*Date.*]
To [*address*],
Attorney for plaintiff.

[*Signature and office address of*],
Sheriff [*or, defendant's attorney*].

Form No. 916.

Examination of bail.

[*Title of court and action.*]

On this day of , 18 , before the undersigned, J. K., a justice of this court [*or, county judge of the county of*], personally appeared M. N. and O. P., the bail of the defendant Y. Z. in this action, to justify pursuant to notice; and the said M. N., being duly sworn, says [*here state testimony, inserting, if desired, the questions and answers in form*].

And said O. P., being duly sworn, says [*&c., as above*].

[*Jurat.*]
[*Signature of judge,*
with initials of title.]

[*Signature of bail.*]

[*Annex to undertaking.*⁴]

¹ Leave may be granted, later, on ten days' notice. *N. Y. Code Civ. Pro.*, terms. *Zimm v. Ritterman*, 5 *Robt.*, § 578.
618.

² Not less than five nor more than

³ *Id.*

⁴ *N. Y. Code Civ. Pro.*, § 581.

Form No. 917.**Allowance of bail.**

[To be endorsed on the undertaking.]

This day appeared before me the within-named M. N. and O. P., bail for the defendant Y. Z. in this action, and justified as such, and I find said bail to be sufficient, and allow the same.

[Date.] [Signature of judge, with initials of title.]

Form No. 918.

The same; as to one bail, and for time for the other to justify.

[As above, omitting, however, one name; and adding at the end,] and upon reading and filing the annexed affidavit of C. C., it is further ordered, that the defendant have days further time *[or, until]* to justify O. P., his other bail in this cause; the defendant hereby consenting that the plaintiff shall be in the same situation by the course of this court, as if they had both justified this day.

Form No. 919.

The same; with the direction that the money be refunded.¹

[Add:] And further ORDERED, that the sum of dollars, deposited in the hands of the sheriff of the county of , by the defendant on his arrest in this cause, instead of bail, and since brought into court by the sheriff pursuant to the statute, be paid out of court by , to the defendant or his attorney.

Form No. 920.**Allowance of added bail.**

[To be indorsed on the undertaking:²]

Upon reading and filing the affidavit of T. Z. *[or, where the*

¹ Provision is made for the substitution of bail for deposit by *N. Y. Code Civ. Pro.*, § 584.

² *N. Y. Code Civ. Pro.*, § 581.

bail in question is added by a new undertaking and notice of justification, say, the within undertaking of O. P. as bail, and the annexed notice of bail and justification and proof of service thereof], and the said O. P. having appeared before me and justified as such, I find said bail to be sufficient, and allow the same, together with M. N., who justified himself on the day of last.

[Date.] [Signature of judge, with initials of title.]

Form No. 921.

Certificate of deposit in lieu of bail.¹

[Title of court and action.]

[Venue.]

I, M. N., sheriff of the county of , hereby certify that I have received from the defendant the sum of dollars as a deposit instead of bail, being the amount mentioned in the order of arrest in this action.

[Date.]

[Signature]
Sheriff of county.

Form No. 922.

Notice to protect deposit in lieu of bail.²

[Title of court and action.]

I, Y. Z., defendant above named, on whose behalf the sum of dollars has been this day [*or, was, on the day of*] deposited with you, in lieu of the bail required of me in this action, hereby direct you to pay over said deposit to M. N., of , in the event that I become entitled to a return of said deposit.

[Date.]

[Signature.]

[Address to], Sheriff of the county of .

[Acknowledgment, or proof by witness, as in Form No. 445, p. 6.]

¹ See *N. Y. Code Civ. Pro.*, § 682.

² This direction may be given any time before the payment of the de-
posit into court. *N. Y. Code Civ. Pro.*, § 586. See on this subject, 18 *Abb. N. C.*, 323.

Form No. 923.

Certificate that bail has been given instead of deposit.¹[*Title of court and action.*][*Venue.*]

I, M. N., sheriff of the county of _____, hereby certify that the defendant Y. Z. has deposited with me an undertaking, of which the within is a copy, in lieu and instead of the money heretofore deposited with me.

[*Signature*]

Sheriff of _____ county.

IV. SUPERSEDEAS.

Form No. 924.

Affidavit to move for supersedeas.

[*Title of court and action.*][*Venue.*]

Y. Z., the defendant above named, being duly sworn, says :

I. That on the _____ day of _____, 18____, he was arrested by the sheriff of the [city and] county of _____, by virtue of an order of arrest in this action, dated [*or, entered*] the _____ day of _____, 18____, and held to bail in the sum of _____ dollars [*and if bailed and surrendered, add*], and that he gave bail, and afterward and on the _____ day of _____, 18____, his bail on said arrest surrendered deponent to the said sheriff, in their own discharge [*and were exonerated, as appears by the—naming papers—copies of which are hereto annexed*].

II. That ever since said arrest [*or, surrender*] this deponent has been and now is held in actual custody² by said sheriff, by virtue of said order of arrest.

[*If defendant has not yet been imprisoned under the order, substitute for paragraphs I and II, That on or about the day of _____, an order of arrest in this action was granted by the Hon. J. K., a judge of this court—or, county judge of _____ county—and that deponent, having been arrested thereon by the sheriff of _____, gave bail on the _____ day of _____, 18____.*]

III. That [*here state the condition of the cause, showing*

¹ *N. Y. Code Civ. Pro.*, § 584.² Formerly this provision as to discharge of the defendant applied only to defendants in actual custody;otherwise since the amendment to *N. Y. Code Civ. Pro.*, § 572, effected by the Act of 1886.

that plaintiff has unreasonably delayed the trial of the action; or, that he had power, at least ten days previous to the application, to enter judgment, and has not done so; or, that judgment has been entered and execution against property thereon returned at least ten days previous to the application; or, that judgment has been entered¹ and plaintiff has neglected for three months thereafter to issue a body execution;² or, that plaintiff delays the enforcement of his remedies by collusion or for the purpose of allowing the debtor to remain in prison under a mandate in any other action, before the issuing of the mandate in favor of the plaintiff, so as to produce a continued and extended imprisonment by virtue of the separate mandates in the different actions, for instance, as follows:] on the day of , 18 , a final judgment was entered by the plaintiff in his favor against the defendant, and duly docketed, and the judgment-roll filed, for the sum of dollars [*or, directing the payment of the sum of dollars by this defendant to the plaintiff—or, awarding to the plaintiff the recovery against the defendant³ of the chattel therein mentioned*].

IV. That plaintiff has neglected to issue execution against the person of the deponent, although three months have elapsed since the entry of judgment and filing of the judgment-roll as aforesaid.

V. [*State as to previous application, and also the condition of the cause, and the necessity of an order to show cause, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 925.

Certificate of sheriff that defendant is in custody.

[*Title of court and action.*]

[*Venue.*]

I do certify that Y. Z., the defendant above named, is a

¹ The time for charging in execution is to be computed from the date of *actual entry* of judgment, not from the date when it *might have been entered*. If plaintiff neglects to enter it, he may be compelled to do so by order. The mere acceptance of an offer to allow judgment is not obtaining judgment within the meaning of the statute. *Lippman v. Petersberger*, 9 *Abb. Pr.*, 209; s. c., 18 *How. Pr.*, 270.

And any evidence of such entry of

judgment is sufficient. *Standacher v. Pregenzer*, 52 *How. Pr.*, 76 (where it was held unnecessary to produce a certified copy of the docket).

² But where plaintiffs had been guilty of gross neglect to enter judgment they were required to charge the defendant in execution within a specified time. *Carter v. Loomis*, 2 *Abb. Pr.*, N. S., 295.

³ See *N. Y. Code Civ. Pro.*, §§ 1239, 1240.

prisoner in my custody, on an order of arrest dated [*or, entered*] herein the day of , 18 , and [*on surrender to me of him, made the* day of , 18 , by his bail in this action, in their exoneration], and is confined in the county jail of said county [*or, but has been admitted to the jail liberties, by an undertaking given the* day of , 18 ¹], and that no execution against the person of said defendant has, up to the date hereof, been issued to me by the plaintiff in this action.

[*Date.*]

[*Signature of*], Sheriff
of the [city and] county of .

Form No. 926.

Order to show cause for supersedeas of arrest.²

[*Caption as in Form 492 or 493, p. 4, of this Volume.*]

Upon the annexed affidavit of [the defendant] Y. Z., verified the day of , 18 [and sheriff's certificate], and on [*name other papers relied on, if any*], let plaintiff or his attorney show cause before this court, at a special term thereof to be held at [chambers at] the County Court House [in], on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, why a supersedeas should not be allowed, discharging the said defendant from the custody of the sheriff of the city and county of [*or, if the defendant has not yet been imprisoned, relieving the defendant from imprisonment under the order of arrest granted in this action on the* day of , 18], and why such other and further relief should not be granted to defendant as may be proper. [*If irregularity is relied on, specify it.*] Service of this order and said papers shall be sufficient if made days before its return.³

[*Authentication as in Form 491, p. 3.*]

¹ See note 2 to Form 924.

² By *N. Y. Code Civ. Pro.*, § 572, as amended in 1886, this application must be made to the court in which the action was commenced, and on notice to the plaintiff.

³ The clause allowing this applica-

tion to be made in the county where defendant is in custody, irrespective of the general rule (*Sumner v. Osborn*, 22 *Hun*, 13, and see Volume I of this work, p. 121), was superseded by the amendment of 1886.

SECTION III.

SURRENDER AND EXONERATION.

FORMS.

- | | |
|--|---|
| (927.) Surrender by bail. | dered after their time to answer has expired. |
| (928.) Certificate by sheriff of surrender. | (933.) Order giving bail leave to surrender after answer. |
| (929.) Authority from bail to arrest principal. | (934.) Affidavit to move for enlargement of time to surrender. |
| (930.) Notice of motion to exonerate bail. | (935.) Notice of motion for enlargement of time to surrender. |
| (931.) Order exonerating bail who have surrendered. | (936.) Affidavit to move for exoneration of bail on death or imprisonment of principal. |
| (932.) Affidavit of debtor to move for exoneration of bail, who have been sued, and have surrendered after their time to answer has expired. | (937.) Order exonerating bail on death or imprisonment of principal. |

Form No. 927.

Surrender by bail.¹

[Indorse on or annex to a certified copy of the undertaking:]

To the sheriff of the county of [name of county where defendant was arrested]. The undersigned, a surety² [or, sureties] on the annexed undertaking given on the arrest of [or, on admitting to the liberties] the defendant, Y. Z., therein named, herewith surrender him to you, and require you to take him into your custody pursuant to law.

[Date.]

[Signature.]

[Acknowledgment, as in Form 495, p. 6.]

Form No. 928.

Certificate by sheriff of surrender.³

[Title of court and action.]

[Venue.]

I, M. N., sheriff of the county of [or, keeper of the jail in county], hereby certify that Y. Z., the defendant mentioned in the [within] undertaking [or, if not in-

¹ N. Y. Code Civ. Pro., § 592, provides for this surrender by bail, § 154, for this surrender by sureties on an undertaking for the limits.

² Matter of Taylor, 7 How. Pr.,

212, dictum, that one of several sureties may surrender.

³ Convenient to have indorsed on a certified copy of the undertaking.

dorsed, refer to the undertaking so as to identify it], was surrendered to me by [*name of surety or sureties surrendering*], this day of _____, 18____, and remains in custody by virtue thereof. [*Signature and title.*]

Form No. 929.

Authority from bail to arrest principal.

KNOW ALL MEN by these presents, that the undersigned C. D. [and E. F.], the within named bail, depute, authorize, and empower O. P., of _____ [*and if an officer, add official addition*], to arrest and to surrender to the sheriff of the [city and] county of _____, Y. Z., the within named defendant, in exoneration and discharge of my [*or, our*] undertaking as bail for the said Y. Z., in said cause; and to employ such assistance as may be necessary for the purpose.¹

[*Date.*][*Signature.*][*Acknowledgment, as in Form 495, p. 6.*]

Form No. 930.

Notice of motion to exonerate bail.²[*Title of court and action.*]

Please take notice, that on the affidavit of C. D., and the certificate and undertaking of which copies are herewith served, the undersigned will move, before the Hon. _____ [one of the justices of this court—*or, county judge of the county of* _____], on the _____ day of _____ next, at _____ o'clock in the _____ noon, at _____ in _____, * to exonerate C. D. and E. F., the bail of the defendant in this action, from all further liability upon the undertaking of bail heretofore entered into by them; * and for such other and further relief as may be just.

[*Date.*][*Name and office address of*],Attorney for [*naming bail*].³

To [address]

Plaintiff's attorney.

¹ This Form is sustained by *Nicolls v. Ingersoll*, 7 *Johns.*, 145, and see *N. Y. Code Civ. Pro.*, § 593. It is not essential that all the sureties should unite. *In re Taylor*, 7 *How. Pr.*, 212.

termine any question as to whether the proceedings in the original action sanction or prevent charging the bail. *Obregon v. De Mier*, 54 *How. Pr.*, 390.

³ It must appear that the bail move.

² On this motion the judge can de-

Form No. 931.

Order exonerating bail who have surrendered.¹[*Title of court and action.*²]

On reading and filing the affidavit of C. D., verified the day of _____, 18____, satisfactorily proving that said C. D., as bail of the defendant above named, has duly surrendered him to the custody of the sheriff of the [city and] county of _____, pursuant to law, and on reading and filing a verified copy of the undertaking of said bail and the certificate of said sheriff annexed thereto, dated the _____ day of _____, 18____, acknowledging said surrender³ [and on reading and filing proof of due notice of this motion] and on hearing T. Z., in support of the motion, and A. T. [or, no one appearing] for _____, in opposition thereto; now, on motion of A. T., attorney for _____ :

ORDERED, that said bail [*naming them*], of said defendant Y. Z., be and they are hereby exonerated and discharged from all liability.

[*Date.*] [*Signature of judge with initials of title.*]

Form No. 932.

Affidavit of debtor to move for exoneration of bail, who have been sued, and have surrendered after their time to answer has expired.⁴

[*Title of court and action against the bail.*][*Venue.*]

Y. Z., being duly sworn, says :

I. That he is one of the above-named defendants herein.

II. That this action is brought upon an undertaking duly given upon defendant's arrest upon an order of arrest granted in an action in [this] court, wherein said plaintiff was plaintiff, and this deponent was defendant, and which was brought for [*indicating that it was not replevin*].

¹ Under *N. Y. Code Civ. Pro.*, § 592, application for this order is to be made (upon notice to plaintiff's attorney) to a judge of the court or the county judge of the county where the action is triable.

² Entitle in the action in which the bail was given; unless they have

been sued. See notes to following Forms.

³ *N. Y. Code Civ. Pro.*, § 598.

⁴ The motion should be made and the papers entitled in the action on the undertaking. *Phelps v. Hall*, 5 *Johns.*, 367; *Pell v. Jadwin*, 3 *Johns.*, 448; *Barker v. Russell*, 11 *Barb.*, 303.

III. That deponent is informed, since this action was commenced, that an execution in said action against deponent's person was issued and returned "not found."

IV. That deponent had no knowledge or information of the same, before the commencement of the action, and never tried to evade the same; and deponent was invariably at his home or place of business in this city.

V. That this action was commenced about 18 [here set forth excuse for not surrendering before the expiration of the time to answer].¹

VI. That upon the day of , 18 , the defendants, E. and D., who were deponent's sureties on said undertaking, duly surrendered and delivered deponent into the custody of the sheriff of the [city and] county of , to whom said order of arrest and execution was issued, and to whom said undertaking was given; and this deponent is now in said sheriff's custody as aforesaid.

[*Jurat.*]

[*Signature.*]

[*Annex corroborating affidavits, also showing date of answering, and the nature of defense; and add certificate of sheriff that defendant is in custody; and move, at special term, on notice; see N. Y. Code Civ. Pro., § 601.*]

Form No. 933.

Order giving bail leave to surrender after answer.

At a special term [*&c., as in Form 493, p. 4, of this Vol.*].

[*Title of action against bail.*]

Upon reading and filing the affidavits of C. D., the defendant Y. Z., verified the day of , 18 , and the sheriff's certificate, dated the day of , 18 [and proof of due service of notice of motion—or, of the order to show cause granted herein], and after hearing T. Z., of counsel for the defendants, for the motion, and A. T. for the plaintiff [*or, no*

¹ If the application for leave to surrender is made after answer, state in the affidavit that bail has not been indemnified. *Mills v. Hildreth*, 7 *Hun*, 298; again, 17 *Hun*, 297 (appeal from 7 *Hun*, dismissed in 81 *N. Y.*, 91); *Bank of Geneva v. Reynolds*, 12 *Abb. Pr.*, 81; s. c., 20 *How. Pr.*, 18.

one appearing], in opposition, and due deliberation being had; now, on motion of T. Z., attorney for :

ORDERED, that the defendants C. D. and E. F. have days from [*the date of service of their answer*] in which to surrender the said Y. Z. into the custody of the sheriff of the [city and] county of , upon the order of arrest and execution issued against the body of said Y. Z., at the suit of plaintiff in this action against him.¹

Enter: [*signature of judge by initials of name and title.*]

Form No. 934.

Affidavit to move for enlargement of time to surrender.

[*Title of court and action.*²]

[*Venue.*]

C. D. being duly sworn, says:

I. That he is one of the bail of the defendant Y. Z. in this action; that said Y. Z. was arrested about the day of , 18 , by virtue of an order of arrest, on the ground that [*here state ground of arrest, so as to show that it was not concealing a chattel, &c.*]; and that on the day of , 18 , the deponent [and E. F.] became bail for said defendant by giving an undertaking of which a copy is hereto annexed.

II. [*Here state excuse for not having surrendered in season—e. g., sickness of bail, mistake as to time, or collusion of the creditor with the debtor—and specify what means, if any, the bail took at any time to ascertain where the principal was, and to effect his surrender.*]

III. [*State, if practicable, facts showing that a surrender is possible.*]

IV. That no action has been commenced against the bail, as deponent is informed and believes [*or if application is made after answer, state excuse for delay.*].

[*Jurat.*]

[*Signature.*]

¹ As to terms for allowing surrender after answer, see *Bank of Geneva v. Reynolds*, 12 *Abb. Pr.*, 81; *Warren Mfg. Co. v. Christern*, 1 *Monthly L. Bul.*, 21; *Douglass v. Haberstro*, 21 *Hun*, 320; 8 *Abb. N. C.*, 230; 59 *How.*

Pr., 194 (appeal dismissed in 82 *N. Y.*, 572).

² If an action has been commenced against the bail, this motion will be made in the new action, and will ask relief upon payment of the costs.

Form No. 935.

Notice of motion for enlargement of time to surrender.

[*As in Form No. 488, substituting for the words between the † and ¶:*] that the undersigned bail of the defendant Y. Z. in this action have days further time to surrender him to the sheriff in their exoneration :

Form No. 936.

Affidavit to move for exoneration of bail on death or imprisonment of principal.¹

[*Title of court and action.*²]

[*Venue.*]

C. D., one of [*or, and E. F.*] the bail for the defendant Y. Z. in this action [*or, if in previous action, state it as in Form 932*], being duly [and severally] sworn [each for himself], says :

I. That judgment was obtained and docketed in this [*or, said*] action against said Y. Z. on or about the day of , 18 , and that an execution in due form was duly issued thereupon on the day of , 18 .

II. That [after the issuing, and before the return of the said execution, and] on or about the day of , 18 , the said defendant died at ³ [*or, if imprisoned, allege it—e. g., as in Form No. 932*].

[*Jurat.*]

[*Signature.*]

Form No. 937.

Order exonerating bail on death or imprisonment of principal.⁴

[*Caption (court order), and recitals, as in Form 493, p. 4, of this Vol.*]

ORDERED, that said bail [*naming them*], of said defendant

¹ The application is too late after the bail has become charged. *Hissong v. Hart*, 39 *N. Y. Supr.*, 411; *Sibley v. Sauer*, *N. Y. Daily Reg.*, Dec. 12, 1876.

² See note to Form 932.

³ Presumptive proof of the death of their principal entitles the bail to exoneration. *Merritt v. Thompson*,

1 *Hill.*, 550 (where principal had gone to sea and not been heard from for a considerable time).

⁴ Under *N. Y. Code Civ. Pro.*, § 601, this order is made by the court in which an action against the bail is pending.

If further time is given, the application must be on notice.

Y. Z., be and they are hereby exonerated and discharged from all liability [upon paying to the plaintiff above named or his attorney, within days¹ after service of this order, the costs and expenses [*&c.*²].

Enter: [*signature of judge by initials of name and title.*]

¹ As to length of time, and as to enforcing conditional order, see Vol. I, p. 259.

² The terms are in the discretion of the court.

CHAPTER IX.

PROCEEDINGS PECULIAR TO DIVORCE.

I. NEXT FRIEND.

FORMS.

- (938.) Petition to authorize next friend of infant, idiot or lunatic, to sue to annul marriage.
 (939.) Order allowing next friend to sue to annul marriage.

II. ALIMONY AND COSTS.

- (940.) Petition for alimony and costs by wife, plaintiff.
 (941.) Petition for alimony and costs by wife, defendant.
 (942.) Notice of motion, or order to show cause, for alimony.
 (943.) Order directing reference as to counsel fee or alimony, or both, etc.
 (944.) Order to pay alimony and costs.
 (945-7.) *Special clauses such as are sometimes inserted in order to pay alimony and costs.*
 (945.) If the allowance dates back.
 (946.) Stay of proceedings.
 (947.) Condition.

- (948.) Affidavit to obtain order for sequestration and receiver.
 (949.) Order for sequestration and receiver.
 (950.) Affidavit to obtain order to show cause why husband should not be attached for contempt on not paying alimony, etc.
 (951.) Order to show cause thereon.
 (951a.) Affidavit to obtain order that husband show cause why his pleading should not be stricken out for failure to pay alimony, etc.
 (952.) Order thereon.

III. CUSTODY OF CHILDREN.

- (953.) Petition for custody of minor children.
 (954.) Order to show cause why plaintiff should not have custody of children, and meanwhile forbidding their removal, and allowing plaintiff to see them.
 (955.) Order confiding the custody of children to mother, with special directions.

I. NEXT FRIEND.

Form No. 938.

Petition to authorize next friend of infant, idiot or lunatic, to sue to annul marriage.¹

To the court.²

The petition of M. N. shows:

I. That A. B., otherwise called A. Z., is an infant, of the age of years on the day of last [*or*, an idiot

¹ See Vol. I, p. 231, as to Petitions generally.

As to similar applications in other cases than divorce, see Vol. I, p. 582.

² The application is not, as in the

case of a guardian *ad litem*, to be made to a judge out of court, but to the court. *N. Y. Code Civ. Pro.*, §§ 1744, 1748.

—or, a lunatic—and if so adjudged, state inquisition, as in Vol. I, p. 579, or otherwise, according to the fact].

II. That said A. B. resides at [stating facts as thus] with your petitioner, who is her aunt], and both the parents of said A. B. are dead. The only other relatives of said A. B. within this State are C. B. and D. B., her cousins, who reside at No. street, in the city of .¹

III. On information and belief, that on or about the day of last, at , the form of marriage was gone through between said A. B., otherwise called A. Z. and Y. Z., of , the said , being then still under the age of legal consent, to wit: only years of age; and that the parties to said supposed marriage have not at any time since said attained the age of legal consent, freely cohabited as husband and wife.²

[Or in case of lunatic or idiot—the said being then and ever since an idiot—or, lunatic as aforesaid, and has never since been restored to a sound mind, but said lunacy still continues.³]

IV. [State any further facts rendering an action desirable, or annex and refer to proposed complaint.]

V. [If application is ex parte, or order to show cause is asked, as in Form 489 or 490, p. 2, of this Vol.]

WHEREFORE, your petitioner prays this court to allow him to bring an action to annul said supposed marriage on the grounds aforesaid, and for such other or further relief as the court may seem just.

[Date.]

[Signature.]

[Verification, as in Form 494, p. 5, of this Vol.]

[Consent of proposed next friend if the foregoing petition is made not by him but by a third person, as in Vol. I, p. 585, substituting "next friend" for "guardian ad litem."]

[Acknowledgment, as in Form 495, p. 6, of this Vol.]

[Affidavit of proposed next friend to his competency, if required by the court, as in Vol. I, p. 586, substituting "next friend" for "guardian ad litem."]

¹ Sufficient should be stated as to relatives to guide the discretion of the court in directing what notice, if any, should be given. For notice, see Vol. I, pp. 347, 348.

² N. Y. Code Civ. Pro., § 1744.

³ N. Y. Code Civ. Pro., § 1748.

Form No. 939.

Order allowing next friend to sue to annul marriage.

At a special term [*&c.*, as in *Form*
493, p. 4, of *this Volume*].

In the Matter of the Application
of

M. N., for leave to sue to annul
a marriage between A. B. and
Y. Z.

On reading and filing the petition of M. N., verified the
day of , 18 [and the consent of C. D., to serve as
next friend as hereinafter provided, acknowledged the day
of , 18], and proof of due notice of this motion given,
pursuant to the direction of the court, to C. B. and D. B.; and
after hearing A. T., of counsel for the petitioner, and Z. T. [*or*,
no one appearing], for Y. Z. in opposition; and due delibera-
tion having been had; now on motion of A. T., attorney for
the petitioner:

ORDERED, that said M. N. is hereby appointed next friend of
A. B., of , an infant [*or*, idiot—*or*, lunatic], with leave
to bring an action to annul a marriage, or supposed marriage,
between said A. B. and Y. Z.

Enter: [*signature of judge by initials of name and title.*]

II. ALIMONY AND COSTS.

Form No. 940.

Petition¹ for alimony and costs by wife, plaintiff.

[*Title of court and action.*]

To the court of .

The petition of A. B., plaintiff above named, respectfully
shows:

I. That she has brought this action against the defendant,

¹ The application may be made upon affidavit, if preferred. See Vol.
I, p. 332.

her husband, for a divorce and judgment dissolving the marriage contract between them for the defendant's adultery [or, for a limited divorce or judgment of separation between them for defendant's cruelty—*or otherwise*—or, for a judgment declaring the marriage between them void on the ground of],¹ as more fully appears by the complaint² hereto annexed * [*and if the complaint is unverified, may add: all the allegations of which are true to the knowledge of the petitioner, except such as are stated on information and belief, and those she is informed and believes are true.*]³

II. That the action has been actually commenced⁴ by the service, on defendant [personally], on the day of 18 , of the summons and complaint [*here state condition of cause, as thus:*] and he has not answered nor demurred [*or if he has answered denying the charges, and he has appeared and answered, denying several material allegations of the complaint; but that all said allegations are nevertheless true, as your petitioner is informed and believes*]; and she will be able to substantiate the allegations of the complaint by proof, on the trial, and has a good cause of action thereon, as she is advised by her counsel, A. T., who resides at , and as she verily believes. [*Set forth facts in detail showing good cause for bringing the action, unless verified complaint is presented as sufficient evidence.*]⁵ *

† III. That said [*husband*] has left your petitioner and ceased to provide for her support⁶ [and that of the children of

¹ The court have power, incident to their jurisdiction to annul a marriage for its original infirmity, to grant a counsel fee and temporary alimony in a husband's action to annul a marriage. *O'Dea v. O'Dea*, 31 *Hun.* 441; *aff'd*, it seems, in 95 *N. Y.* 667, without opinion; *Griffin v. Griffin*, 47 *N. Y.* 134.

But such applications have been held unsustainable in a wife's action. *Isaacsohn v. Isaacsohn*, 3 *Month. L. Bul.* 73; *Bloodgood v. Bloodgood*, 59 *How. Pr.*, 42.

² The application may be made before a copy of the complaint has been served, yet in such case the petition or affidavit must allege, in substance, all the facts necessary to make a good complaint in the action. If the action is for adultery, omitting to show in the affidavit when and where the defendant committed adultery, precludes the court from granting the

order. *Whitney v. Whitney*, 22 *How. Pr.*, 175.

³ If the complaint is not presented, allege both the marriage and the facts constituting the cause of action.

⁴ *Weishaupt v. Weihaupt*, 27 *Wis.* 621; *Hollerman v. Hollerman*, 1 *Barb.* 64; *Bissell v. Bissell*, *id.*, 430; s. c., 3 *How. Pr.*, 242; *Desbrough v. Desbrough*, 29 *Hun.* 592.

⁵ Same cases. A fair presumption of the fact of marriage should be made out, if the marriage is denied. *Brinkley v. Brinkley*, 50 *N. Y.* 184; s. c., 10 *Am. R.* 460; *Smith v. Smith*, 61 *Iowa* 138; *Collins v. Collins*, 80 *N. Y.* 1; *York v. York*, 34 *Iowa* 530; and see *Herforth v. Herforth*, 2 *Abb. Pr.*, *N. S.* 483, 489.

⁶ *Boubon v. Boubon*, 3 *Robt.* 715; *Collins v. Collins*, 80 *N. Y.* 1; previous decision in s. c., 71 *id.* 269; *rev'g* 10 *Hun.* 272; *Maxwell v. Maxwell*, 28 *Hun.* 566.

said marriage], and your petitioner is [wholly] destitute of the means of supporting herself [or said children], pending this action, or carrying on this action §, and defraying the costs and expenses attending the same [the only property or income which she has, being: *here state it*;¹ and if there are children of the marriage, dependent on her, *state facts*.²]

IV. That the said [*husband*] has [real estate and personal] property to a large amount, and amply sufficient to enable him to advance therefrom, to your petitioner, such sums as may be necessary for the above-mentioned purposes [*state details, as thus:*] and in particular has \$3,000 now in bank, and owns a house and lot, No. _____ street in _____, worth, over and above incumbrances, the sum of \$10,000, and is the owner of other property to the amount of more than _____ dollars; and that his annual income is about _____ dollars [*add, also, any other facts as to the husband's profession, the number and age of children dependent on him, &c., which bear on the question of his ability*].

V. [*If an order to show cause is asked, state as to reason, and previous application; see p. 2, of this Vol.*]

WHEREFORE, your petitioner prays that an order be made requiring said [*husband*] to pay her a reasonable sum for her support and maintenance [and that of the aforesaid children], during the pendency of this action, and such sums as may be necessary to enable her to carry on this action, § and to defray the necessary costs and expenses thereof; and for such other and further order as may be just.

[*Date.*]

[*Signature.*]

[*Verification, as in Form 494, p. 5, of this Vol.*]

[*Notice of motion or order to show cause, Form 942.*]

Form No. 941.

Petition for alimony and costs by wife, defendant.

[*Commencement as in preceding Form.*]

I. That the plaintiff, A. B., has commenced an action, by the service of a summons and complaint on your petitioner, to

¹ See *Merritt v. Merritt*, 99 *N. Y.*, 643; aff'g 51 *Super. Ct. (J. & S.)*, 540. state necessity; see *Beadleston v. Beadleston*, 103 *N. Y.*, 402; s. c., 4 *Centr. Rep.*, 537; rev'g 39 *Hun*, 658.

² If sought to cover past expenses,

obtain a judgment for a separation between him and the deponent [*or otherwise, as in 1 of preceding Form*]; and that your petitioner has answered, denying all the material allegations in said complaint, except the allegation as to the marriage between this defendant and said plaintiff.* [*Conclude as in preceding Form, from the †, at beginning of III; but at the §§, substitute the words "her defense" for "this action."*]

Form No. 942.

Notice of motion, or order to show cause, for alimony.¹

[*As in Form 488, p. 1, or 491, p. 3, substituting for the italic clause between the ‡ and the ¶ :*] that the defendant [*or, plaintiff*] pay the plaintiff [*or, defendant*] the sum of dollars monthly [*or, weekly*] for her support [and the education and maintenance of the children, in said petition mentioned], during the pendency of this action [dating from the commencement thereof], and the sum of dollars to enable her to defray the costs and expenses of the said action [*or, her defense*].

Form No. 943.

Order directing reference as to counsel fee or alimony, or both, etc.²

[*Caption (court order) and recitals, according to the circumstances; see p. 4, of this Volume, Form 493.*] ORDERED, that it is referred to R. F., Esq., who is hereby appointed referee for the purpose, to inquire and report [whether alimony should be granted, and if so] what is a reasonable sum to allow said [*wife*] for her support [and the education and support of the children of the marriage] during the pendency of this action and from what time, and the times and manner for payment [and what security, if any, should be required—and what sum should be allowed for counsel fee or other costs and expenses of this action.³]

Enter: [*signature of judge by initials of name and title.*]

¹ This is to be a court order. Notice given before appeal taken, was held in *O'Dea v. O'Dea*, 31 *Hun*, 441, to be in time; *aff'd*, it seems, in 95 *N. Y.*, 667, without opinion.

² See *Gerard v. Gerard*, 2 *Barb. Ch.*, 73.

³ Or may award counsel fee and refer question of alimony. *Brennan v. Brennan*, 19 *Weekly Dig.*, 342.

Form No. 944.

Order to pay alimony and costs.

[Caption (court order), and recitals, see Form 493, p. 4, of this Volume.] ORDERED, 1. That [defendant] pay to [plaintiff's] attorney the sum of dollars counsel fee¹ [in weekly instalments of dollars, commencing] within [ten] days after the service of a certified copy of this order on [defendant's] attorney.*

2. That the [defendant] pay to the [plaintiff] the sum of dollars per [week] for her support [and the education and support of the children of the marriage] during the pendency of this action [and from the commencement thereof]; and make such payments on each day, at the office of the [plaintiff's] attorney.

[Special clauses, see following Forms. Costs, see Volume I, p. 288.]

Enter: [signature of judge by initials of name and title.]

SPECIAL CLAUSES SUCH AS ARE SOMETIMES INSERTED
IN ORDER TO PAY ALIMONY AND COSTS.

945. *If the allowance dates back.*—[Insert in the last Form:] and that in days after service of a certified copy of this order on [defendant's] attorney [defendant] pay the sum of dollars for the aforesaid allowance from the commencement of this action to the date of this order.

946. *Stay of proceedings.*²—That all proceedings on the part of the plaintiff herein, except to pay the sums above required, be and hereby are stayed until after payment of the counsel fee and the [weekly] allowance of temporary alimony up to and including the day of , herein required to be paid. And it is further ordered, that in the event of default in the payment of any instalment of said temporary alimony that may hereafter become due, all proceedings of the plaintiff (except paying the same herein required), be and hereby are further stayed for and during such default.

¹ The order may direct money to be applied to a specific purpose, such as referees' fees, instead of directing that it be used for the purposes of the suit, generally. *Schloemer v. Schloemer*, 49 N. Y., 82.

² A stay has been thus ordered in several considered cases, unreported, but in one of them (*Beadleston v. Beadleston*, 23 *Weekly Dig.*, 365), on dismissing an appeal on other grounds, the general term said the correctness of that part of the order staying plaintiff's proceedings might be doubted, "because it was in its nature a punishment for disobedience."

On general principles however, a stay of proceedings is not regarded as a punishment, but as a proper mode of enforcing compliance with any reasonable order of the court, even though it be such that the court have not power to enforce by punishing for contempt, and therefore can enforce it, if at all, only by stay of proceedings meanwhile. The practice seems proper in cases where the oppressive course of the plaintiff requires it.

947. *Condition.*—This order is made on condition that [defendant] upon or before service thereof file and serve a stipulation to refer the action and proceed to trial on days' notice.

[*Direction for security, if required, as in Form of judgment.*]

Form No. 948.

Affidavit to obtain order for sequestration and receiver.¹

[*Title, and commencement as in other cases.*]

I. [*State condition of cause, and the making and entry of the order to pay, referring to copy annexed.*]

II. [*Allege service; see p. 98 of this Volume, Form 637.*]

III. That on the day of , 18 , deponent at No. street, in , presented to said [husband] a written power signed by [wife] authorizing deponent to receive the payment of dollars required by said order, and then due, of which power a copy is hereto annexed, and then and there demanded payment of said sum; but said [husband] refused to comply, and no part thereof has been paid. *

IV. That the security given by said [husband] cannot be enforced [*or, has proved inadequate*] by reason of [*&c.*].

[*Date.*]

[*Signature.*]

Form No. 949.

Order for sequestration and receiver.²

[*Caption (court order) and recitals according to the case.*]

ORDERED, that R. C., Esq. [counselor-at-law], of , be and hereby is appointed a receiver of the personal property of the said [husband] Y. Z., and the rents and profits of his real property, and is directed to take possession of said property, real and personal, and hold the same until the further order of this court [*or, until the said—husband—shall give sufficient security to this court in regard to the payment aforesaid—*or, and to apply said personal property and the rents and profits of said real property to the payments aforesaid], and said [hus-

¹ *N. Y. Code Civ. Pro.*, §§ 1772-3. hend, 2 *Abb. N. C.*, 29; s. c., 68 *N. Y.*,

² Adapted from *Foster v. Towns*. 203; see *Donnelly v. West*, 17 *Hun*, 564.

band] is hereby directed to deliver possession of said real and personal property to said receiver accordingly.¹

[*Bond clause, and authentication, as on p. 145, of this Volume, paragraph 2, &c.*]

Form No. 950.

Affidavit to obtain order to show cause why husband should not be attached for contempt on not paying alimony, &c.²

[*As in Form 943, adding at the end:*] V. On information and belief, that said [*husband's*] property consists of [*designating it*]; and the same cannot be reached by sequestration and a receivership [without great delay and expense] by reason of [*stating facts*]; and deponent believes that such proceedings would be ineffectual for the following reasons [*stating them, and sources of information*].

VI. [*State as to previous application, &c., as on p. 2 of this Volume.*]

[*Jurat.*]

[*Signature.*]

Form No. 951.

Order to show cause thereon.

[*Caption (court order)*³ and recitals according to circumstances; see p. 4 of this Volume, Form 493, adding:] and it appearing presumptively to the satisfaction of the court that payment of the sums directed by said order of the day of , 18 , cannot be enforced by sequestration or by enforcement of any security therefor [*or, and the court being satisfied that sequestration or direction to give security would not be effectual*]:

ORDERED, that said [*husband*] show cause at a special term of this court to be held [at chambers] at the county court house [*or, city hall*] in , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, why an attachment should not issue against him for contempt in disobeying the order for the payment of alimony, &c.,

¹ As to further instructions, see
RECEIVERS.

² *N. Y. Code Civ. Pro.*, § 1773.

³ *Id.*

entered herein the day of , 18 , unless he pays
dollars as thereby required on or before the inst.,
by o'clock P. M.

Enter: [*signature of judge by initials of name and title.*]

Form No. 951a.

Affidavit to obtain order that husband show cause why his pleading should not be stricken out for failure to pay alimony, &c.

[*As in Form 948 to the *, adding statement as to previous application; p. 2.*]

Form No. 952.

Order thereon.¹

[*Caption (court order) and recitals according to the case; see Form 493, p. 4, of this Volume, adding:*] and it appearing to the satisfaction of the court that said [*husband*] has neglected and refused to pay the sum of dollars required by the order herein of the day of last, although due service of said order and due demand has been made; and that he is in contempt thereby;

ORDERED, that the said [*husband's*] complaint [*or, answer—or, reply*] in this action be stricken out [*and if complaint, may add, and be dismissed with costs—or if answer or reply, may proceed to order reference as on failure to answer or reply*].

Enter: [*signature of judge by initials of name and title.*]

III. CUSTODY OF CHILDREN.

Form No. 953.

'Petition for custody of minor children.'

[*As in Form 940, or as in Form 941 to the *, continuing:*]

II. Your petitioner further shows that the only [living] issue of the marriage between the petitioner and said defendant

¹ Walker v. Walker, 8 Abb. N. C., 436; s. c., 82 N. Y., 250; aff'd 20 Hun, 400; Brisbane v. Brisbane, 34 Hun, 339; aff'd in 67 How. Pr., 184.

² N. Y. Code Civ. Pro., § 1771; Price v. Price, 55 N. Y., 656; Kamp v.

Kamp, 59 N. Y., 212; Crimmins v. Crimmins, 28 Hun, 200; Conn v. Conn, 57 Ind., 323; Holt v. Holt, 19 Centr. L. J., 24; Re Ensign, 103 N. Y., 284.

[*or, plaintiff*], are two children, a boy named _____, of the age of _____, and a girl named _____, of the age of _____; who are now in the custody of said defendant [*or, plaintiff*]; and that he refuses to allow them to remain with your petitioner, or even to visit her. [*State facts as to the defendant's business or habits, or his neglect or inability to provide for or nurture the children, such as go to support the application.*]

WHEREFORE, your petitioner prays that, by an order of this court, the custody of the said children may be awarded to your petitioner, and said defendant ordered and directed to deliver said children up to her, and be restrained and enjoined thereafter from claiming or interfering in any manner with them or either of them, or with your petitioner in her custody thereof, and for such other or further order as may be just.

[*Date.*]

[*Signature.*]

[*Verification, p. 5 of this Volume, Form 494.*]

Form No. 954.

Order to show cause why plaintiff should not have custody of children, and meanwhile forbidding their removal, and allowing plaintiff to see them.

[*Title of court and action.*]

On the summons and complaint annexed [*or, heretofore filed and served herein*], and the annexed petition [*or, affidavit*] of A. B., plaintiff herein, verified the _____ day of _____, 18____,

ORDERED, 1. That the defendant show cause, at a special term of this court, to be held [at chambers] at the court house in _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why the custody of the plaintiff's children, C. and D. B., should not be given to the plaintiff during the pendency of this action, or why such other or further relief should not be granted to the plaintiff in the premises as to the court may seem just.

2. That meantime, and until a hearing and entry of an order on this motion, defendant is hereby restrained and enjoined from removing the said children, or either of them, from the jurisdiction of this court.

3. That the defendant meanwhile allow the plaintiff to see and converse with the children at all reasonable times.

4. Service of this order on the defendant [three] days before the hearing shall be sufficient.

[*Authentication as in Form 491, p. 3, of this Volume.*]

Form No. 955.

Order confiding the custody of children to mother.

[*Caption (court order) and recitals, according to the case; see Form 493, p. 5, of this Volume.*]

ORDERED, that the custody, care and education of the children of the petitioner be, until further order, confided to the said petitioner exclusively [but to be kept within the jurisdiction of the court¹], and that the defendant is hereby enjoined from interfering with either of said children, or with the plaintiff in her custody of them; and that the defendant shall not, until further order, be permitted to visit the said children except under the direction of one of the justices of this court [or, the referee heretofore appointed in this cause²].

[*Or leave may be given as thus:* but the defendant shall, until otherwise ordered by the court, be allowed to enter upon the premises where the children may be and see the children in the presence of the petitioner, or any person in charge of the children, twice a week, between the hours of two and four in the afternoon, for a period not exceeding an hour each time, without the mother's consent for him to remain longer.]

[And it is further ordered that defendant pay to the plaintiff or her attorney, within days after service of a certified copy of this order,³ the sum of dollars, her costs and disbursements upon this petition, and dollars counsel fees, amounting in the whole to dollars.⁴]

Enter: [*signature of judge by initials of name and title.*]

[*Enforce, if necessary, by attachment or habeas corpus.*⁵]

¹ Campbell v. Campbell, 37 Wisc., 206

² See Codd v. Codd, 2 Johns. Ch., 141; Welch v. Welch, 33 Wisc., 535. Security may be required. People v. Paulding, 15 How. Pr., 167.

³ As to time when no limit is fixed, see Volume I, p. 234.

⁴ See Matter of Pray, Barrett, J., N. Y. Daily Reg., Jan. 27, 1883.

⁵ Nichols v. Nichols, 3 Duer, 642.

CHAPTER X.

THE PLEADINGS, AND PROCEEDINGS INCIDENTAL THERETO.

ART. I.—DISCOVERY AND EXAMINATION OF PARTIES, TO ENABLE TO PLEAD.

II.—FORMAL PARTS OF PLEADINGS.

III.—VERIFICATION.

IV.—FILING AND SERVING.

V.—AMENDING AND WITHDRAWING ONE'S OWN PLEADING.

VI.—DEMURRING.

VII.—SEVERING ACTION.

VIII.—SUPPLEMENTAL PLEADING.

IX.—PARTICULARS; AND MODIFYING OR STRIKING OUT ADVERSARY'S PLEADING; AND COMPELLING ELECTION.

X.—REQUIRING REPLY.

XI.—JUDGMENT ON THE PLEADINGS.

ARTICLE I.

DISCOVERY AND EXAMINATION OF PARTIES, TO ENABLE TO PLEAD.

[In the language of the courts of chancery "Discovery" included both the responding to interrogatories which called for testimony of defendant, and the production of documents by him. The legislature in 1830 reduced the necessity of filing bills for discovery by giving the late Supreme Court power to compel discovery to be made by producing documents (2 *N. Y. R. S.*, 199, § 21), but not by answering interrogatories. Hence the phrase "discovery and inspection," or more shortly, "discovery," was used in the common law courts to mean only a discovery of writings.

When the Code of Procedure was adopted, bills of discovery were abolished, and the right to examine the adverse party as a witness before trial, was substituted (note to *Glenney v. Stedwell*, 1 *Abb. N. C.*, 332), and by the Code of Civil Procedure (in 1876) the regulations as to this oral discovery—called now "examination before trial"—were merged with those regulating the taking depositions of witnesses not parties (*N. Y. Code Civ. Pro.*, § 872). This for a time obscured the rule of law, which yet remained unchanged, that testimony of *parties* can, although that of witnesses cannot, be taken by way of discovery. Thus it has come about that "discovery" is now often used to mean discovery of documents; and "examination before trial" is used to mean examination by oral interrogatory, whether for the purpose of discovery, or for the purpose of using the answer like the deposition of a witness at the trial.¹]

¹ In *Merritt v. Thompson*, 3 *E. D. Smith*, 283, 294, Woodruff, J., said: "It is, I apprehend, an entire mistake to say that because the bill for a discovery is

1. Power of court.
2. The practice—if documents only are sought.
3. — if oral examination only is sought.
4. — if both are sought.

FORMS.

- (956.) Petition for discovery and inspection of documents to enable plaintiff to plead.
- (957.) Affidavit to obtain examination of defendants and discovery

and inspection of documents to enable plaintiff to plead (action by stockholders for accounting).

- (958.) Affidavit to obtain examination of plaintiff to enable defendant to plead (General Form).
- (959.) Affidavit to obtain examination of plaintiff to enable defendant to plead and prove his case (defense of fraud to action on a sale).

1. *Power of court.*—The new procedure has abolished bills of discovery,¹ and requires each party's pleading to state the facts constituting his cause of action or defense; and it has provided a remedy for a party who is ignorant of any of the facts material to constitute his case, and alleged to be in possession of his adversary, by examining the adversary² so far as necessary to enable him to plead,³ and, for the same purpose, he may require the adversary to make discovery of books and papers containing the necessary information.⁴

Such an investigation is in practice usually limited to establishing one's own case, and not generally extended to exploring his adversary's case. The principal exception to this restriction is where an undisputed agency or other fiduciary relation gives the principal or beneficiary a right to know what has been done in his name or under cover of the relation.⁵

no longer to be used, therefore a plaintiff cannot have a discovery. It is only the mode of obtaining a discovery that is altered. It is no longer necessary to apply by bill to a court of equity for a discovery where that alone is sought. The defendant may now be orally examined by order. But where the equitable power of the court is invoked to compel an accounting, to enforce a trust, to prevent a fraudulent misapplication of funds, or a misappropriation of property held as trustee, the jurisdiction of the court is as ample as it was before the Code. And the circumstance, that in ascertaining the facts by which the exercise of that jurisdiction is to be guided, the defendant may now be orally examined, and that discovery by answer cannot be compelled for the mere purpose of discovery, is quite immaterial."

¹ *N. Y. Code Civ. Pro.*, § 1914.

² *Glenny v. Stedwell*, 1 *Abb. N. C.*, 327, with note; s. c., 64 *N. Y.*, 120; *Davis v. Stanford*, 37 *Hun.*, 531. But not a third person. *Adrian v. Sanders*, 11 *Abb. N. C.*, 422, and cas. cit.; *Knowlton v. Bannigan*, 11 *Abb. N. C.*, 419.

³ *Kinney v. Roberts & Co.*, 26 *Hun.*, 166.

⁴ See Form 956, p. 421.

⁵ *Manley v. Bonnel*, 11 *Abb. N. C.*, 123. In creditor's suits against judgment-debtors other than corporations, discovery by examination under oath

And when sought before pleading, the examination is not granted to ascertain evidence, but only so far as needed for the purpose of pleading.

2. *The practice—if documents only are sought.*—If the application is for discovery and inspection of documents, without oral examination of the party, apply *ex parte* to the court, or to any judge authorized to make an order in the action;¹ and in such case it is the usual practice to apply by petition,² and take an order that the party produce, &c., or show cause.

3. — *if oral examination only is sought.*—If the application is for oral examination without discovery of documents, apply *ex parte*, not to the court, but to a judge of the court in which the action is pending (or if that court be the Supreme Court, application may be made to a county judge³), and take an order that the party appear before the judge, or before a referee named in the order.

4. — *if both are sought.*—It is common practice to insert in an order for oral examination a direction for discovery and inspection of documents; but where this is done it may be safer practice to apply only to a judge of the court in which the action is brought.

Form No. 956.

Petition for discovery and inspection of documents to enable plaintiff to plead.⁴

[*Title of court and action.*]

To the Court of [*or, To Hon. J. K., justice*
—*or, judge*—of the Court of].

before the court or a referee is expressly provided for. *N. Y. Code Civ. Pro.*, § 1878.

¹ *N. Y. Code Civ. Pro.*, § 805. As to what judge may act, see Volume I, pp. 121, &c., 131, &c.

² *N. Y. Code Civ. Pro.*, § 805. See as to distinction between petition and application on affidavits, Volume I, p. 332.

³ *N. Y. Code Civ. Pro.*, § 872. But if to a county judge it is safer to apply in the county where the action is triable. See Volume I, p. 131.

⁴ Sustained in *Stilwell v. Priest*, 85 expressly sanctioned by *N. Y. Gen. N. Y.*, 649. The application is ex- *Rules*, No. 14, of 1884, where books,

The petition of A. B., the above-named plaintiff, respectfully shows,

I. [*State condition of cause, as thus:*] That on the day of , 18 , this action was commenced by service of a summons without a complaint upon each of the above-named defendants; that on the day of , 18 , defendants P. and B. duly appeared herein by T. Z., Esq., their attorney, of [*stating residence or office address*], and demanded a copy of plaintiff's complaint [*or, that neither of said defendants have appeared herein*]. That no complaint has yet been served, and the time to serve said complaint extends to the day of , 18 .

II. That this action is brought [*state object, as thus*] to recover damages for injuries received by your petitioner by defendants' bill-board being blown down upon your petitioner in the village of , on the day of , 18 , while your petitioner was walking in street, in the ordinary pursuit of his business, by reason of the negligent and unskilful construction and erection of said bill-board by defendants, and your petitioner claims to recover damages of the defendants for his said injuries.

III. That the place of trial of this action is county, and the defendants reside at aforesaid [*stating street and number*].

IV. Upon information and belief, that the defendants Y. & Z. are copartners in the printing and publishing business at aforesaid, under the firm name and style of , and the defendants W. and X. are also engaged in the same business at aforesaid, but in another establishment; and that all the defendants are jointly interested and engaged in owning, erecting, using and letting for hire bill-boards in said village of ; that their copartnership and joint interest in said business, and the manner in which it is conducted and the relation of each defendant thereto, was created and is evidenced by a written contract signed by them.

papers or documents relate to the merits of the action. In an action by a principal against his agent, for an accounting, an inspection with copy of the books and vouchers of the agent may be ordered to enable the plaintiff to frame his complaint. The right of a principal rests on stronger grounds than that of an ordinary party to the inspection of the books of an adversary. *Manley v. Bonnel*, 11 *Abb. N.*

C., 123, and *cas. cit.* See, further, **DISCOVERY.**

The action must be already pending and in a court of record other than a justice's court in a city. *N. Y. Code Civ. Pro.*, § 803. Discovery is granted to ascertain facts necessary to state the cause of action or defense, but has often been denied when sought at law, to ascertain names of parties. *Opdyke v. Marble*, 44 *Barb.*, 64.

V. That no copy or duplicate of said contract exists; that said contract is in the possession or under the control of one or more of the defendants [*names*]. That none of the defendants deny that a written contract between defendants in relation to said bill board business existed at the time of said injury, but the defendant W. claims that said contract does not make all the defendants copartners in said business, nor the defendants W. and X. jointly liable with the other defendants for the plaintiff's aforesaid injuries.

VI. That said contract is not, nor is any copy thereof in your petitioner's possession, nor under his control; that an inspection and copy of said contract is necessary to your petitioner to enable him to frame his complaint in said action [*stating reasons fully*].

VII. That your petitioner has applied to the defendants for permission to inspect and take a copy of said contract, but such permission has been refused [*stating the particulars of the application, or, as appears by the affidavits of C. D. hereto annexed*].

VIII. [*Affidavit of merits may be inserted as in Form 981, VII.*]

IX. That this application is made in good faith for the purpose stated; and no previous application has been made [except, &c.; see p. 2 of this Volume].

WHEREFORE your petitioner prays that the defendants may be required to deposit said contract for the inspection of your petitioner according to law, and that your petitioner have leave to take copy thereof, and for such other and further relief as may be just.

[*Date.*]

[*Signature.*]

[*Verification as in Form 494, p. 5.*]

[*Order, see DISCOVERY.*]

Form No. 957.

Affidavit to obtain examination of defendants, and discovery and inspection of documents to enable plaintiff to plead (action by stockholders for accounting).¹

[*Title of court and action.*]

[*Venue.*]

C. F. F. being duly sworn, says:

I. That he is the plaintiff in this action, and is and has

¹ Adapted from *Frothingham v. R. (Browne)*, 304, where this affidavit Broadway, &c., R. R. Co., 9 *Civ. Pro.* was sustained.

long been a stockholder in the corporation defendant called the B. and S. Ave. R. R. Co., which, for brevity in this affidavit, is called "The S. Co." That said S. Co. was incorporated in the year 18 , for the purpose of maintaining a street railroad in the city of New York, from [stating route]. That said company has been in the enjoyment of the franchise of operating such railway, and has been making very large profits therefrom, ever since its incorporation. It has a capital stock of dollars, which said stock has been for many years last past a very profitable investment, and said corporation has been regularly paying dividends to its stockholders, and duly paying interest upon its funded debt.

The plaintiff is the owner and holder of shares of said stock, which are inscribed upon the books of said corporation in plaintiff's name.

That the defendants [naming which] are, and for some time have been, the directors of the said S. Co. That the defendant J. W. F. is its president; that T. B. K. is its secretary and treasurer, and, as such secretary and treasurer, has possession, either individually or in conjunction with said president, of its books and papers.

II. That at about the time of the incorporation of the said S. Co. [*Here followed allegations of constant efforts on the company's part to obtain a right of way on Broadway; the formation by the individual defendants of the B. Company for that purpose in the interest of the S. Company and its directors; the names of defendants who held the offices of the B. Company and its books and papers; their acquisition of the right of way, and its use by the S. Company, and that the latter company paid large sums of money in acquiring the franchise for the B. Company; and that the officers of the S. Company had given and afterward countermanded notice of a meeting of stockholders to consider an agreement to lease the B. road to the S. Company; and continued thus:*]

That plaintiff does not know and has no means of ascertaining what was the agreement referred to by the defendant F. in the statement aforesaid, made between the said B. Co. and the defendant, J. S., or what are the purposes of Mr. S., in pursuance of which he transferred the said stock of the B. S. R. Co. to Mr. F., as President of the S. Co., or what trusts, he, the said S., imposed upon the said transfer. But deponent believes the fact to be, that the said S. Co. was, in fact, the real owners of the said B. Co., and was entitled to have the said stock transferred and held for its benefit, and was entitled to have the use of the said B. Co.'s road secured to it for the ben-

effit of its stockholders, and that the officers and directors of the said B. Co. are, in fact, the agents and trustees for the said S. Co., and bound to hold, manage and transfer the property of the said B. Co. for the benefit of the S. Co. and its stockholders, and that any alleged agreement or pretended agreement between Mr. J. S. and the B. Co. or its officers or directors, and any purposes of J. S. in contravention of the rights, duties and obligations aforesaid, are in fraud of the rights of the stockholders of the S. Co.

That it appears by the records in the Register's office of _____, that a mortgage for _____, executed by the said B. Co. to W. H. Hayes, as trustee, to secure _____ dollars of bonds dated _____, 18____, and acknowledged _____, 18____, was, on the _____ day of _____, 18____, duly recorded in the said Register's office, in Liber _____ of mortgages, page _____, and that a second mortgage for _____ dollars, executed by the said B. Co. to F. A. P., to secure _____ dollars of bonds, dated _____, 18____, and acknowledged _____, 18____, was on the _____ of _____, 18____, duly recorded in the said Register's office, in Liber _____, of mortgages, page _____.

That bonds have been issued under the said two mortgages to the full amount of said _____ dollars, and that the entire railroad, rolling stock, property, franchises and rights to maintain a railroad upon _____ of the said B. Co. are encumbered by the same to the full amount thereof.

That many of the bonds so issued were sold by the persons having control of the said B. Co., at prices above par, and the money therefor was received by them, and many of the bonds were distributed among the said defendants or some of them and by them retained or sold, and the proceeds of such sales retained by them individually, but for what sums the said bonds were so sold, or how many of them were sold, and how many were distributed, and by whom the same were distributed, plaintiff does not know and has no means of ascertaining.

That the moneys so received have not been accounted for or paid over to the said S. Co., and that neither the said moneys or the said bonds were to any considerable extent used for the legitimate purposes of the said B. Co.

That the building of the entire railroad of the B. Co., which is about _____ miles in length, did not cost to exceed about _____ dollars, and that substantially the entire rolling stock, horses and stable accommodations for the new road, and the legitimate expenses of organization, legal expenses and securing of franchises were paid by the said S. Co. out of the proceeds of an issue of _____ dollars, bonds secured by second mortgage upon the proper-

ty of the said S. Co., dated , 18 , and that as to about dollars of the said dollars, the same was not expended for any lawful purposes, but has been illegally, unjustly and fraudulently disposed of some way to the plaintiff unknown; but the manner of its disposition is known to all or some of the defendants, and that deponent is informed and believes each of the defendants knows what was the disposition of some portion of the said bonds or the moneys realized thereupon, and that all or some of the defendants have personally received and retained some of the bonds or the proceeds thereof.

That plaintiff does not know, and has no means of ascertaining, what formal, colorable or pretended contracts or agreements may have been made by and between the defendants or any of them, either in their own name or purporting to act in behalf of the several corporations aforesaid in order to appear to justify or excuse the keeping of the control and actual possession and benefit of the said B. Co. railroad from the said S. Co. and its stockholders, but the plaintiff believes that the real reason therefor was the dishonest and illegal purposes of subjecting the franchise and railroad of the said B. Co. by the actions of the defendants occupying the position of officers and directors of said company to the large and fraudulent indebtedness and encumbrance aforesaid, without any apparent or easily established accountability therefor to the stockholders of the S. Co.

That the acts and doings of the individual defendants have given a good cause of action to the S. Co. against them for an accounting respecting the mortgages aforesaid and the proceeds thereof, but that the said S. Co. will not bring any action against the individual defendants, because the individual defendants are now the directors, managers and officers of said S. Co., and have full and complete control of it, and will not use the name of the company for the purpose of bringing an action against themselves. That the franchise to run cars on B. from to , is a very valuable franchise, and worth at least, as deponent is informed and believes, dollars. That the result of the mortgages placed on such property by the defendants, has been to encumber this property with mortgages to the amount of dollars without the said S. Co. having received any compensation therefor to the damage to that amount of the S. Co. and of the stockholders thereof and of these plaintiffs.

That the plaintiff has commenced an action in this court, as well on his own behalf as that of all other stockholders similarly situated with him against the said S. Co. and the directors and managers thereof, and against the said B. Co. and the di-

rectors and managers thereof, for the purpose of procuring a judgment against the said individual defendants, forcing them to account for the moneys received for the said dollars of bonds, or the bonds themselves, if the same have not yet been distributed, and for the purpose of causing to be transferred, if the same has not been heretofore done, the capital stock of said B. Co. which is owned, beneficially at least, by said S. Co. to said Co., and to restrain the defendants forever from interfering with the proceeds of any of said mortgages in any other way than to pay them over to the S. Co., or a receiver, to be appointed by the court to receive the same on behalf of said S. Co.

III-V. [*State condition of cause; names of parties; and names of persons to be examined, as in Volume I, pp. 684, 685; Form 375, paragraphs II to V.*]

VI. That the testimony of said persons is material and necessary for the plaintiff herein for the prosecution of this action, and that he may know therefrom the particulars of the facts, which will enable him to frame a complaint. That he is not now able to frame his complaint, and does not know the circumstances under which the said mortgages were placed upon the said B. Co.'s property, and does not know to whom the proceeds of said mortgages have been paid, except in a general way that they have been divided among the defendants and other persons, but who these other persons are he does not know.

VII. That the books and papers of the defendant, the S. company, are necessary to enable the plaintiff to make the examination which he desires to make of the affairs of said S. Co., and that the defendant, J. W. F., as president, and T. B. K., as treasurer and secretary of said S. Co., have possession of the books and papers, which the plaintiff desires to examine; that said books are the cash-books of the said S. Co., and the ledger of the said S. Co., and particularly the minute books or the transactions of the directors of said S. Co.¹

The said named officers are the directors thereof whose testimony is necessary and material.

[*Continue as in Form 375, p. 686, of Vol. I, beginning with paragraph VIII to end.*]

¹ In an affidavit and order for the production of books and papers of a corporation, their names must be given. *Williams v. W. U. Tel. Co.*, 47 *Super. Ct. (J. & S.)*, 380.

Form No. 958.

Affidavit to obtain examination of plaintiff to enable defendant to plead (General Form).

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is the [defendant above named]. [*If not defendant, state name, and relation to cause.*]

II. That this action was commenced by the service of summons [and complaint] on deponent, on the day of , and no answer has been served, and defendant's time to serve his answer extends to the day of , 18 .

III. That the names and residences of all the present parties to this action [*if any are unknown, add*], so far as their residences [*or names and residences*] can be ascertained, and the facts as to whether they have appeared, by attorney or otherwise, or not, are as follows:

PLAINTIFFS, appearing by A. T., of , their attorney, whose [office] address is :

A. B., of No. street, in the city of , county of , and State of .

C. D., of the town of , county of , and State of .

DEFENDANTS: W. Z., of No. [state address], has appeared by T. Z., of , his attorney, whose [office] address is .

W. Y., of , has appeared in person.

Y. Z., of , has not appeared.

[*Or if very numerous, may more conveniently annex and refer to a tabular schedule.*]

IV. That this action is brought [*here state the nature of the action, and the substance of the judgment demanded therein*].

V. That the defense in this action is [*here state the nature of the defense*].

VI. That the said [name] whose examination is desired, is now residing [*or, sojourning—or, regularly transacting business*] at [*stating place; and if a town or city, the street and number; and, if a resident of the State but not of the county where the examination is sought, add:*] and there has an office for the regular transaction of business in person. [*If a non-resident, and leave is desired to serve in any other coun-*

ty than that where the order is to require him to attend for examination, add reason.]

[Or where plaintiff is a corporation.] That the plaintiff, whose examination is desired, is a corporation having its office at . That the names of the officers [*or, directors*] thereof, whose testimony is material and necessary for defendant are [*stating their names and residence*].

VII. That the testimony of the said [*name*] is material and necessary to enable defendant to frame his answer herein, and that without the same, he is not able to frame his answer for the reason [*stating reasons fully*].

VIII. [*May add other facts to show a case within N. Y. Code Civ. Pro., §§ 870 and 871.*]

[If it is necessary to examine the party on the contents of books and papers, they should be specified in affidavit with reasons for necessity; and direction to produce be inserted in the order. See last Form, p. 427, VII.]

IX. That no previous application for examination of said [*name*] has been made herein [*except, &c.*].

X. [*Where stay is desired, state (if not already stated) condition of cause and date of issue, and the time when it can first be tried, &c. (see p. 2), and add affidavit of merits—if on the part of the defendant, as in Form 981, VII, in this collection—on the part of plaintiff, as in Form .*]

XI. [*If sanction for less than five or more than twenty days' service is desired, state special circumstances making such time of service necessary.*]

[*Jurat.*]

[*Signature.*]

Form No. 959.

Affidavit to obtain examination of plaintiff to enable defendant to plead and to prove his case (defense of fraud to action on a sale).¹

[As in last Form, substituting for paragraphs IV, V and VII, as follows:]

IV. The complaint is for the price of bales of Malta colored rags, alleged to have been sold by plaintiff to defendants,

¹ Adapted from *Sprague v. Burthmont*, 22 *Hun*, 502. Appeal dismissed, in 84 *N. Y.*, 649.

and judgment is demanded for dollars, with interest and costs.

V. The nature of the defense is that the sale was fraudulent and void, and that the goods are not what they were falsely and fraudulently represented and warranted to be. Before purchasing I examined said goods, so far as was then possible. They were packed in bales, so as to be incapable of internal examination, but from all examination in my power, the bales appeared to contain rags, as represented and warranted by the plaintiff. After receiving and sending said bales to the paper-mill, about bales, taken at hazard, were opened for use, and the contents thoroughly examined and sorted, and each and every bale was then found to contain, so packed and arranged as to be undiscoverable on external examination, a large mass of rubbish, which were not rags of any kind, nor of any pecuniary value, averaging about of the whole weight, as I am informed by the persons who opened, sorted and weighed the same, and verily believe. I tendered to the plaintiff a return of said goods, which he refused.

VII. The plaintiff has in this action attached said goods, and the same are held by the sheriff in behalf of plaintiff, and I am unable to examine the bales not already opened, or to ascertain the contents thereof, except by an examination of the plaintiff.

The defendant desires to examine the plaintiff to prove the contents of the bales not yet opened, and to prove the fraudulent and deceitful packing and arrangement thereof, and to prove plaintiff's knowledge of and connection with such frauds, both for the purpose of preparing their answer and establishing the facts on the trial of the action; and that the testimony of plaintiff is material and necessary to prove the said facts, because, as I believe, the plaintiff has special knowledge of the facts not possessed by any one else, and has control of the bales attached and of the means of proving their contents.¹

¹ For another Form by discovery of documents, see *Brooke v. Foster*, 20 *Abb. N. C.*, 200.

ARTICLE II.

FORMAL PARTS OF PLEADINGS.

FORMS.

- | | |
|--|---|
| (960.) Complaint; general Form; in action for legal relief. | ing one as defendant, instead of as plaintiff. |
| (961.) The same; in case of equitable relief. | (964.) Answer; general form. |
| (962.) Allegations where part of the facts are stated on information and belief. | (965.) Answer admitting part and denying the rest. |
| (963.) Allegation of reason for joining one as defendant, instead of as plaintiff. | (966.) Denial, where party or person verifying has not information sufficient to form a belief. |
| | (967.) Reply. |

Form No. 960.

Complaint;¹ general Form; action for legal relief.

[*Name of court, place of trial, and parties, as in caption of summons, Volume I, p. 617.*]

The plaintiff above named [*if appearing by attorney, may say, by A. T., his attorney*], complaining of the defendant, alleges [*if all the allegations are on information and belief of the person verifying, add: upon information and belief*].

[*In court of limited jurisdiction may allege jurisdictional facts, if any, not appearing in statement of cause of action.*²]

[*Here allege, if necessary, plaintiffs' character or capacity to sue,*³ *as thus:*] that the plaintiffs [*or, defendants*] are a

¹ Folio the complaint (see Volume I, p. 95), which, if the summons and complaint are served together, is done continuously in one series, beginning with the summons.

Verification of complaint is optional so far as pleading is concerned (except in case of a complaint against one of several joint-debtors not served in the original action, which must be verified. *N. Y. Code Civ. Pro.*, § 1938).

But in other cases verification is often necessary for some collateral purposes, such as applying for service by publication (Volume I, p. 364); or for arrest (Volume II, p. 355); or attachment (*id.*, 277, &c.).

² In a Superior City Court, under *N. Y. Code Civ. Pro.*, § 266, jurisdiction is presumed, and need not be alleged. As to foreign corporations, see note in 18 *Abb. N. C.*, 435.

³ By *N. Y. Code Civ. Pro.*, § 1775, if a corporation is a party, the com-

plaint should state whether it is a domestic corporation (that is, one created by or under the laws of the State or one located in the State and created by the colony of New York, or under a law of the United States, § 3343, subd. 18) or a foreign corporation; and if the latter, the State, country or government must be mentioned. The complaint need not specially refer to the act or proceeding of incorporation (§ 1775); but it is usual to do so, especially if it be a private act; and a private act of the legislature of the State is well pleaded in the Form above. *Id.*, § 530. A statute of another State may be pleaded by stating its legal effect, subject to the right of the adverse party to move to make it more definite and certain. *Robarge v. Central Vt. R. R. Co.*, 18 *Abb. N. C.*, 363.

An United States corporation is foreign or domestic according to

corporation created under and by the laws of this State [or, the State of], duly organized pursuant to an act of the legislature entitled [*title*], passed [*date*], [and the acts amending the same].

[*Here may allege, if necessary, leave to sue, unless more conveniently to be stated after alleging cause of action.*¹]

[*Allege facts constituting cause of action; and, if several causes of action are joined, state each separately, complete by itself, and number them² thus:*] For a first cause of action [*stating facts*].

For a second cause of action³ [*stating facts, and taking care to repeat any allegations in the first cause of action relied on to make out the second cause of action, or to incorporate them by reference, as thus, repeating as a part of this cause of action the allegations in paragraphs 1 and 2 of the first cause of action, plaintiff further alleges—&c.*].

WHEREFORE, plaintiff demands judgment against the defendant for the sum of dollars [with interest from the day of , 18], with the costs of this action.

[*Signature of*], plaintiff.

[*With address⁴ if he does not appear by attorney.*]

[*Or, signature and office address⁴ of*],

Plaintiff's attorney.

whether it is located within or without the State; and this must be shown.

As to necessity of denying incorporation positively under oath, in order to raise an issue on that point, see *N. Y. Code Civ. Pro.*, § 1776. As to pleading misnomer, see *id.*, § 1777.

As to designating *executors and administrators*, see *Bingham v. Marine Natl. Bank*, 17 *Abb. N. C.*, 431, and note (abstract s. c., in 41 *Hun*, 377); *Thompson v. Whitmarsh*, 100 *N. Y.*, 35, 39, explaining *N. Y. Code Civ. Pro.*, § 1814; *Stilwell v. Carpenter* (below cited).

As to suing or being sued individually and in representative character, see *Day v. Stone*, 15 *Abb. Pr., N. S.*, 137; s. c., 5 *Daly*, 353.

As to *guardian ad litem* of an infant, see *Grantman v. Thrall*, 44 *Barb.*, 173; *Hulbert v. Young*, 13 *Hov. Pr.*, 413.

As to designating *public officers*, see Volume I, p. 612, and *N. Y. Code Civ. Pro.*, § 1929, and *Stilwell v. Carpenter*, 2 *Abb. N. C.*, 238, and note, (abstr. s. c., 62 *N. Y.*, 639); *Lunt v. Lunt*, 8 *Abb. N. C.*, 83.

¹ See note on this subject in 18

Abb. N. C., 149, and Volume I of this work, p. 544.

² Separate causes of action must be not only separately stated but also numbered. *N. Y. Code Civ. Pro.*, § 483.

³ Plaintiff may, in doubt as to the legal theory on which he should recover, allege his claim in several counts or causes of action, so as to cover all aspects of the case (*Velie v. Newark City Ins. Co.*, 12 *Abb. N. C.*, 309, and note; s. c., 65 *Hov. Pr.*, 1); but in doing this must not state grounds of recovery which would be inconsistent as separate causes of action under the rule as to joinder (*N. Y. Code Civ. Pro.*, § 484); and if arrest or attachment is to be sought, should not state his cause of action in any aspect in which such remedy would not be allowable. See pp. 355, 360, &c., of this Volume, as to arrest, and pp. 277, 283, &c., as to attachment.

⁴ *N. Y. Code Civ. Pro.*, § 520. It is enough if the address appears on the usual indorsement of notice that the within is the complaint.

It is optional with the attorney whether he will sign the pleading, or take his client's signature.

Form No. 961.

The same ; in case of equitable relief.

[As in last Form, varying, if need be, as follows:]

[Where plaintiff sues on behalf of himself and others:¹] The plaintiff above named, appearing by A. T., his attorney, complaining on behalf of himself and all others² [describing them, as thus], the judgment-creditors of the defendant Y. Z., who shall in due time come in and seek relief by and contribute to the expenses of this action, alleges: [and if the necessity does not appear by the allegations of the complaint, state it, as thus:] That the object of this action is one of a common and general interest of all the said who are more than in number;³ wherefore plaintiff sues for the benefit of all [or thus: that the said creditors of Y. Z. are very numerous, to wit, more than in number, and that some of them are unknown to the plaintiff, and cannot with diligence be ascertained by him, and that it is impracticable therefore for him to bring them all before the court in this action;⁴ wherefore he sues for the benefit of all].

[May allege any fact bearing on the right to costs, where they are in the discretion of the court.⁵]

[If a temporary injunction to be sought, it may for greater caution be asked as part of the demand of relief; see p. 36 of this Volume.]

[So also of temporary receiver; see p. 125.]

[So also of interlocutory judgment; see N. Y. Code Civ. Pro., § 482.]

[And close demand of final judgment by adding:] and for such other or further relief as may be just, together with the costs of this action.

Form No. 962.

Allegations where part of the facts are stated on information and belief.

I. That on the day of [&c., stating facts known positively].

¹ N. Y. Code Civ. Pro., § 448; Rule 48, U. S. Ct. Equity Pr.; Clegg v. Aikens, 5 Abb. N. C., 95; Brainerd v. Bertram, *id.*, 102.

² This intention, though not alleged, may be inferred. Piedmont & Arlington Life Ins. Co. v. Maury, 75 Va., 508; 12 Reporter, 510.

³ McKenzie v. L'Amoureux, 11 Barb., 516.

⁴ Coe v. Beckwith, 10 Abb. Pr., 296; s. c., 31 Barb., 339; 19 How. Pr., 398; Coann v. Atlanta Cotton Factory, 14 Fed. Rep., 4.

⁵ See N. Y. Code Civ. Pro., § 3230.

II. Upon information and belief, that [*dec.*].

III. And plaintiff further alleges that [*dec., stating facts positively known*].

Form No. 963.

Allegation of reason for joining one as defendant, instead of as plaintiff.¹

That the defendant [*naming him*] has some interest in [*state subject of action*]; that plaintiff, before bringing this action, requested said defendant to join as a co-plaintiff herein, but he refused so to do, and for these reasons he is made a defendant herein; and no personal claim is made against him.

Form No. 964.

Answer²; general form.

[*Name of court.*]

[*Names of all the parties.*]

The defendant [*name, if less than all—if by attorney, and appearance has not been entered, add, by T. Z., his attorney*], answering the complaint herein denies [*or, if the defense is new matter, alleges*].

[*If a partial defense—alleges as a partial defense.³ If for affirmative relief—alleges as a counter-claim thereto*], that [*dec.*].⁴

¹ *N. Y. Code Civ. Pro.*, § 448.

² Add verification, if the complaint is verified, unless verification of answer is excused by reason of privilege (*N. Y. Code Civ. Pro.*, §§ 523, 529), or unless it be the general answer of a guardian *ad litem* (*id.*, § 523), or an answer in divorce for adultery (*id.*, § 1757).

Even if the complaint be not verified, nevertheless, the answer or part of it must be, if it contains a defense which does not involve the merits (*N. Y. Code Civ. Pro.*, § 513), or a denial of incorporation (*id.*, 1776).

³ *N. Y. Code Civ. Pro.*, § 508.

⁴ If there are several defenses or counter-claims or both, state them separately and number them, making

each complete by itself, like causes of action, as thus:

[*Form 964a.*] *First.* For a first defense to the first alleged cause of action, denies [*dec., generally or specifically*].

Second. For a second defense to said first cause of action, said defendant alleges [*here set forth the facts constituting it*].

Third. For a third defense to said first cause of action, said defendant alleges [*here set forth the facts constituting it, except that if any of them have been alleged above, an express incorporation of those allegations by referring to them will suffice instead of a repetition*].

Fourth. For a counter-claim to the

[If affirmative relief is sought, add:] WHEREFORE, this defendant demands judgment against the plaintiff [or, against the defendant Y. Z.], for the sum of _____ dollars [or other relief according to the case, in the same manner as in a complaint], together with the costs of this action.

[Signature of] defendant,¹
 [with address, if he does not appear by attorney],
 [Or signature and office address of]
 Attorney for defendant.

Form No. 965.

Answer admitting part and denying the rest.

[Title of court and action.]

The defendant [Y. Z.—appearing by Z. T., his attorney], for answer to the [amended] complaint herein, admits the allegations therein in the paragraphs numbered [I and II].

As to the allegations in paragraph number III, defendant has no knowledge or information sufficient to form a belief.²

He denies each and every allegation not hereinbefore expressly admitted or expressly controverted.³

second alleged cause of action, said defendant alleges [*&c.*].

WHEREFORE, said defendant demands [*&c.*].

So far as the opinion in *O'Gorman v. Arnoux*, 63 *How. Pr.*, 159, is to the effect that new matter cannot be deemed in avoidance if the cause of action be not admitted, it is overruled by later cases which establish the just rule that a denial and matter in avoidance may be joined in the same answer.

It is not necessary that defenses and counter-claims pleaded be consistent. *Bruce v. Burr*, 67 *N. Y.*, 237; *N. Y. Code Civ. Pro.*, § 507, amended in 1879.

The remedy against abuse of this privilege is to compel the party to elect, if there are allegations the truth of one of which necessarily involves the falsity of another, which is not by any means commonly the case with defenses called inconsistent under the old system, such as denial and payment, limitations, or accord and satisfaction, and counter-claim.

Allegations in a verified answer in the present tense are liable to be mis-

construed or ineffectual if intended to relate to the time of the transactions mentioned in the complaint. *Coulson v. Whiting*, 14 *Abb. N. C.*, 60.

¹ See note to Form 962.

² See next Form.

³ This Form is not good unless the parts thus referred to are so specified by clerical reference, or otherwise, that they may be at once distinguished, without discussion or comparison of substance. Note in 15 *Abb. N. C.*, 278. A reference by folio merely is objectionable, Vol. I, p. 95.

An answer denying on information and belief, in the following Form, was held good in *Metraz v. Pearsall*, 5 *Abb. N. C.*, 90, and it is now so settled; *Bennett v. Leeds Mfg. Co.* (*N. Y. Ct. App.*, June, 1888), overruling several cases, and confirming note in 14 *Abb. N. C.*, 319; 15 *id.*, 270.

[Form 966a]. The defendant answers the amended complaint herein, upon information and belief, as follows:

He alleges that no allegation of said complaint is true [except that \$100 has been paid].

Form No. 966.

Denial, where party or person verifying has not information sufficient to form belief.

He has no knowledge or information sufficient to form a belief of any allegation of the complaint¹ [*or, of any of the allegations in paragraph No. I—or, of the allegation that, &c., quoting it.*²]

Form No. 967.

Reply.³

[*Title of court and action.*]

The plaintiff [under direction of this court], for reply to the new matter set forth in the answer of the defendants herein, by Henry W. Clark, her guardian ad litem, and on information and belief, says [*or, alleges—or, denies, &c.*]:

¹ This Form is sufficient, and going on to add, "and therefore denies the same," is surplusage. 15 *Abb. N. C.*, 274.

² In denying, by quoting the allegation with a negative added, care must be taken not to involve a nega-

tive pregnant: for this purpose, in general, allegations connected by the conjunctive, must be denied in the disjunctive.

³ Folio; see p. 435, note 3. Verify, if answer was verified, unless privileged; see note 2, p. 434.

ARTICLE III.

VERIFICATION OF PLEADINGS.

1. Requisite form.
2. "Subsequent pleading."
3. Excuse for omitting.
4. The remedy for defects.

FORMS.

- (968.) Verification of pleading—by sole plaintiff or defendant.
- (969.) — by one of several parties united in interest and pleading together.
- (970.) — by two parties not united in interest, but pleading together.
- (971.) — by officer of domestic corporation.
- (972.) — where the people, or a public officer in their behalf, is the party.
- (973.) — where the party is a foreign corporation.

- (974.) Short verification by agent or attorney, when all the material allegations are within his personal knowledge.
- (975.) The same, when the action or defense is founded on "a written instrument for the payment of money only," which is in his possession.
- (976.) The same, because the party is not within the county, or is incapable.
- (977.) The same, for two or more parties united in interest and pleading together, when neither acquainted with the facts is within the county.
- (978.) Verification of answer, referring exclusively to counter-claim therein.

1. *Requisite form.*]—The principles on which the statutory requirement of verification are to be construed and applied are already stated.¹

2. "*Subsequent pleading.*"—The phrase, "subsequent pleading," in the cases and statutes on this subject, mean pleading served by way of response. A plaintiff, who, after serving a verified complaint, serves an amended complaint, may serve it without verification if he choose, although defendant had, meanwhile, served a verified answer; and, thereafter, the pleadings may be unverified.² So, if defendant serves an unverified answer when he ought to have verified it, plaintiff, if he accepts it as sufficient, may serve an unverified reply, although the complaint was verified.

An answer, even though it interpose a counter-claim on which defendant might have sued by an unverified complaint in a separate action, must be verified if the complaint in the

¹ P. 500, of Vol. I, of this work.

The formal requisites, such as venue, jurat, and authentication, are those stated in Vol. I, p. 80, as to affidavits.

² Reynolds v. Smathers, 87 N. C., 24; Rankin v. Allison, 64 id., 673.

action on which it was interposed was verified,¹ and a privilege excusing from verifying the answer because of matter in the complaint as to which the defendant would be privileged from testifying, does not extend to such new matter.²

One whose pleading is defectively verified cannot object to the lack of a verification of his adversary's responsive pleading.

3. *Excuse for omitting.*—The verification of a pleading required by reason of a previous pleading of the adversary being verified, may be omitted wherever the pleading contains an allegation or denial concerning which the party would be excused from testifying as a witness.³ This exemption, however, does not extend to a charge of fraud on creditors, or affecting the right or property of others.⁴ Where the ground of exemption is a charge of crime apparent on the face of the adversary's pleading, an unverified answer to the allegation may be served without any explanation.⁵ Where a tendency to disgrace not apparent on the face of the pleading is the ground for claiming exemption, such tendency must be alleged, either in an affidavit served with the unverified pleading or presented in opposition to plaintiff's proceeding as for want of an answer. That is to say, the privilege of a witness must, in either case, be made to appear.⁶

If it does appear, the exemption extends to the whole re-

¹ *Thompson v. Killian*, 25 *Minn.*, 111. So far, however, as this case holds that failure to object to the omission of verification is not a waiver, it is not in accordance with our practice.

Contra in *Innes v. Krysher*, 9 *Iowa*, 295; *Briggs v. Montgomery*, 3 *Heisk. (Tenn.)*, 673.

² *Fredericks v. Taylor*, 52 *N. Y.*, 596; 14 *Abb. Pr. (N. S.)*, 77; *Fellows v. Menasha*, 11 *Wis.*, 558 (defect was lack of seal and statement of official authority in authentication of verification of complaint, without the State).

³ *N. Y. Code Civ. Pro.*, § 523. *Gadsden v. Woodward*, 103 *N. Y.*, 242 (action against trustee of corporation founded on failure to file report).

⁴ *Id.*, § 529. Compare *Frist v. Climm*, 6 *Civ. Pro. R.*, 30, where fraud in inducing a sale was held not within the exception to exemption.

⁵ *Wilson v. Bennett*, 2 *Civ. Pro. R.*, 34 (libel); *Anderson v. Doty*, 33 *Hun.*, 238 (charge of keeping a bawdy house); *Ray v. Sellers*, 1 *Duval (Ky.)*, 254 (injury to the person by nuisance, held within the exemption in Kentucky).

⁶ *Roache v. Kivlin*, 25 *Hun.*, 150 (answer of defendant in crim. con., adultery not being, in this State, a crime).

sponsive pleading; but it does not extend to a pleading of new matter, in avoidance as a counter-claim.¹

4. *The remedy for defects.*—The remedy for a defect of verification is promptly to treat the pleading as a nullity, and return it with notice.²

Form No. 968.

Verification of pleading³—by sole plaintiff or defendant.

[*Venue.*]

A. B., the plaintiff [*or, defendant*] above named [*or, the guardian ad litem*⁴ above named, for C. D. above named], being duly sworn, says,⁵ that the foregoing complaint [*or other pleading*] is true, * to the knowledge of the deponent⁶ [*if anything is stated on information and belief, add: except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true*].

[*Jurat.*]

[*Signature.*]

Form No. 969.

Verification by one of several parties united in interest and pleading together.

[*Venue.*]

A. B., one of the plaintiffs [*or, defendants*] above named, being duly sworn, says † [that he is acquainted with the facts stated in the foregoing complaint—*or, answer*]; that the same is true [*continuing as above from the **].

¹ *Fredericks v. Taylor*, 52 *N. Y.*, 596.

² See Vol. I, 511. But compare *Jaillard v. Tomes*, 3 *Abb. N. C.*, 24.

³ *N. Y. Code Civ. Pro.*, §§ 523–526.

⁴ A guardian *ad litem* verifies as the party, instead of the infant, and is not required to state reasons. Volume I, p. 507; *Clay v. Baker*, 41 *Hun.*, 58.

⁵ It is very common but not necessary for the party to allege that he is the party. An allegation that he has read or heard read the pleading, and knows the contents thereof, is unnecessary, unless it appears by the pleading that he is of impaired sight or understanding.

⁶ The omission of the words “to the knowledge of the deponent” is not necessarily fatal. *Matter of Macauley*, 94 *N. Y.*, 574.

⁷ Where all the allegations of the pleading are stated as made on information and belief, a statement “that the pleading is true as the deponent is informed and believes,” without more, is sufficient. *Orvis v. Goldschmidt*, 2 *Civ. Pro. R. (Browne)*, 314; s. c., 64 *How. Pr.*, 71.

Form No. 970.

Verification by two parties not united in interest,¹ but pleading together.

[*Venue.*]

A. B. and C. D., the plaintiffs [*or*, defendants—*or*, two of the plaintiffs—*or*, defendants] above named, being severally duly sworn, say, each for himself, that the foregoing complaint [*or*, answer] is true [*continuing as in Form 969 to the **].

Form No. 971.

Verification by officer of domestic corporation.²

[*Venue.*]

A. B., being duly sworn, says, that he is president [*or other officer*³] of the _____ Company, plaintiffs [*or*, defendants] above named [*if not alleged in the complaint, add: who are a corporation created under the laws of the State of New York—*or*, a corporation located in New York and created by or under the laws of the United States*], and that the foregoing complaint [*or*, answer—*or*, reply] is true to the knowledge of the deponent [*if any allegations are on information and belief, add: except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true*]. * [*Unless on the face of the pleadings deponent appears to be the proper officer, add: Deponent further says, that the reason why the verification is not made by the plaintiffs is that they are such corporation; that this deponent is an officer of the same, to wit—deputy controller—and is acquainted with the facts;—and if any allegation in the pleading is stated to be made on information and belief, set forth the grounds of his belief as to each, as thus—and that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows, to wit, information obtained from the books and*

¹ See Volume I, p. 508.

² A verification on behalf of a domestic corporation (which includes an U. S. corporation located in the State), if made by an appropriate officer, is regarded as made by the corporation as the party, and is not required to state reasons nor grounds of belief. Volume I, p. 507; *Glaubensklee v. Hamburgh, &c.*, Packet Co., 9 *Abb. Pr.*, 104; followed in *Am.*

Insulator Co. v. Bankers' & Mer. Teleg. Co., 13 *Daly*, 200; s. c., 7 *Civ. Pro. R.*, 443; 2 *How. Pr.*, N. S., 120; and see *Macauley v. Bromell, &c.*, Printing Co., 14 *Abb. N. C.*, 316, and note.

³ The president is always a proper officer. The secretary, treasurer, cashier, or a director, is usually a proper officer, especially if the transaction may be presumed to be within the cognizance of his functions.

records of the Department of—Finance—or of other departments of the city government, or from statements made to him by certain officers or agents of the defendants,¹ to wit—*names.*]

Form No. 972.

Verification where the people, or a public officer in their behalf, is the party.

[*Venue.*]

A. B., being duly sworn, says [*here state residence, business, &c.*], and that deponent is acquainted with the facts in respect to the matters stated in the foregoing complaint [*or, answer*], and that said complaint [*or, answer*] is true [*continue as in Form 968, from the **].

Form No. 973.

Verification where the party is a foreign corporation.

[*Venue.*]

A. B., being duly sworn, says, that he is the agent in _____, of [*or, that he is the attorney for*] the _____ Company, plaintiffs [*or, defendants*] above named, [*and, if not alleged in the pleading, add*] who are a corporation created by or under the laws of the State of _____ [*or, the laws of the United States, and not located in this State*], and that the foregoing complaint [*or, answer*] is true to the knowledge of the deponent^{*} [*except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true*], and that the reason why this verification is not made by the party is that the party is a foreign corporation [*and where any allegation of the pleading is stated to be made on information and belief, set forth the sources of information and grounds of belief. See preceding and following Forms*].

[*Jurat.*]

[*Signature.*]

Form No. 974.

Short verification by agent or attorney, when all the material allegations are within his personal knowledge.

[*Venue.*]

A. T., being duly sworn, says, that he is [one of] the

¹ This is the Form used by the city of New York.

attorney[s] for the plaintiff [*or*, the defendant] herein [*or*, the agent at _____ of the plaintiff—*or*, defendant—herein for the purpose of—*characterizing agency*]. That the foregoing complaint [*or*, answer] is true * to the knowledge of the deponent; and that all the material allegations of said complaint [*or*, answer] are within the personal knowledge of the deponent.

[*Jurat.*]

[*Signature.*]

Form No. 975.

The same, when the action or defense is founded on "a written instrument for the payment of money only,"¹ which is in his possession.

[*As in last Form to the *, continuing thus:*] true to the [personal²] knowledge of the deponent [*but if any allegation is on information and belief, add:* except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true].

That this action [*or*, the defense in this action] is founded upon a written instrument for the payment of money only, now in deponent's possession, which instrument is the source of deponent's information and the grounds of his belief³ [*may add other sources and grounds, if any; see two next Forms*].

[*Jurat.*]

[*Signature.*]

Form No. 976.

Verification by attorney or agent, because the party is not within the county, or is incapable.

[*Venue.*]

A. T., being duly sworn, says, that he is [one of] the

¹ Foreclosure is not such a suit. *Peyser v. McCormack*, 7 Hun, 300.

² This word is not necessary, but imports another ground for allowing substituted verification if no material allegations are on information and belief.

³ This Form is sustained by *Hyde v. Salg*, 27 Hun, 369.

Another Form, No. 975a.—Action on insurance policy. [*As above, substituting for the last paragraph the following:*] That the sources of deponent's information and the grounds of his belief on the subject are that this

action is brought upon a policy of insurance partly written and partly printed, purporting to have been made by the defendant as alleged in complaint, which policy is in the possession of the said attorneys for the plaintiff; that deponent has personal knowledge of the loss by fire of the dwelling-house referred to, and some of the furniture and property therein.

That he has seen the proofs, account of the loss and damage referred to, and that he has derived his information generally upon the subject from the plaintiff.

attorney[s] of the plaintiff [*or*, the defendant Y. Z.] in this action, and resides at _____, in the county of _____ [*and, if in another State, name such State and add*: and has his office at _____, in the county of _____, in this State]; that the foregoing complaint [*or*, answer] is true to the [personal¹] knowledge of the deponent [*but if any allegation is on information and belief, add*: except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true].

Deponent further says, that the grounds of his belief as to all matters therein not stated upon his knowledge, are as follows [*as thus*]: that he has possession of the notes mentioned in the complaint, and of letters from the defendant acknowledging his liability thereon and promising to pay the same,² and of the notarial certificate of demand and of notice of dishonor, given to defendant upon the non-payment of said notes at maturity.*

Deponent further says, that the reason why this verification is not made by said plaintiff [*or*, defendant] is that said plaintiff [*or*, defendant] is not within the said county of _____ [*or, if within the county*—is not capable of making this verification by reason of—*here state the cause, such as extreme infancy, sickness, &c.*].

[*Jurat.*]

[*Signature.*]

Form No. 977.

The same, for two or more parties united in interest and pleading together, when neither acquainted with the facts is within the county.

[*As in last Form to the *, substituting for last paragraph the following:*]

That the reason why this verification is not made by either of said parties is that they are parties united in interest, and pleading together, but neither of them acquainted with the facts is within the county and capable of making this affidavit [but that said _____ is now in the State of _____, and that said Y. Z. is, as he informs deponent, unacquainted with the facts alleged in said complaint—*or*, answer].

[*Jurat.*]

[*Signature.*]

¹ See note 3 to last Form.

² Documents may be thus referred to for the mere purpose of verifying the pleading, without reciting tenor or annexing copies. *Moorhouse v. Hutchinson*, 2 *Dem.*, 429. But if the verified pleading is relied on as proof of

matters in the documents in support of an application on the pleadings—as for instance, an attachment—copies must be given, or a separate affidavit produced which will satisfy the rule. See p. 37 of this Volume.

Form No. 978.

Verification of answer, referring exclusively to counter-claim therein.

[*Venue.*]

Y. Z., the defendant above named, being duly sworn, says, that the counter-claim contained in the foregoing answer, stated as the [second] defense therein, is true to the knowledge of the deponent [*if any allegation is on information and belief, add: except as to the matters in said counter-claim stated to be alleged on information and belief, and that as to those matters he believes it to be true*].

ARTICLE IV.

FILING AND SERVING PLEADINGS.

I. DEMAND; AND ENLARGING TIME.

FORMS.

(979.) Demand of copy of complaint.

(980.) Order extending time to serve complaint.

(981.) Affidavit to move for extension of time to plead.

(982.) Notice of motion or order to show cause to enlarge time to plead.

(983.) Order extending time to plead, &c.

(984.) Stipulation extending time to plead, &c.

II. SERVING; AND RETURNING.

(985.) Notice indorsed on answer served on co-defendant.

(986.) Order for trial, to prevent summary judgment against corporation in action for damages for non-payment of note or other evidence of debt.

(987.) Notice indorsed on pleading returned.

III. FILING.

(988.) Affidavit to move to compel filing of pleadings.

(989.) Certificate that pleadings are not filed.

(990.) Order that pleadings, &c., be filed or deemed abandoned.

I. DEMAND; AND ENLARGING TIME.

Form No. 979.

Demand of copy of complaint.¹

[As in Form 385 or 387, Vol. I, pp. 713-715.]

Form No. 980.

Order extending time to serve complaint.²[Name of] Court [or, if court order] At a special term [&c.,
as in Form 493, p. 4].

[Title of action.]

On the annexed affidavit of A. B., and the summons [and other papers, if any]:

ORDERED, that plaintiffs may have to, and including the
day of , 18 , to serve complaint herein on all the
defendants.

[Authentication, as in Form 491, p. 3, of this Volume.]

¹ For demand of copy account or bill of particulars, see Article IX.² For a fuller Form, see Volume I p. 432.

Form No. 981.

Affidavit to move for extension of time to plead.¹[*Title of court and cause.*][*Venue.*]

T. Z., being duly sworn, says:

I. That he is [the attorney retained to defend this action for] the defendant Y. Z., herein, and resides in the city of [or otherwise state his relation to the cause].

II. That plaintiff's attorney resides in the city of

III. That the complaint herein was served on said defendant on the day of , 18 .

IV. That no extension of time to answer or demur has been granted by stipulation or order [except that the time to answer was on the day of , 18 , extended by stipulation—or, by order of Mr. Justice J. K.—for days²]. And no previous application for an order extending the time to answer herein from the time when it will now expire has been made.³

V. That the place of trial designated in the complaint is the county of , in which the next circuit is appointed to be held on the day of , 18 .

VI. That defendant's attorney has been and will be unable to prepare and serve an answer herein within the time now limited, by reason of the following facts: [*stating necessity for extension, as thus:*] that deponent was compelled to leave the city of New York, in which he resides, on business, immediately after being served with the summons herein, and remained absent for two weeks, since which he has not had time to instruct his attorney concerning his answer in this cause; and that days further time is necessary therefor.

VII. [*Here add oath to merits, which, if the affidavit is by the party, will be as follows:*] That this defendant has fully and fairly stated the case to , his counsel, who resides at No. street, in , and that he has a good and substantial defense on the merits, to the cause of ac-

¹ As to extension pending litigation of a question of jurisdiction, see Vol. I, p. 813. As to enlargements of time, and stays generally, see Vol. I, p. 484.

² N. Y. Gen. Rules, No. 24, of 1884.

³ P. 2, of this Vol.

tion set forth in the complaint [*or, some part thereof*], as he is advised by his said counsel, after such statement, and verily believes.

[*Or if the affidavit is by the attorney, thus:*] That from the statement of the case in the action made to deponent by the defendant Y. Z., deponent verily believes that said defendant has a good and substantial defense upon the merits, to the cause of action set forth in the complaint, or to some part thereof.¹

[*Or, if an affidavit of merits has already been filed, thus:*] that a due and sufficient affidavit of merits in this action has been made by [defendant], and was filed with the clerk of this court on the day of , 18 ; and notice thereof duly then given to plaintiff's attorney.

[*Surat.*]

[*Signature.*]

Form No. 982.

Notice of motion or order to show cause to enlarge time to plead.²

[*As in Form No. 488, p. 1, or 491, p. 3, substituting for the italic clause between the ¶ and the †*], that the time of the defendant Y. Z., to plead or demur, or make such application as he may be advised, be extended days from the day of .

Form No. 983.

Order extending time to plead, &c.

[*Entitle, unless indorsed on the affidavit.*³]

On the annexed affidavit of T. Z.,

ORDERED, 1. That the defendant Y. Z. have twenty days further time from the day of , to answer herein [*may add as directed, for instance, thus*, or demur,⁴ or make such

¹ *N. Y. Gen. Rules*, Nos. 23 and 24, of 1888.

² See notes to last Form. If the time has expired notice should be given.

In other cases notice is not necessary on the first application of the kind.

A local rule in Albany county requires notice or order to show cause, if more than 20 days is asked. Rule II, *Hun's ed.*, 275.

³ Need not be an order of court unless defendant is a corporation sued on its evidences of debt, described in *N. Y. Code Civ. Pro.*, § 1778, or unless the time has expired, § 783.

In any case, a court order may be taken if preferred. A court order should be entitled as in Form 493, p. 4.

⁴ Extension of time to answer includes time to demur. *Bedell v. Be-*

application as he may be advised¹—*or thus*: without prejudice to his right to omit such answer, and to appeal from any judgment which may be entered on the demurrer previously interposed herein].

2. That the date of issue herein, in case an answer is served, stand as of [*naming a date 20 days after service of complaint*].

[*Authentication as in Form 491, p. 3, of this Vol.*]

[*Serve copy affidavit with copy order. Code Civ. Pro., § 782.*]

Form No. 984.

Stipulation extending time to plead,¹ &c.

[*Title of the cause.*]

Stipulated that the time for the defendant to plead [or answer or demur to the complaint herein, or otherwise move, as he may be advised] is hereby extended to and including the day of _____, 18____; the issue to date as if no extension had been granted [or, to date of the _____ day of _____, 18____].

[*Date.*]

[*Signatures of attorneys.*]

II. SERVING AND RETURNING.

Form No. 985.

Notice indorsed on answer served on co-defendant against whom it asks relief.⁴

To W. T., attorney for defendant W. X. :

Please take notice, that the within is a copy of the answer of the defendant Y. Z. in this action.

[*Date.*]

[*Signature and office address of*],

Attorney for defendant Y. Z.

dell, 2 *Barb. Ch.*, 99; Brodhead v. Brodhead, 4 *How. Pr.*, 308; s. c., 3 *Code R.*, 8. But it avoids doubt (see *Kelly v. Downing*, 43 *N. Y.*, 71, 77) to specify demurrer.

¹ But such extension precludes the party obtaining it from moving to strike out irrelevant matter, unless the right to make the motion is expressly reserved by the order. *Bow-*

man v. Sheldon, 5 *Sandf.*, 657; *Isham v. Williamson*, 7 *N. Y. Leg. Obs.*, 340.

² *N. Y. Gen. Rules*, No. 24, of 1884.

³ As to stipulations generally, see Vol. I, p. 450.

⁴ *N. Y. Code Civ. Pro.* § 521, which merely states the previous practice in equity cases. § 1543 requires it where such relief is sought in partition.

Form No. 986.

Order for trial, to prevent summary judgment against corporation in action for damages for non-payment of note or other evidence of debt.¹

[*Title of court and action.*]

Upon the complaint herein, and upon the annexed answer [or, demurrer] of the defendant corporation [and the affidavit of Z. T., verified the day of , 18], and upon motion of said Z. T., attorney for said defendant,

ORDERED, that the issues presented by said complaint and answer [or, demurrer] be tried.

[*Date.*] [*Signature of judge with initials of title.*]

[*Serve with the pleading, and mention in the notice for service indorsed thereon.*²]

Form No. 987.

Notice indorsed on pleading returned.³

The within [*name of pleading*] is hereby returned to you for the reason [*stating it as thus:*] that it is without verification [or, that the verification is defective in that it does not state—

¹ *N. Y. Code Civ. Pro.*, § 1778. This is a judge's order. Serve with the answer or demurrer. The order is not necessary in an action on a contingent obligation such as an insurance policy. *Moran v. L. I. City Ins. Co.*, 101 *N. Y.*, 439; s. c., 5 *Northeastern Rep.*, 80; rev'g 38 *Hun*, 122. It is as necessary in case of a municipal corporation as any other (*id.*), and irrespective of whether an extension of time has been asked. *Hutson v. Morrisania Steamboat Co.*, 12 *Abb. N. C.*, 278. It is not necessary on an amended answer. *Barr v. Kuntz*, 18 *id.*, 478. Apply for *ex parte*, on an affidavit that the answer or demurrer annexed is intended to be served, adding an oath to merits (see pp. 446, 7, of this Volume), to which may be added any particulars deemed useful to satisfy the judicial discretion that

the corporation has a substantial defense on the merits. If the pleadings are unverified or do not contain an allegation that defendant is a corporation, that fact had better also be alleged.

Add that no previous application, &c., has been made. See p. 2.

² If such an order is not served with the pleading it may be well to return the pleading with a notice indorsed, stating the objection, in deference to a ruling in one of the lower courts that the objection is waived if the pleading is retained. *Wilcox v. Boat & Vessel, &c., Co.*, *N. Y. Daily Reg.*, Feb. 28, 1885.

³ See Volume I, p. 426, and *Ost-rander v. Conkey*, 20 *Hun*, 421. For notice of paper re-served after being returned, see Volume I, p. 433.

specifying defect] as required by law, and therefore plaintiff elects to treat it as a nullity.

[Date.] [Signature and office address of],
[Address], To , Attorney for plaintiff.
Attorney for [defendant].

III. FILING.

Form No. 988.

Affidavit to move to compel filing of pleadings.¹

[Title of court and action.]

[Venue.]

A. T., the defendant's attorney, being duly sworn, says that the summons and complaint [and reply] herein were served on more than ten days since; that the place of trial is laid in the county of ; and that said summons and complaint [and reply] have not been filed in said county, as appears by the annexed certificate of the clerk thereof.²

[Jurat.]

[Signature.]

Form No. 989.

Certificate that pleadings are not filed.³

[Title of court and action.]

I, M. N., clerk of the county of , do hereby certify that no [summons] complaint [or, answer—or, reply] in the above-entitled action has been filed in my office.

[Date.]

[Signature.]

¹ It should appear that the papers in question have been served. *Toomey v. Shields*, 9 *N. Y. Leg. Obs.*, 66; *Littlefield v. Murin*, 4 *How. Pr.*, 306; s. c., 2 *Code R.*, 128; s. p., *N. Y. Code Civ. Pro.*, § 824.

² If application is *ex parte*, add statement as in Form 490 and 491, p. 2, of this Volume.

If the moving party desires to take costs upon the order, he should before applying give notice to the adverse

party requiring him to file, and that in default thereof that the motion will be made, in which case costs may be granted on the *ex parte* motion. For a form of notice for this purpose, see *Langbein v. Gross*, 14 *Abb. Pr.*, *N. S.*, 412.

³ The aid of the statute giving a clerk power to make such a certificate (*N. Y. Code Civ. Pro.*, § 961) is not necessary for this purpose. See Volume I, p. 75.

Form No. 990.

Order that pleadings, &c., be filed or deemed abandoned.¹

[*Title of court and action.*]

It appearing to my satisfaction that [the complaint] in this action has not been filed, let the plaintiff file the same with the clerk of the county of _____, within _____ days after service of a copy of this order; or let the same be, in default thereof, deemed abandoned.

[*Date.*]

[*Signature of judge, with initials of official title.*]

¹ No notice of this motion is required (*N. Y. Code Civ. Pro.*, § 824); and the adverse party need not give notice that he has obeyed the order. *Douoy v. Hoyt*, 1 *Code R., N. S.*, 286.

ARTICLE V.

AMENDING AND WITHDRAWING ONE'S OWN PLEADING.

1. Right to withdraw or amend.
2. Power of court.
3. The practice.
4. Effect.

(993.) Order striking out amended pleading.

II. LEAVE TO AMEND.

(994.) Notice of motion for leave to amend a pleading.

(995.) Order granting leave to amend a pleading.

I. AMENDMENTS OF COURSE.

FORMS.

(991.) Amended pleading.

(992.) Notice of amended pleading.

1. *Right to withdraw or amend.*—The right to amend a pleading, when the pleading has been served in advance of the time limited, and the amendment is made before the expiration of that time, rests upon the right to withdraw a pleading.

The right to amend after the time for serving has expired is purely statutory. By the New York statute,¹ “within twenty days after a pleading, or the answer or demurrer thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course without costs, and without prejudice to the proceedings already had,” subject to the power of the court to strike out an amendment made for delay.²

An amendment of the complaint which requires the summons also to be amended—as for instance, in respect to the names of the parties³ or the place of trial⁴—requires leave of court.

2. *Power of court.*—The power to allow an amendment is inherent in the court⁵ (but not in a judge), for within the limits of its jurisdiction it may allow the parties to mould their

¹ *N. Y. Code Civ. Pro.*, § 542; *Code Pro.*, § 172.

² *Id.* This right has hitherto been understood to include the withdrawal of a demurrer and substitution of an answer, the withdrawal of an answer and substitution of a demurrer. *Carpenter v. Adams*, 34 *Hun*, 449. But by a recent decision giving a strict construction to the words of the statute, the contrary is held. *Smith v. Laird*, 44 *Hun*, 530. Compare 20 *Abb. N. C.*, 1.

³ Volume I, p. 691.

⁴ *Wadsworth v. Georger*, 18 *Abb. N. C.*, 199, and note.

⁵ *Knott v. Taylor*, (*N. Car.*, 1887) 9 *Southwest Rep.*, 680.

pleadings so as to present the controversy to be tried; and the power is expressly recognized by the statute.¹

By granting leave to amend, the court do not part with their power over the pleading; and before final judgment may, even after amendment made, pursuant to leave, modify the leave so as to restrict the effect of the amendment.²

3. *The practice.*—For leave to amend before trial,³ or to make a supplemental complaint, answer or reply,⁴ setting up matter occurred pending the action, apply to the court on notice, and on affidavit, with the proposed pleading duly verified annexed. Leave being granted, the order is to be entered or the motion papers filed; and the amended pleading is to be served with a copy of the order.⁵

4. *Effect.*—After amendment the original pleading is no longer of significance as a pleading, but it is competent evidence upon the trial.⁶

I. AMENDMENTS OF COURSE.

Form No. 991.

Amended pleading.⁷

[*Title of court and action.*]

The plaintiff by this his amended complaint alleges :

[*Set forth cause of action as in an original complaint.*⁸]

¹ *N. Y. Code Civ. Pro.*, § 723.

² *Henderson v. Louisville, &c., R. R. Co.* (*U. S. Supm. Ct.*, Oct. 31, 1887).

³ *N. Y. Code Civ. Pro.*, § 723.

⁴ *Id.*, § 544.

⁵ Amendments after judgment are usually made differently. See Volume I, p. 57. The mode of amending to bring in new parties has already been stated in Volume I, p. 691.

⁶ *Abb. Tr. Brief*, 65, and *cas. cit.*; *N. Y. & Lake Champlain, &c., Co. v. Hurd*, 44 *Hun*, 17.

⁷ Under the Code it is the practice where a party amends his pleading, either of course or after obtaining consent or leave, to serve a new pleading; and it supersedes the original. It is the practice, too, to designate it on its face as an amended complaint

or answer, as the case may be; though it has been held that the omission so to designate it does not render it void. *Hurley v. Second Building Association*, 15 *Abb. Pr.*, 206, *note*.

⁸ An amendment must be substantial, not merely verbal. *Snyder v.*

Form No. 992.

Notice of Amended pleading.

[*To be indorsed on pleading.*]

Please take notice, that the within is a copy of the amended complaint [*or, answer—or, reply*] in this action.

[*Date.*]

[*Signature and office address of*],

Attorney for [*amending party*].

[*Address*] To

Attorney for [*adverse party*].

Form No. 993.

Order striking out amended pleading.¹

At a special term [*&c., as in Form 493, p. 4.*]

[*Names of parties.*]

On reading the [pleadings] heretofore filed herein, and on reading and filing the affidavit of A. T., verified the day of , 18 , by which it appears satisfactorily to the court that the amended answer [*or, demurrer—or, reply*], heretofore served herein by [*name of party*] was put in for the purpose of delay, and that the [*name of adverse party*] would thereby lose the benefit of a term for which this cause has been [*or, may be, noticed*]; [*or, by which appears satisfactorily to the court that the amendment heretofore made in the answer filed herein was made without authority of law*];

And on proof of due notice to , and after hearing A. T., of counsel for the [plaintiff], and Z. T. [*or, no one*]

White, 6 *How. Pr.*, 321; *Epley v. Ely*, 68 *Iowa*, 70, 25 *Northwestern Rep.*, 934. Adding a verification to a complaint is held not an amendment allowable of course. *George v. McAvoy*, 6 *How. Pr.*, 200. But a bill of particulars may be amended as a part of the pleading. *Melvin v. Wood*, 3 *Abb. Ct. App. Dec.*, 272. Amendment may add a new cause of action. *Mason v. Whitely*, 4 *Duer*, 611; s. c., 1 *Abb. Pr.*, 85; *Brown v. Leigh*, 49 *N. Y.*, 78; 12 *Abb. Pr. N. S.*, 193. Or strike out a cause of action. *Watson v. Rushmore*, 15 *Abb. Pr.*, 51. An amended pleading cannot set up matter which occurred after suit brought.

Supplemental pleading is the proper remedy. *Hornfager v. Hornfager*, 6 *How. Pr.*, 13; *Lampson v. McQueen*, 15 *id.*, 345. Compare Vol. I, pp. 38-40; *Anthony v. Day*, 5 *Week. Dig.*, 240, and *Hurd v. Everett*, 1 *Paige*, 124.

If the amendment requires change of parties, or place of trial, it will not be effectual without amendment of the summons, for which leave of court must be asked. See Vol. I, p. 691, 702, &c., and 18 *Abb. N. C.*, 201.

As to mode of making slight or clerical amendments, see Vol. I, p. 58.

¹ See Vol. I, p. 57.

appearing] for the [defendant] in opposition: and on motion of A. T., attorney for [plaintiff]:

ORDERED, 1. That said amended [*name of pleading*] be and the same is hereby stricken out.

[*Or*, that said—*name of pleading*—be and hereby is restored to its original form, and has leave to file a sworn copy thereof in such form, with this order—*or*, and that the clerk be directed to restore the same on the files of this court to its original form, adding a memorandum on the margin thereof referring to this order].

2. That [plaintiff] have dollars costs of this motion, to be paid by [defendant's attorney personally].¹

Enter: [*signature of judge by initials of name and title.*]

II. LEAVE TO AMEND.

Form No. 994.

Notice of motion for leave to amend a pleading.²

[*As in Form 488, p. 1, omitting the matter between the † and ‡, and substituting for the italic matter between the † and ‡, as follows:*] that the plaintiff have leave to amend his [summons³ and] complaint [*or*, his reply] herein [*or*, that the defend-

¹ See Vol. I, pp. 264, 288. See *Ostrander v. Conkey*, 20 *Hun*, 421; *Frank v. Bush*, 2 *Civ. Pro.*, 250; *Allen v. Compton*, 8 *How. Pr.*, 251.

² As to whether all the defendants must, in every case, have notice of a plaintiff's application to amend, compare *Fassett v. Tallmadge*, 15 *Abb. Pr.*, 205; *People v. Woods*, 2 *Sandf.*, 652; and Vol. I, pp. 119, 120; *Weil v. Martin*, 24 *Hun*, 645; s. c., 1 *Civ. Pro. R.*, 133.

The moving party should show, by affidavit, an excuse for the defect which he seeks leave to remedy. *Harrington v. Slade*, 22 *Barb.*, 161. If the amendment will raise a new issue, he should show that he was not aware of the facts at the time of pleading, and excuse laches in his application. *Cocks v. Radford*, 13 *Abb. Pr.*, 207; s. p., *Cross v. Morgan*, 6 *Fed. Rep.*, 241.

A general allegation of the attorney that he deems an amendment advisable, is not sufficient. *Bewley*

v. Equitable Life Ins. Co., 10 *Weekly Dig.*, 191.

The court have power to allow an amendment even increasing the amount claimed. *Reed v. Mayor, &c.*, of New York, 97 *N. Y.*, 620; aff'g 31 *Hun*, 311.

But should not generally allow an amendment substituting a new and different cause of action. *Shields v. Barrow*, 17 *How. U. S.*, 130. Compare *Eighmie v. Taylor*, 39 *Hun*, 366.

The court may refuse leave, on affidavits that the proposed amendment is false (*Muller v. Muller*, 21 *Weekly Dig.*, 287), but will not usually do so unless the evidence be sufficient to strike out a pleading as sham. *Hughes v. Heath*, 9 *Abb. Pr.*, *N. S.*, 275; *Richardson v. Chynoweth*, 26 *Wisc.*, 656.

³ As to amending summons, see Vol. I, p. 695, &c.; *Heckemann v. Young*, 18 *Abb. N. C.*, 196.

The summons is amendable under

ant have leave to amend his answer—or, his demurrer herein]. [*Here indicate the amendment, as thus:* by substituting in the complaint in place of the paragraph numbered “five,”¹ the following words—&c.].

[*Or, that the—plaintiff—have leave to serve the proposed² amended complaint—or other pleading—a copy of which is herewith served upon you.*]

Form No. 995.

Order granting leave to amend a pleading.

[*Caption (court order) and recitals, as in Form 493, pp. 4 and 5, of this Vol.*]

ORDERED, that the plaintiff have leave to * serve a complaint [*or, answer*] in this action, amended [*state nature of amendment, as thus:* by substituting, for the paragraph numbered “five” in the original complaint, the words, *reciting them*] within _____ days from the date of the entry and service of this order, on payment of _____ dollars costs to the defendant [and that defendant have leave to answer thereto within the usual time].

[*Or if a formal error³ is amended, may say: amend his*

the general prayer for relief, if the motion is opposed. *Walkenshaw v. Perzel*, 7 *Robt.*, 606; s. c., 32 *How. Pr.*, 310.

¹ Vol. I, p. 95; *Sprague v. Pritchard*, 6 *Western Rep.*, 888.

² The particulars in which the amendment is desired should be specified in the notice of motion. Vol. I, p. 167; *Barker v. Walbridge*, 14 *Minn.*, 469; *Cashman v. Anderson*, 26 *Mo.*, 67.

It has not always been held necessary to submit the proposed amendment, in final form, for in a proper case, the court may authorize the party to amend as he shall be advised. *Renwick v. Wilson*, 6 *Johns. Ch.*, 81. (*Contra*, *New v. Aland*, 62 *How. Pr.*, 185; *Thompson v. Malone*, 13 *Rich. L. (S. C.)*, 252.) But if the complaint is verified, and particularly if a provisional remedy has been granted upon the strength of it, the proposed amendments, or the amended pleading should be submitted, duly verified; and this is now the settled prac-

tice in the case of all motions for leave to make substantial amendment. *Lynde v. Verity*, 3 *How. Pr.*, 350; s. c., 1 *Code R.*, 97; *Stern v. Knapp*, 8 *Civ. Pro. R.*, 54.

According to the case of *Marquisee v. Brigham*, 12 *How. Pr.*, 399, a defendant, whose answer has been stricken out as frivolous, and who seeks leave to put in a new one, should prepare it, and offer it to the plaintiff's attorneys; and if they decline to receive it, he must then move for leave.

Leave to put in an amended pleading should be denied if it is apparent that the proposed pleading is insufficient. *Smith v. Gould*, 61 *Wisc.*, 31; *Pracht v. Ritter*, 48 *Supm. Ct. (J. & S.)*, 508. But the granting of leave does not necessarily sanction the new pleading, in substance or form, but leaves it obnoxious to such legal objections as may subsequently be taken against it. *Ward v. Barber*, 1 *E. D. Smith*, 423.

³ In case of mere formal errors,

complaint, on file in this action, by inserting—*or*, canceling—the word *designating the error*—after the word , in the paragraph numbered .]

[*Or if amendment is as to parties, see Vol. I, pp. 704, 705.*]

[*Here insert terms imposed as a condition for granting the favor, as thus: the new issue to come up for trial in its regular order*¹—*or*, the issue to stand as if the day of , 18 —*and as thus: and upon the payment to the defendant of his taxable costs up to date.*]²

Enter: [*signature of judge by initials of name and title.*]

such an order, allowing the original on file to be amended, is proper (*De Caters v. De Chaumont*, 3 *Paige*, 178; *Jackson v. Belknap*, 7 *Johns.*, 300; *Fitzpatrick v. Gebhart*, 7 *Kans.*, 35); and service of a certified copy of the order, without a new copy of the original, is enough.

But where the amendment is substantial—*e. g.*, striking out or adding an allegation—it should not be done by mutilating or altering the files. The party amending should either file a new pleading, or file a statement of the amendment, and designate by reference where the new matter is to be inserted, or what is to be considered as stricken out. *Stimpson v. Daniels*, 10 *Ohio St.*, 620; *Luce v.*

Graham, 4 *Johns. Ch.*, 170. The usual practice is to serve a new pleading.

¹ See *Black v. Continental Natl. Bank*, 2 *Abb. N. C.*, 332.

² The general rule is, that the amendment shall not be made at the expense of the opposite party, and that he be indemnified for all additional expense involved in such amendment. And defendant should be allowed to answer anew. *Union Bank v. Mott*, 11 *Abb. Pr.*, 42; s. c., 19 *How. Pr.*, 267.

See, as to terms, *Marsh v. McNair*, 40 *Hun*, 206. But the court may allow an amendment without imposing costs. *Moll v. Semler*, 28 *Wisc.*, 589; *Cayuga Bank v. Warden*, 6 *N. Y.*, 19.

ARTICLE VI.

DEMURRING.

FORMS.

(996.) Demurrer to complaint; general Form.

(997-1004.) Statements of grounds thereof.

(1005.) Demurrer to new matter in

an answer not asking affirmative relief.

(1006.) Demurrer to counter-claim demanding affirmative relief.

(1007-1016.) Statements of grounds thereof.

(1017.) Demurrer to reply.

Form No. 996.

Demurrer to complaint; ¹ general Form.

[Title of court and action.]

The defendant [if one or more of several, name demurrant²] above named [if demurring by attorney whose appearance has not been entered, say: appearing by Z. T., his attorney] demurs to the [amended³] complaint herein [or, to the first—or, second—or, other—cause of action⁴ stated in the complaint herein] for the ground⁵ that it appears upon the face of the complaint⁶ [state one or more grounds, as below⁷].

[Date.] [Signature and address of defendant in person.]

[Or, signature and office address of],

Attorney for defendant.

¹ N. Y. Code Civ. Pro., §§ 488-490.

² If several defendants are not so united in interest that their rights to take any of the following objections are identical, it is better to demur separately, because a joint demurrer is not sustained for one demurrant, unless sustainable for all. *Oakley v. Tugwell*, 33 *Hun*, 357; *Clark v. Lovering*, (Minn., 1887) 33 *Northwestern Rep.*, 776; *People v. Mayor, &c.*, of N. Y., 8 *Abb. Pr.*, 7; s. c., 28 *Barb.*, 240.

³ The decision on demurrer to an original complaint does not preclude a demurrer to an amended complaint. *Marie v. Garrison*, 13 *Abb. N. C.*, 210, 215, 321; *Hauselt v. Fine*, 18 *id.*, 142; *Post v. Pearson*, 108 *U. S.*, 418; aff'g 9 *Northwestern Rep.*, 684.

⁴ If a complaint contains several causes of action, a demurrer which does not specify which it is addressed to will be wholly overruled if either cause of action is good. *Hale v. Omaha Natl. Bank*, 49 *N. Y.*, 626; *Swords v. Northern Light Oil Co.*, 17 *Abb. N. C.*, 115.

But a specification which informs the court and party is enough, though informal. *Indiana B. & W. R. R. Co. v. Dailey*, 110 *Ind.*, 75, 10 *Northeastern Rep.*, 631 (holding that a demurrer expressed to be "separately to the 1st, 2d, 3d" [*&c.*] paragraphs, for the reason that none of said paragraphs state facts sufficient [*&c.*], was a good demurrer to each).

⁵ A ground not specified is not available. *Carter v. De Camp*, 40 *Hun*, 258; *Berney v. Drexel*, 33 *id.*, 419; *Adrian Water Works v. City of Adrian*, (Mich., 1887) 31 *Northwestern Rep.*, 529. Except want of jurisdiction of subject-matter (and, in some cases, of the person) and insufficiency; for these the court may treat as ground for dismissal at any stage.

⁶ A demurrer can allege nothing. It can only point to the pleading demurred to.

⁷ A demurrer cannot be sustained on any other ground than here indicated. *Marie v. Garrison*, 33 *N. Y.*, 14, 23.

997-1004.—STATEMENTS OF GROUNDS OF DEMURRER SUITABLE TO BE INSERTED IN FOREGOING FORM.

997. *No jurisdiction of the person.*¹—that the court has not jurisdiction of the person of this defendant [*or, these defendants*].

998. *No jurisdiction of subject.*²—that the court has not jurisdiction of the subject of this action.

999. *No legal capacity to sue.*³—that the plaintiff has not legal capacity to sue, in that [*stating defect*].

1000. *Another action pending.*⁴—that there is another action pending between the same parties, for the same cause.

1001. *Misjoinder of plaintiffs.*—that there is a misjoinder of parties plaintiff, in that⁵ [*here specify the particular objection to the plaintiff in question, as thus*] said A. B., the husband of the plaintiff C. D., is not a proper plaintiff in this action, and has no cause of action upon [*and no interest in*] the matters alleged in the complaint against this defendant [*or, these defendants*].

1002. *Defect of parties.*⁶—that there is a defect of parties plaintiff [*or, a defect of parties defendant*] in the omission of [*designating the omitted person,*

¹ This is available, in general at least, only where it appears by the complaint that the person is such that the court cannot acquire jurisdiction, such as a foreign consul sued in a State court. See *Valarino v. Thompson*, 7 *N. Y.*, 576. Where the objection rests on defect of service of process, which must be alleged, the remedy is by motion (Volume I, p. 112) or answer. See *Hamburger v. Baker*, 35 *Hun*, 455, and *cas. cit.*; *Heenan v. N. Y., West Shore, &c., R. R. Co.*, 34 *id.*, 602.

² It is not always enough, even in a Superior City Court, that it does not affirmatively appear that the court has jurisdiction. *N. Y. Code Civ. Pro.*, § 266; *Fisher v. Charter Oak Life Ins. Co.*, 14 *Abb. N. C.*, 32.

³ This does not include the objection that a plaintiff's legal capacity to sue does not extend to the alleged cause of action. Such objection goes not against the appearance of the plaintiff in court, but the sufficiency of his alleged cause of action. *Tip-ton County v. Kimberlin*, 108 *Ind.*, 449, 6 *Western Rep.*, 885.

The want of capacity must affirmatively appear. *Phoenix Bank v. Donnell*, 40 *N. Y.*, 410; *aff'g* 41 *Barb.*, 571, (holding that suing in a corporate name and omitting to allege incorporation was not a case for demurrer).

s. p., *Seymour v. Thomas Hanow Co.*, (*Ala.*, 1887) 1 *Southern Rep.*, 45. But see *N. Y. Code Civ. Pro.*, § 1775, and *Abb. Ann. Dig.*, 1886, p. 291.

⁴ The particular defect relied on must be specifically pointed out. *N. Y. Code Civ. Pro.*, § 490, otherwise the demurrer may be disregarded. Omission to allege leave to sue when that is necessary, is taken advantage of by demurrer for insufficiency. *Hauselt v. Fine*, 18 *Abb. N. C.*, 142; *s. p.*, *Freeman v. Dutcher*, 15 *id.*, 431.

⁵ The other action must be such that its pendency is a good defense. See *Haire v. Baker*, 5 *N. Y.*, 357.

It need not be strictly "an action" as distinguished from a special proceeding. *Groshon v. Lyon*, 16 *Barb.*, 461.

⁶ The particular objection must be indicated. See note 4 (*above*).

⁷ An excess of parties defendant is not available as ground of demurrer for one who is not an improper party.

A defect of parties which does not prejudice the defendant is not necessarily ground of demurrer. *Anderton v. Wolf*, 41 *Hun*, 571, and *cas. cit.* A defect of parties which prevents the court from doing justice is not waived by omitting to demur. *Bear v. Am. Rapid Tel. Co.*, 36 *Hun*, 400.

Defect of parties defendant sued as carriers not always available. *N. Y.*

either by name or by the character in which he is referred to in the complaint, as thus] the maker of the note mentioned in said complaint [or, the husband of the plaintiff¹].

1003. *Misjoinder of actions.*²—that several causes of action have been improperly united, one being [very briefly designating it, e. g., thus] a money demand on contract, and the second a claim to recover real property and damages for withholding thereof, and the third a claim to recover damages for injuries to the person.³

1004. *Insufficiency.*⁴—that the complaint does not state facts sufficient to constitute a cause of action.⁵

Code Civ. Pro., § 1945. Objection to nonjoinder of a public officer, to be taken by answer. *Id.*, § 1929.

¹ The person must be specified. See note 4, p. 459.

If several defects of parties are relied on, some of which might be held ground of demurrer, and others not, it is better to state each objection as a separate ground of demurrer, or to omit the doubtful ones. See *Anderton v. Wolf*, 41 *Hun*, 571.

² If the misjoined causes of action are commingled in statement, it is not necessary to move to compel separate statement before demurring. *Harris v. Eldridge*, 5 *Abb. N. C.*, 278; *Goldberg v. Utley*, 60 *N. Y.*, 427; *Zorn v. Zorn*, 38 *Hun*, 67; *Taylor v. Metrop. Elev. R. R. Co.*, 52 *Super. Ct. (J. & S.)*, 299, and cas. cit. But commingled statement is not misjoinder. *Bass v. Comstock*, 38 *N. Y.*, 21.

Demurrer for misjoinder is not sustainable where the complaint attempts to set forth several causes of action, but sets forth only one sufficiently. *Sullivan v. N. Y., New Haven, & C., R. R. Co.*, 11 *Fed. Rep.*, 848; s. c., 19 *Blatchf.*, 388.

If the causes of action joined do not all affect all the parties, a demurrer on that ground may be sustained, although they do all affect the demurrant. *Nichols v. Drew*, 94 *N. Y.*, 22.

³ The objection must be stated in detail. *Anderton v. Wolf*, 41 *Hun*, 571. See note 4, p. 459.

⁴ Only available when it appears that admitting all the facts (as distinguished from conclusions of law) alleged (even though argumentatively or indefinitely alleged), no cause of

action whatever is presented; *Marie v. Garrison*, 83 *N. Y.*, 14, 23; but see *Willis v. Fairchild*, 51 *Super. Ct. (J. & S.)*, 405; or that a complete defense is also sufficiently stated.

Inappropriateness of the demand of relief is not ground of demurrer. *Throop's Ed. Code Civ. Pro.*, § 489, note; *Haines v. Hollister*, 64 *N. Y.*, 1; *Price v. Brown*, 10 *Abb. N. C.*, 67; *Garner v. Harmony Mills*, 6 *Abb. N. C.*, 212; *Price v. Brown*, 10 *id.*, 67; but see *Willis v. Fairchild*, 51 *Super. Ct. (J. & S.)*, 405.

One against whom a sufficient cause is stated cannot demur for insufficiency on the ground that the complaint is not sufficient as against another defendant. *Jones v. Foster*, 67 *Wisc.*, 296, 30 *Northwestern Rep.*, 697. But the same facts may sustain a demurrer for misjoinder. See *Nichols v. Drew*, 94 *N. Y.*, 22. Compare *Edson v. Girvan*, 29 *Hun*, 422.

The objection that the action is barred by a statutory limitation of time, whether by virtue of the general Statute of Limitations (*N. Y. Code Civ. Pro.*, § 413) or special limitations (*Kaiser v. Kaiser*, 16 *Hun*, 602; *Baldwin v. Martin*, 14 *Abb. Pr., N. S.*, 9), is generally to be taken by answer, not demurrer.

[*Contra*, as to limitation on time for recovering back usury, see *National State Bk. v. Boylan*, 2 *Abb. N. C.*, 216.] But the equitable doctrine of staleness of claim may be availed of on demurrer.

⁵ It is not necessary to specify any particular omission (§ 488), and is dangerous to do so. *Nellis v. De Forest*, 16 *Barb.*, 61.

Form No. 1005.

Demurrer to new matter in an answer not asking affirmative relief.¹

[*Title of court and action.*]

The plaintiff herein demurs to the answer [*or, if there is more than one defense therein, specify which defense is demurred to,*² *as thus:* to the first defense contained in the answer] of the defendant Y. Z., on the ground that it is insufficient in law upon the face thereof.

[*Date.*]

[*Signature as in Form 996.*]

Form No. 1006.

Demurrer to counter-claim demanding affirmative relief;³ general Form.

[*Title of court and action.*]

The plaintiff herein demurs to the [*first, or other*] counter-claim contained in the answer of the defendant Y. Z., on the ground that it appears on the face of said counter-claim that [*stating one or more grounds as below*].

[*Date.*]

[*Signature as in Form 996.*]

STATEMENT OF GROUNDS OF DEMURRER TO COUNTER-CLAIM, SUITABLE TO BE INSERTED IN FOREGOING FORM.

1007. *No jurisdiction.*—that the court has not jurisdiction of the subject thereof.

1008. *No legal capacity to recover.*—that defendant has not legal capacity to recover upon the same, because [*stating defect*].

1009. *Another action pending.*—that there is another action pending between the same parties for the same cause.

1010. *Counter-claim not pleadable, because not such as to affect relief.*⁴—that said counter-claim is not of the character allowed by law to be pleaded

¹ That on demurrer to answer, the court may still as before the Code consider demurrable objections to the complaint,—see *Gleason v. Youmans*, 9 *Abb. N. C.*, 107; *Young v. Brice*, 19 *id.*, 79, note; *United States v. Central Natl. Bk.*, 10 *Fed. Rep.*, 612.

² If an answer contains several grounds of defense, a demurrer which does not specify which it is addressed

to will be wholly overruled if either defense is good. *Dallas County v. Mackenzie*, 94 *U. S.*, 660.

³ See note to last Form.

⁴ See *National Fire Ins. Co. v. McKay*, 21 *N. Y.*, 191. Compare *Metropol. Trust Co v. Tonawanda, &c., R. R. Co.*, 18 *Abb. N. C.*, 368, *aff'd* in 103 *N. Y.*, 245.

in this action, because it does not tend to diminish or defeat plaintiff's demand for a recovery of _____, but is for wholly independent relief, irrespective of such recovery.

1011. *The same; plaintiff not the one liable.*¹—that said counter-claim is not of the character allowed by law to be pleaded in this action, because it is not a cause of action against the plaintiff nor any person whom, for the purpose of the relief sought, he represents; but, if at all, against A. B. individually, and not as executor.

1012. *The same; defendant not entitled, or not entitled alone to recover on it.*—that said counter-claim is not of the character allowed by law to be pleaded in this action, because it is not a cause of action in favor of said defendant pleading it; but if at all, is in favor of said defendant individually, and not as executor [or, is in favor of M. N. therein named—or, is in favor of said defendant jointly with M. N. therein named²].

1013. *The same; separate counter-claim by one as to whom separate judgment could not be had.*³—that said counter-claim is not of the character allowed by law to be pleaded in this action, because a separate judgment cannot be had herein between said Y. Z. [defendant pleading it] and this plaintiff, the plaintiff's cause of action, if any, being admitted to be joint against said W. Z. and W. X.⁴

1014. *The same; not germane to an action on contract.*—that it is not a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim [specifying it as thus], to wit, the lease alleged by plaintiff, nor connected with the subject of the action,⁵ to wit, the recovery of rent; but it appears that it is for an alleged tort, and arises, if at all, out of an entirely different transaction and subject, to wit [&c.].

[Or, but it is alleged as a cause of action on a contract not existing at the commencement of the action.]

1015. *The same; not germane to an action other than on contract.*—that it is not a cause of action arising out of the [contract or] transaction set forth in the complaint as the foundation of plaintiff's claim, to wit [specifying it]; nor connected with the subject of the action, to wit [specifying it], but arises, if at all, out of an entirely different transaction and subject, to wit [&c.].

1016. *Insufficiency.*—that it does not state facts sufficient to constitute a cause of action.

¹ See *Thompson v. Whitmarsh*, 100 *N. Y.*, 35; *Wakeman v. Everitt*, 41 *Hun.*, 278; *Carter v. Holahan*, 92 *N. Y.*, 498. Compare *Lerche v. Brasher*, 37 *Hun.*, 385.

² See *Hopkins v. Lane*, 87 *N. Y.*, 501; *Woodruff v. Brush*, (Cal., 1887) 13 *Pacif. Rep.*, 627.

³ See *Vanderbilt v. Baldwin*, 15 *Abb. N. C.*, 312; *Bathgate v. Haskin*, 59 *N. Y.*, 533, rev'g 5 *Daly*, 361.

⁴ One of several defendants, who

alleges that the liability is several, not joint, may plead a counter-claim existing in his own favor alone, although the complaint alleges that the liability is joint. *Clegg v. Cramer*, 32 *Hun.*, 162. But if the joint character of the cause of action is not denied, only a joint counter-claim can be pleaded.

⁵ See *Carpenter v. Manhattan Life Ins. Co.*, 93 *N. Y.*, 552, aff'g 22 *Hun.*, 49; *Chamboret v. Cagney*, 10 *Abb. Pr.*, *N. S.*, 31; s. c., 2 *Sweeney*, 378.

Form No. 1017.

Demurrer to reply.¹

[*Title of court and action.*]

The defendant Y. Z. herein demurs to the reply herein [*or, if to a traverse or matter of avoidance forming only part of it, designate the part by paragraph, or quotation of first and last phrases*²] on the ground that it is insufficient in law upon the face thereof [*here may specify particular defects as if it were a demurrer to the answer*].

¹ N. Y. Code Civ. Pro., § 493.

² Volume I, p. 95.

ARTICLE VII.

SEVERING ACTION.

1. Power of the court.

(1019.) Order severing action against defendants severally liable, after judgment against part.

FORMS.

(1018.) Order severing ejectment against distinct occupants.

[As to severance on admission of part of claim, see p. 495; as to severance on death, see PARTIES.]

1. *Power of the court.*—The court have inherent power to sever an action, in furtherance of justice, as, for instance, where, by the joinder, the competency of witnesses¹ or other remedies, may be prejudiced.

Form No. 1018.

Order severing ejectment against distinct occupants.²

At a special term [*&c.*, as in Form 493, p. 4].

[*Title of action.*]

It appearing satisfactorily to the court [by the verified answers herein], that the defendant, W. X., occupies [*or*, that the defendants, W. X. and U. V., jointly occupy] a distinct parcel of the lands for the recovery of which this action is brought, and that the defendant [*name or names*] possesses the other parcel thereof in severalty [*or*, jointly]; and [on reading and filing proof of due notice of this motion, and] after hearing W. T., of counsel for W. X. and A. T. [*or*, no one appearing] for A. B. and Y. Z. in opposition; and due deliberation having been had; now, on motion of W. T., attorney for W. X.:

ORDERED, that this action be divided into [two] several actions, one of which shall be by said A. B. against W. X., for the recovery of the parcel hereinafter described as parcel A., with such other relief, as under the complaint, may be had in respect thereto, and the other by said A. B. against Y. Z., for the

¹ See *Hill v. Alvord*, 19 *Hun*, 77, where a severance ordered on this ground, was reversed as unnecessary. So they have power to order a separate trial.

² *N. Y. Code Civ. Pro.*, § 1516; *Judson v. Malloy*, 40 *Cal.*, 299.

recovery of the parcel hereinafter described as B., and such other relief in respect thereto :

[*May add :*] This severance is without prejudice to the proceedings already had herein ; and the clerk is directed to make on the margin of the notice of pendency of this action, a memorandum referring to this order.

[*May add any conditions imposed.*]

[*Add descriptions respectively.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1019.

Order severing action against defendants severally liable after judgment against part.¹

[*Title of court and action.*]

It appearing that in this action summons has been issued against both [*or, all*] the above-named defendants, and that they are alleged in the complaint to be severally liable, and that said summons has been duly served upon the defendant Y. Z., [*naming all those served*], as appears by the affidavit of C. D., hereto annexed, but has not been served upon W. X., the other of said defendants, and judgment having been herein entered pursuant to law in favor of the plaintiff and against the defendant Y. Z. ; now, on motion of A. T., attorney for plaintiff :

ORDERED, that the action be severed, and that the plaintiff may proceed against the defendant W. X. [*naming all the defendants severally liable not served*], as if he were the only defendant named therein.

[*Date.*]

[*Signature of*] Clerk.

¹ Entered by the clerk without *Y. Code Civ. Pro.*, § 456, and see need of application to the court. *N.* § 1205.

ARTICLE VIII.

SUPPLEMENTAL PLEADING.

FORMS.

(1020.) Affidavit to move for leave to file supplemental pleading.

(1021.) — — answer setting up payment.

(1022.) Order to show cause why a

party should not have leave to serve a supplemental pleading.

(1023.) — granting leave to serve a supplemental pleading.

(1024.) Supplemental complaint.

Form No. 1020.

Affidavit to move for leave to file supplemental pleading.[*Title of court and action.*][*Venue.*]

A. B. being duly sworn, says:

I. That he is the [plaintiff] above named; that this action was commenced in this court by the service of a summons and complaint on the day of , 18 ; that the action is brought for the purpose of [*state briefly the object of the suit, as, the foreclosure of a certain mortgage particularly described in the complaint herein*]; that issue has been joined herein, and the cause is now upon the calendar of this court, awaiting trial.

II. Deponent further says, that he has read the annexed draft of the proposed supplemental [complaint], and the facts therein stated are true, to the best of deponent's knowledge and belief. That said facts did not occur [*or, did not come to the knowledge of this deponent, nor had he any information thereof*] until after the service of the said original complaint.

[*Or, that, to the best of his recollection and belief, the plaintiff—or, the defendant—was ignorant of the facts stated in this supplemental complaint—or, answer—until after the service of the original—complaint—herein.*]

* [*If an order to show cause is asked for, state as to previous application as in Form 490, p. 2, and also the condition of the cause as in Form 489, p. 2.*]

[*If the application relates to answer or reply, add oath to merits, see pp. 446, 7, VII.*]

[*Jurat.*][*Signature.*]

Form No. 1021.

Affidavit to move for leave to file supplemental answer setting up payment.

[*Title of court and action.*]

Y. Z., defendant above named, being duly sworn, says:

I. That this action was commenced on the day of , 18 ; that issue was joined therein by the service of this defendant's answer on the day of , 18 , and this cause is now upon the calendar of this court, awaiting trial.

II. Deponent further says, that this action is brought [upon a promissory note alleged to have been made by him, and to be held and owned by the plaintiff]. That since the joining of the issue, viz., on the day of , 18 , this defendant paid to the plaintiff the sum of dollars in full payment of the note mentioned in the complaint, and of the costs, up to that day, accrued herein.

[*Conclude as in last Form, from the *.*]

Form No. 1022.

Order to show cause why a party should not have leave to serve a supplemental pleading.

[*As in Form 491, p. 3, omitting matter in brackets before the ‡ and substituting for the italic matter between the ‡ and ¶ the following:*] the [plaintiff] should not have leave to serve the proposed supplemental complaint [*or other supplemental pleading*] [*or, a supplemental—name of pleading—setting up the matters contained in the annexed affidavit*].

Form No. 1023.

Order granting leave to serve a supplemental pleading.

[*Caption and recitals as in Form 493, p. 4.*]

ORDERED, that the [plaintiff] have leave to make, file and serve the proposed supplemental [complaint] in addition to [*or, amended and supplemental complaint in place of*] the original

[complaint], and that the service of the copy thereof, heretofore made, stand as the service of the same [*or*, to make, file and serve, within days from the entry and service of a copy of this order, a supplemental—complaint—in addition to—*or*, an amended and supplemental complaint in place of—the original—complaint—setting up the matters contained in the affidavit of A. B., hereinbefore referred to—*or*, the notice of motion—*or*, order to show cause—herein].

[*If conditions are to be imposed, state them.*]

Enter: [*signature of judge by initials of name and title*]

Form No. 1024.

Supplemental complaint.

[*Title of court and action.*]

In and by this supplemental [and amended] complaint, which is served under and pursuant to an order of this court, dated the day of , 18 , to which reference is hereby made, A. B., plaintiff [*continuing as in commencement of an original complaint, Form 960*].

ARTICLE IX.

PARTICULARS; AND MODIFYING OR STRIKING OUT ADVERSARY'S PLEADING.

SECTION I.—COPY OF ACCOUNT, OR BILL OF PARTICULARS.

II.—MOTION TO COMPEL SEPARATE STATEMENT.

III.—MOTION TO MAKE MORE DEFINITE AND CERTAIN.

IV.—MOTION TO STRIKE OUT A PLEADING OR MATTER THEREFROM.

SECTION I.

COPY OF ACCOUNT, OR BILL OF PARTICULARS.

I. PROCEEDINGS TO OBTAIN COPY OF ACCOUNT REFERRED TO IN PLEADING.

FORMS.

- (1025.) Demand of copy of account referred to in pleadings.
- (1026.) Affidavit to obtain stay of proceedings and extension of time, on demanding copy of account.
- (1027.) Copy of account.

II. BILLS OF PARTICULARS.

- (1028.) Affidavit to obtain order for bill of particulars.
- (1029.) Order to furnish a bill of particulars (General Form).
- (1030.) Another Form; order, in the alternative, to serve particulars or show cause.
- (1031–1036a.) Statement of particulars suitable to be inserted in foregoing Form.
- (1037.) Proof of service of alternative order, and default.
- (1038.) Order (peremptory) to serve

bill of particulars; after default under alternative order

- (1039.) Bill of particulars.
- (1040.) Verification of bill of particulars, or account referred to in pleading.
- (1041.) Affidavit to obtain further account or further bill of particulars.
- (1042.) Notice of motion to compel the service of a further account or bill of particulars.
- (1043.) Order for further account or further bill of particulars.
- (1044.) Notice of motion to preclude evidence for defect of account or particulars.
- (1045.) Order precluding evidence at the trial.
- (1046.) — striking out complaint, or counter-claim for not obeying order for account or particulars.

I. PROCEEDINGS TO OBTAIN COPY OF ACCOUNT REFERRED TO IN PLEADING.

Form No. 1025.

Demand of copy of account referred to in pleadings.¹

[*Title of court and action.*]

I hereby demand that you deliver to me within ten days a

¹ The right to proceed by this kind of demand is statutory, and only mentioned in the pleading and items,

copy [or if the pleading be verified, say: a verified copy] of the account [if more than one account is referred to, identify the one demanded] referred to in the complaint [or, the answer] in this action.

[Date.] [Signature and office address of],
[Address] To Attorney for
Attorney for

Form No. 1026.

Affidavit to obtain stay of proceedings and extension of time, on demanding copy of account.¹

[Title of court and action.]

[Venue.]

Y. Z., defendant above named, being duly sworn, says, that this action was commenced by the service of a summons and complaint on this defendant, on the day of ; that the action is brought to recover the sum of dollars on an alleged account [here state cause of action—e. g., thus] for goods alleged to have been sold and delivered by the plaintiff to this defendant; that the particulars respecting such sale and delivery do not appear in the plaintiff's complaint, and that this defendant has demanded a copy of said account, of which demand a copy is annexed; and that this defendant is advised

such as are proper matter of book account, or which were actually matter of account between the parties. It does not extend to a case of items of damage, which have not been made matter of account between the parties. Compare the following cases: *Ives v. Shaw*, 31 *How. Pr.*, 54; *Fullerton v. Gaylord*, 7 *Robt.*, 551; *Dowdney v. Volkening*, 37 *Super. Ct. (J. & S.)*, 313; *Johnson v. Mallory*, 2 *Robt.*, 681; *Black v. Chesser*, 12 *Ohio St.*, 621; *Bradley v. Bailey*, *N. Y. Daily Reg.*, Sept. 17, 1886; *Blackie v. Neilson*, 6 *Bosw.*, 681; *Clegg v. Am. Newspaper Union*, 7 *Abb. N. C.*, 59; *Moore v. Beltoni*, 42 *Super. Ct. (J. & S.)*, 184.

It has been intimated that demanding a copy of an account precludes a subsequent motion to make the pleading more definite and certain. *M'Kinney v. M'Kinney*, 12 *How. Pr.*, 22. But this is not to be applied except so

far as the remedy by requiring the account is sufficient. Even then the demand does not take away the power of the court to require amendment.

A motion for a further account may be made on affidavits similar to those relating to a bill of particulars.

¹ *N. Y. Code Civ. Pro.*, § 531, requires that the party pleading an "account" shall, within ten days after demand in writing, serve a copy of such account. But as neither the plaintiff's proceedings are stayed, nor the defendant's time to answer extended by a simple demand, it is sometimes well to obtain in the first instance an order from the court. Where no account is alleged in the pleading, but a bill of particulars of the claim is desired, it is now common practice to serve a similar demand, and if that be not complied with move for an order with costs. See Forms below.

by his counsel, T. Z., who resides at [&c.], and verily believes that he will not be able to answer the same properly without a copy of said account [*continue as in Form 1028, from the †*].

Form No. 1027.

Copy of account.

[*Title of court and action.*]

[*Here set forth the account referred to in the pleading.*]

[*Address to attorney.*]

Please take notice, that the above is a copy of the account demanded by you [*or, referred to in the complaint—or, answer*] in this action.

[*Date.*]

[*Signature and office address of*],
Attorney for .

[*Verification, if pleading is verified, as in Form 1040, substituting, copy of the account referred to in the—complaint—herein, in place of the words, bill of particulars of the claim of the—plaintiff—herein.*]

[*Affidavit to obtain further account, see Form 1041.*]

II. BILLS OF PARTICULARS.

Form No. 1028.

Affidavit to obtain order for bill of particulars.

[May serve previous demand, if costs of motion are desired: see Forms 1025 and 1029, 1030–6.]

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is defendant in this action¹ [*or if the affidavit be made by another than defendant, state reason, and his relation to the cause, so as to show means of knowledge*]. *

II. [*State condition of the cause, for instance thus:*] That the complaint herein was served on deponent [*or, on the*

¹ In divorce, affidavit by the party was required in *Gridley v. Gridley*, 7 Civ. Pro. R., 215.

Contra, *Winchell v. Martin*, 14

Week. Dig., 458 (crim. con., where the affidavit relied on was by the attorney, and denial of the motion because it was not by the party was held error).

attorney of this deponent] on the day of , 18 , and that he has appeared¹ in the action, but has not answered [*or*, that the cause is at issue by the service of his answer—hereto annexed—*or*, on the day of]; and that the reason why this application was not sooner made is as follows [*stating the excuse for delay*].

III. That the cause of action alleged in the complaint is [*here state it briefly*], and said cause of action is alleged generally in the complaint, and without stating the particulars of the claim [*or*, the particulars of the property which the plaintiff seeks to recover].

IV. [*If previous demand has been made, allege it and default.*]

V. That defendant intends in good faith to defend this action, and that he is ignorant of the particulars of the claim². [*or*, of the breaches—*&c.*, as above] alleged by the plaintiff, and that it is necessary and material to his defense in this cause [and to enable him to answer herein], that he shall have rendered to him a bill of the particulars thereof; as he is advised by T. Z., his counsel, and verily believes. †

VI. [*If an order to show cause is asked for*] That no previous application for a bill of particulars [*or*, an order for copy of account] has been made herein [except, *&c.*; see p. 2]. [*Also state reason for asking order instead of giving notice. Id.*]

VII. [*If extension of time to plead is asked, add oath to merits, as in Form 981, pp. 446-47, VII.*]
[*Jurat.*] [Signature]

Form No. 1029.

Order to furnish a bill of particulars (General Form).³

At a special term [*&c.*,
as in Form 493, p. 4].

[*Title of action.*]

Upon the summons and complaint in this action, and the

¹ Previous appearance is not essential. *Roosevelt v. Gardinier*, 2 Cow., 463; *Watkins v. Brown*, 5 Ark., 197.

² It should appear from the affidavit or otherwise that the defendant has not equal facilities with the plaintiff for obtaining the information

sought. *Powers v. Hughes*, 39 Super. Ct. (J. & S.), 482.

³ By the former practice the order was not absolute, but in terms that the plaintiff furnish a bill of particulars by a certain day, or show cause (see next Form). *Roosevelt v. Gardinier*, 2

annexed affidavit [and the pleadings in this action], let the [plaintiff], on or before the day of , 18 , deliver to the [defendant] a [verified] bill of particulars * of the demand for which this action is brought [or, of the counter-claim set up in his answer, to wit—*may indicate particulars*¹ *as in Forms 1031 to 1036 (below)*], † and in the meantime let all further proceedings on the part of the [plaintiff] be stayed,² and let the [defendant] have days further time³ to answer [or, reply], demur, or take such other proceedings as he may be entitled to, after the day of [or, after the service of such bill].
[If previous demand was made and disregarded may add costs of motion.]

Enter: [signature of judge by initials of name and title.]

Form No. 1030.

Another Form; order, in the alternative, to serve particulars or show cause.⁴

*[As in last Form, inserting at the *:]* or let [plaintiff] show cause before me [or, this court] at [d.c.], on [d.c.], why he should not deliver such bill, or in default thereof be precluded from giving evidence at the trial in support thereof. *[And, if short time is fixed, add at end: service hereof on or before the day of , shall be sufficient.]*

Conn., 463. If absolute, the court will not dismiss the suit on default in complying, without a further order. *Brewster v. Sackett*, 1 *id.*, 571. But under the Code, an order for a bill may be made by the court; and it is common practice to make now an absolute order, in the first instance, after both parties have an opportunity of being heard on the motion.

A demand that the adverse party's pleading be made more definite and certain may be inserted as part of this motion, in the alternative, or otherwise.

¹ A sweeping clause specifying no details is usually improper. *Hubbard v. Otis*, 17 *Weekly Dig.*, 348.

For the form of an order for bill of particulars of evidence of fraud or false representations in procuring life insurance,—see *Dwight v. Germania*

Life Ins. Co., 84 *N. Y.*, 493, dismissing appeal from 22 *Hun*, 167.

For an order for particulars of fraud in general assignment for benefit of creditors,—*Claffin v. Smith*, 13 *Abb. N. C.*, 205.

For an order for particulars of a charge of fraud in conspiring to withhold evidence,—*Leigh v. Atwater*, 2 *Abb. N. C.*, 419.

² This clause is necessary in order to effect a stay. *Vermont Academy of Medicine v. Landon*, 2 *Wend.*, 621.

³ The stay does not enlarge time to plead. *Volume I*, p. 435.

⁴ See notes to last Form.

If this order is made, as is usual, out of court, and without notice, the time fixed should be within twenty days, in order to sustain the stay of proceedings,—see *Vol. I*, p. 437.

(1031-1036a.) STATEMENT OF PARTICULARS SUITABLE TO BE
INSERTED IN FOREGOING FORM.

1031. *In action on a bond; substitute between * and † in Form 1028*—of the breaches of the bond, on which this action is brought.

1032. *In action for money paid, &c.; substitute between * and † in Form 1028*—of the dates of the alleged purchases and sales, the kinds and amounts of goods alleged to have been purchased and sold, the names of the persons and firms to and from whom such sales and purchases were made, the amounts received and paid by his said firm in making said purchases and sales, and where and when each such purchases and sales were made, and when and where the goods so purchased and sold were received and delivered, and the names of the persons or firms to whom and from whom goods were delivered and received.

1033. *In action for conversion: substitute between * and † in Form 1028*—of the goods, chattels, fixtures and other personal property alleged to have been carried away and converted by the defendant, with a statement of the alleged value of each article, piece or portion thereof so alleged to have been converted.

1034. *In action of crim. con.: substitute between * and † in Form 1028*—of the particular times and places at which he expects or intends to prove that any acts of adultery or criminal intercourse took place between the defendant and the wife of the plaintiff, and of the particular times and places at which he expects or intends to prove that the defendant confessed any such act of adultery or criminal intercourse.

1035. *In slander: substitute between * and † in Form 1028*—of the particular place or places at which, and the names of the persons [*or, some of them on each occasion*] in whose presence he expects or intends to prove the defendant uttered the alleged slanderous words set forth in the complaint.¹

1036. *In libel: substitute between * and † in Form 1028*—of the name of every person and firm to whom he intends to prove the alleged libelous statement was published, giving the names of the towns and cities in which such persons respectively reside [*or thus: the names of the persons who, by reason of the matters in the complaint alleged, ceased or refused to contribute or donate any further sums of money to the plaintiff*].

1036a. *Items of damage by loss of custom*³—of the sales and profits that plaintiff has lost by reason of defendant's alleged libels, as claimed and alleged in plaintiff's complaint herein, giving the names of the persons whose custom has been lost and their places of business respectively, and the times when and places where such losses have occurred, as well as the dates and amounts of any transactions or sales or orders which the plaintiff lost the benefit of by reason of the defendant's alleged libels and of the plaintiff's losses thereon specifically.]

¹ This is from the order entered in *Stiebeling v. Lockhaus*, 21 *Hun*, 457. The words in brackets are here inserted in deference to the ruling in *Dempewolf v. Hills*, 53 *Super. Ct. (J. & S.)*, 105.

² Sustained in *New York Infant Asylum v. Roosevelt*, 35 *Hun*, 501.

³ Sustained by *American, &c., Fabric Co. v. Eureka, &c., Hose Co.*, 18 *Abb. N. C.*, 70.

Form No. 1037.

Proof of service of alternative order, and default.

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says: that he is managing clerk in the office of the [defendant's] attorney herein; that on the day of , at , he served a copy of the annexed affidavit and alternative order for a bill of particulars upon the [plaintiff's] attorney herein, by delivering the same personally to him [*or other mode, see Vol. I, p. 403, &c.*], and that no bill of particulars in this action has been served on the [defendant's] attorney herein.

[*Jurat.*]

[*Signature.*]

Form No. 1038.

Order (peremptory) to serve bill of particulars; after default under alternative order.

At a special term [*&c., as in Form 493, p. 4.*]

[*Title of action.*]

On the complaint [*or, the pleadings*] herein and the annexed order to show cause and affidavit of M. N. [*and if default is made, add,* and on reading and filing proof by the affidavit of M. N., of due and timely service of said order to show cause and affidavit, and that no bill of particulars has been served]; and after hearing A. T., of counsel for , and T. Z., of counsel [*or, no one appearing*] for in opposition thereto; and due deliberation having been had, now, on motion of A. T., attorney for ;

ORDERED, that the [plaintiff's] attorney deliver to the [defendant's] attorney a bill of the particulars of [*here indicate the points desired, as in Forms Nos. 1029, 1031 to 1036a*] within days from the service of this order; or in default thereof that he be precluded from giving evidence at the trial in support of said [counter-claim]; and in the meantime, let all further proceedings in this action on the part of the [plaintiff] be stayed. [And it is further ordered, that the—defendant—have days further time after the time above limited, or from the service of such bill if sooner served, within which to [answer the complaint, or to demur, or make such motion as he may be advised].

[*Authentication, as in Form 493, p. 4, of this Vol.*]

Form No. 1039.

Bill of particulars.

[*Title of court and action.*¹]

The following is a bill of particulars of the claim for which this action is brought [*or*, the counter-claim in the answer herein is set up—*or*, of the matters called for by the demand—*or*, order—made herein the day of , 18]:²

[*Here set out the items with precision and certainty; and if any of the items or their dates cannot be given, state that fact, giving the reason for such omission. For instance, in an action for money paid, thus:*]

The defendants, composing the firm of B. & H.,

To the plaintiff, Dr.

For the following remittances of E. M., the plaintiff, from New York, to B. C. & Co., at New Orleans, for the use of the defendants B. & H., of New Orleans, at their, the said B. &

¹ It is not essential that the bill have a caption; and hence an error in inserting a caption which wrongly designates the defendant, may be disregarded if he has not been misled. *Benson v. Brown*, 10 *Wend.*, 259. Where the non-joinder of a joint-debtor is waived by omitting to plead it, the objection that the bill was not made out against him also, falls too. *Gay v. Cary*, 9 *Cow.*, 44.

² The account should state all the facts which the party will prove. *Kellogg v. Paine*, 8 *How. Pr.*, 329. The dates must be stated in the bill; and if the party cannot state the precise day, he must state the year and the month, if he can (*Humphry v. Cottleyou*, 4 *Cow.*, 54; s.p., *Morgen v. Burrough*, (N. J., 1887) 8 *Atlan. Rep.*, 517); and the time stated in the bill is material. *Quin v. Astor*, 2 *Wend.*, 577; but compare *Duncan v. Ray*, 19 *id.*, 530. A general allegation that the plaintiff claims the same items for every other date within a long period, is not a fair compliance.

An item of "cash" must show whether it was lent to defendant, or paid for him, or received by him for plaintiff's use. A charge of a note should show whether it was made by defendant, or if made by some one else, whether it was sold to the de-

fendant or delivered to him for collection. *Stanley v. Millard*, 4 *Hill*, 50.

Stating an item as "amount advanced" is not enough. *Moran v. Morrissey*, 18 *Abb. Pr.*, 131; s. c., less fully, 28 *How. Pr.*, 100. Where the plaintiff has already rendered an account of the items of his demand, it is sufficient in a bill of particulars to refer to it generally as an account rendered, without restating the items, unless the court order further particulars (*Goodrich ads. James*, 1 *Wend.*, 289); but a reference to balance due on settlement, &c., was held insufficient in *Wetmore v. Jennys*, 1 *Barb.*, 53.

Plaintiff is not to be required to include the items with which he credits the defendant. *Ryckman v. Haight*, 15 *Johns.*, 222; *Williams v. Shaw*, 4 *Abb. Pr.*, 209 (actions for price of goods sold). And see *Case v. Pharis* (1887), 8 *N. Y. State Rep.*, 548. The English practice requires him to do so. 1 *Tidd's Pr.*, 598. It may be otherwise of an action for the balance of an account, as stated.

A bill containing items of service sued for but not placing a value on any one item, but only on the aggregate—held insufficient. *Colwell v. Ludlam*, 1 *Month. L. Bul.*, 42.

H.'s special instance and request, to be, by the said B. C. & Co., applied to the payment of the indebtedness of B. & H., and which several sums were in the course of mail received and realized by them, and applied to the payment of the business and indebtedness of the said firm of B. & H.

1861, May 3. Checks of the Mechanics' Bank of New York to the branch bank of New Orleans, remitted from New York to New Orleans by the plaintiff, as above mentioned, to B. C. & Co., on this day, for account of the defendant, and at the defendant's request, . . . \$3,000 00

[*And other items in like detail.*]

Also interest on the aforesaid several amounts, from the dates of their respective remittances and payment.¹

[*Date.*] [*Signature and office address of*],
[*Address*] To , Attorney for .
Attorney for .

Form No. 1040.

Verification of bill of particulars, or account referred to in pleading.²

[*Venue.*]

A. B., of said city, being duly sworn, says: that the foregoing is a correct bill of particulars of the demand for which this action is brought [*or*, of the counter-claim set up in his answer herein—*or*, of the account referred to in the complaint—*or*, answer herein].

[*Jurat.*] [*Signature.*]

Form No. 1041.

Affidavit to obtain further account or further bill of particulars.³

[*Title of court and action.*]

[*Venue.*]

Y. Z., the [defendant] herein, being duly sworn, says:

¹ This Form was sustained in *Matthews v. Hubbard*, 47 *N. Y.*, 428.

² If the party does not make the verification, add clauses such as are required in verification of a pleading by another than the party. See p. 439, &c. See *Baremore v. Taylor*, 53 *Super. Ct. (J. & S.)*, 119.

omitted, when the party is entitled to a verified bill or account, return the paper with notice of the objection. Volume I, pp. 426, 433; *Dennison v. Smith*, 1 *Cal.*, 437; *Paine v. Smith*, 32 *Wise.*, 335; *Hoag v. Weston*, 10 *Civ. Pro. R. (Browne)*, 92.

³ If a bill is defective, the applicant should apply for an order for a

If verification is insufficient, or

that the [plaintiff] herein, in pursuance of an order requiring him so to do [*or, voluntarily—or, on request of deponent's attorney*], served upon the [defendant's] attorney a copy of the account alleged in [plaintiff's complaint] [*or, served on, &c.,* a bill of particulars], of which the annexed is a copy; and that said copy-account [*or, said bill*] is defective, and insufficient to enable the [defendant] to [answer or to proceed to trial], in that it does not state the dates of the several items [*or otherwise specifying the defect*¹]: and that a further and better account [*or, bill of particulars*] in this respect is essential and material to the defense of the defendant in [*or, the prosecution of*] this action [*state reason, or say: for the reasons stated in the affidavit on which said bill of particulars was ordered*].

[*Jurat.*]

[*Signature.*]

Form No. 1042.

Notice of motion to compel the service of a further account or bill of particulars.

[*As in Form 488, p. 1, substituting for the italic clause between the ‡ and the ¶, requiring the said—plaintiff—to serve a further bill of particulars of—indicating the respects in which further particularity is desired, as in Forms 1031–1036, of this Vol.*]

Form No. 1043.

Order for further account or further bill of particulars.

[*As in Form 1029, inserting the word “further,” before “bill of particulars;” or, substituting there the words “further account or bill of particulars of the matters of account referred to in the complaint herein.”*]

Form No. 1044.

Notice of motion to preclude evidence for defect of account or particulars.

[*Title of court and action.*]

Please take notice, that on the original and further bill of

further bill, unless it is so clearly evasive as to justify a dismissal of the action. *Purdy v. Warden*, 18 *Wend.*, 671; *Stanley v. Millard*, 4 *Hill*, 50; *Commonwealth v. Davis*, 11 *Pick.*, 135.

¹ Not perhaps essential in the notice if the defect is apparent on the face of the bill. *Colwell v. Spofford*, *N. Y. Daily Reg.*, Jan. 26, 1881, *Barrett, J.*

particulars and the orders for the same heretofore served by the [plaintiff] upon the attorney of the [defendant]; and upon the affidavit of T. Z., verified the day of , 18 , a copy of which is herewith served:¹

[Or, that on the order, a copy of which was served on—plaintiff's—attorney on the day of , 18 , requiring the—plaintiff—to serve a—further—bill of particulars on the attorney for the—defendant—on or before the day of , 18 , and on the affidavit of M. N., verified the day of , 18 , that no such bill has been served:]

The undersigned will move this court at a special term thereof to be held at [chambers] at the County Court House [or, City Hall], in the city of , on the day of , at the opening of the court, [or, o'clock in the noon,] or as soon thereafter as counsel can be heard, for an order precluding the [plaintiff] from giving evidence, on the trial of this action, of the following matters alleged or referred to in his [complaint—or, of the following items contained in the account—or, bill of particulars—or, further account—or, bill, &c.], served by said [plaintiff] upon the attorney of the [defendant], to wit [*here specify particularly the matters not stated, or defectively stated*], or for such other or further relief as may be just, and for the costs of this motion.

[Date.] [Signature and office address of]
Attorney for [moving party].

[Address] To
Attorney for [adverse party].

Form No. 1045.

Order precluding evidence at the trial.

At a special term [&c.,
as in Form 493, p. 4].

[Title of action.]

On reading [and filing] the affidavit of T. Z., verified the day of , 18 , and the original and further bills of particulars herein, and the orders for the same [or, the order, a

¹ This is the better practice, rather than to rely on excluding the evidence at the trial, without a previous order to exclude. *Moore v. Belloni*, 42 *Super. Ct. (J. & S.)*, 184 (refusing to exclude items of account because no

such order was obtained); *Whitehall, &c., R. R. Co. v. Myers*, 16 *Abb. Pr., N. S.*, 34 (bill of particulars, holding it error to exclude at the trial if no previous order was obtained).

copy of which was served on _____, on the _____ day of _____, 18____, requiring the _____ to serve a further account—*or*, bill of particulars—on or before the _____ day of _____, 18____, and the affidavit of T. Z., verified the day of _____, 18____. that no such further account—*or*, bill—has been served]; and after hearing T. Z., of counsel for the [defendant], and A. T., of counsel [*or*, no one appearing for the plaintiff] in opposition; now, on motion of T. Z., attorney for the [defendant]:

ORDERED, 1. That the [plaintiff] be precluded from giving any evidence on the trial of this action, in support of the matters whereof he has failed to render a [further or sufficient] bill of particulars indicated in the order [to show cause] above referred to [*or may state them here, as thus*: any evidence of the account and the items thereof mentioned in the answer of the defendant Y. Z. herein, except only so far as may be necessary to establish the single defense of account stated and settled between the parties¹].

2. That the [plaintiff] pay to the [defendant] _____ dollars costs of this motion.

[*Authentication as in Form 493, p. 4 of this Volume.*]

Form No. 1046.

Order striking out complaint, or counter-claim for not obeying order for account or particulars.²

At a special term [dec., as in Form 493, p. 4, of this Volume].

[*Title of action.*]

On reading and filing the affidavit of Y. Z., verified the day of _____, 18____, and the order to show cause granted thereon [*or*, the notice of this motion], dated _____, 18____ [and on proof of due service thereof], and after hearing T. Z., of counsel for [defendant], and A. T. [*or*, no one appearing], for _____ in opposition, and due deliberation having been had; now, on motion of T. Z., attorney for [defendant]:

¹ See *Goings v. Patten*, 1 *Daly*, 168; s. c., 17 *Abb. Pr.*, 339.

² For approval of this practice see *Gross v. Clark*, 87 *N. Y.*, 272, 276; s. c., 1 *Civ. Pro. R.*, 464, and 13 *Week. Dig.*, 434; aff'g 1 *Civ. Pro. R.*, 17; s. c., 11 *Reporter*, 583 (complaint);

Wilson v. Fowler, 44 *Hun*, 89 (counter-claim); *Baremore v. Taylor*, 53 *Super. Ct. (J. & S.)*, 119 (defense). Notice of motion or order to show cause may readily be adapted from Forms 488, 491, and the recitals in 1044.

ORDERED, 1. That the complaint [*or, the counter-claim in the answer*] herein be stricken out, and the [defendant] have judgment dismissing the same with costs [*it is usual to add*¹], provided that if the [plaintiff] within days serve on the [defendant's] attorney a bill of particulars as required by the order of made herein the day of , 18 , and comply in all respects with said order, and pay the costs of this motion below stated, then this motion be denied.²

2. That the [plaintiff] pay to the [defendant] dollars, costs of this motion.

Enter: [*signature of judge with initials of name and title.*]

SECTION II.

MOTION TO COMPEL SEPARATE STATEMENT OF CAUSES OF ACTION, DEFENSES, &c.

FORMS.

(1047.) Notice of motion to compel separate statement of causes of action.

(1048.) Order requiring the plaintiff to separately state and number his causes of action.

Form No. 1047.

Notice of motion to compel separate statement of causes of action.³

[*As in Form 488, p. 1, omitting clause between the † and ‡, and substituting for the italic clause between the † and the ‡ the following:*] that the plaintiff be required to serve an amended complaint in this action wherein he shall set forth, and number the same, his statement of the facts which constitute his alleged cause of action against the defendant [*indicating one, as thus:*] for trespass to the property⁴ of the plaintiff, and wherein he shall set forth separately in another count, and

¹ See *Wetmore v. Jennys*, 1 *Barb.*, 53.

² In case of default draw affidavit of default as in Form 1037, substituting "order to strike out complaint," &c., in place of "affidavit and alternative order for a bill of particulars."

³ Directions as in first note to Form 1049.

⁴ This illustration is taken from *Gunn v. Fellows*, 41 *Hun*, 257, where such a motion was granted. But the decision is questionable. It was there held that while injuries to real and personal property by one and the same tort are regarded as constituting a single cause of action, injuries to the

person by the same tort is a separate cause of action. Compare *N. Y. Code Civ. Pro.*, § 484, subds. 4 and 6; and *Gilbert v. Pritchard*, 46 *Hun*, 46, where it was held that injuries to person and property by the same tort may be stated as one cause of action; and this is the better opinion so far at least as the right to state them as such is concerned; s. p., *Bebinger v. Sweet*, 1 *Abb. N. C.*, 263; s. c., 6 *Hun*, 478. Whether plaintiff can sue on them separately is perhaps another question. There is a different limitation upon the demands. *N. Y. Code Civ. Pro.*, §§ 382, 383.

in brackets following the †, and substituting for the italic clause between the ‡ and ¶ the following:] requiring the complaint [*or, answer*] herein to be made more definite and certain [*here state the respects wherein more certainty is desired, as thus:*¹] by showing the kind, character, amount and value of merchandise stated by the plaintiff to have been shipped to defendant.

[*Or thus:* by describing particularly, by metes and bounds, the premises mentioned therein.]

[*Or, by setting forth any provisions of the charter of the Illinois and St. Louis Bridge Company, and any provisions of the laws of the States of Illinois and Missouri respectively, by or under which it is claimed by the plaintiff that the stockholders of said company are severally liable as alleged in such subdivision of said complaint.*]

[*Or, by stating the nature and grounds of the alleged indebtedness of the defendant to the plaintiff.*]²

Form No. 1050.

Order that pleading be made more definite and certain.

[*Caption (court order) and recitals as in Form 493, p. 4, of this Volume.*]

ORDERED, 1. That within days after service of a copy of this order upon the [plaintiff's] attorney, the [plaintiff] serve upon the [defendant's] attorney a copy of the complaint [*or, answer*] amended [*here state in what respect; see last Form*].

2. That within [the same time] the pay to the [defendant's] attorney dollars costs of this motion.

of the pleading objected to, and before noticing for trial, and before answering, demurring or replying to the pleading, or obtaining any extension of time to do so, unless the right to move be reserved therein.

If it does not appear that the applicant is embarrassed by indefiniteness, &c., apply on affidavit showing how. If order to show cause is asked, add allegations under *N. Y. Gen. Rules*; see p. 2.

If defendant moves make affidavit of merits. *Bingham v. Bingham*, 1 *Civ. Pro. R.*, 166. For Form, see pp. 446, 447, VII.

¹ In analogy to the practice on

special demurrer, for which this motion is a substitute, the notice should point out the defects of the pleading as distinctly as possible. *Gilmore v. Norton*, 10 *Kans.*, 491; *Kerr v. Reece*, 27 *id.*, 338; *O'Connor v. Koch*, 56 *Mo.*, 253; *Carney v. Bernheimer*, 3 *Month. L. Bul.*, 22; *Truesdell v. Hull*, 35 *Minn.*, 468; s. c., 29 *Northw. Rep.*, 72; *Nischke v. Wirth*, 66 *Wis.*, 470; s. c., 28 *Northw. Rep.*, 342.

² Under a motion for judgment as frivolous, and for other relief, irrelevant matter may be struck out. *Thompson v. Erie Railway Co.*, 45 *N. Y.*, 468.

3. That in default of such service and payment the complaint [*or, answer—or specify particular allegations*¹] be stricken out.

[4. Meanwhile let all further proceedings by the plaintiff be stayed.]

5. That the time for the defendant to answer [*or, reply*], demur, or take any other action to which he may be entitled, is extended until the expiration of twenty days after such amended [complaint] shall have been served on his attorneys.

Enter : [*signature of judge by initials of name and title.*]

SECTION IV.

MOTION TO STRIKE OUT A PLEADING OR MATTER THEREFROM.

I. STRIKING OUT PLEADING FOR CONTEMPT. FORMS.

(1051.) Order striking out pleading for refusal of a party to obey an order of the court.

irrelevant, redundant, or scandalous matter.

(1056.) Order striking out irrelevant, redundant, or scandalous matter.

II. STRIKING OUT PLEADING, &C., AS SHAM, &C.

(1052.) Affidavit to move to strike out sham answer or defense.

(1053.) Notice of motion to strike out a sham answer or defense.

(1054.) Order striking out sham answer or defense.

III. IRRELEVANT, REDUNDANT, AND SCANDALOUS MATTER.

(1055.) Notice of motion to strike out

IV. COMPELLING ELECTION.

(1057.) Affidavit in support of motion to compel election.

(1058.) Notice of motion to compel plaintiff to elect between several counts setting forth the same cause of action.

(1059.) Order requiring election between several counts setting forth the same cause of action.

I. STRIKING OUT PLEADING FOR CONTEMPT.

Form No. 1051.

Order striking out pleading for refusal of a party to obey an order of the court.²

At a special term [*dec., as in Form 493, p. 4.*]

[*Title of action.*]

An order having been made by Mr. Justice , in this

¹ See *Hughes v. Chicago, &c., R.W. Co.*, 45 *Super. Ct. (J. & S.)*, 114.

² Sustained in *Richards v. Judd*, 15 *Abb. Pr., N. S.*, 184.

action, on the day of , 18 , requiring the [plaintiff] [state order and refusal, as thus] to appear on the day of , 18 , at o'clock [A.] M., and be examined as a witness herein, and give his deposition, at the instance of the [defendant], pursuant to the Code of Civil Procedure; And the said [plaintiff] having appeared, and having given certain testimony, and the matter having been adjourned from time to time until this day, and the following question among others having been propounded to him, viz. [stating question].

And the said [plaintiff] having refused to answer said question, and thereafter a motion by [defendant] to compel said [plaintiff] to answer said question having been made and heard before Mr. Justice , and he having decided that the [plaintiff] must answer said question which has been propounded, and the same question being again propounded, and the witness having stated, in answer, as follows [stating evasive answer or refusal], and having declined to give any other answer, and the court having decided that said answer was evasive, and that the plaintiff must disclose the [constituent parts of said remedy], and the plaintiff having refused to answer further, and the defendant having moved that the plaintiff's complaint be dismissed, and after reading and filing the evidence taken herein, and the complaint and answer, and the order of Mr. Justice , of , 18 , and the affidavit of L. A. C., dated the day of , 18 , on which said order was founded, and after hearing A. G. H., Esq., of counsel for the defendant, and J. S. W., Esq., for the plaintiff, and due deliberation having been had; now, on motion of the defendant's attorney :

ORDERED, that the [plaintiff's complaint] herein be stricken out [and dismissed¹] with costs.

Enter: [signature of judge by initials of name and title.]

¹ Sustained in *Richards v. Judd*, 15 *Abb. Pr., N. S.*, 184, a case of refusal to answer on examination before trial; *s. p.*, *Walker v. Walker*, 8 *Abb. N. C.*, 436; *s. c.*, 82 *N. Y.*, 260 (neglect to pay alimony, see p. 416 of this Volume); *s. p.*, *Gross v. Clark*, cited on p. 480 of this Volume, as to neglect to serve bill of particulars.

The language of the statute as to examination before trial only contem-

plates "striking out the pleading." The practice has been, in the case of plaintiff's refusal, to add that the complaint be dismissed. When a defendant's answer is stricken out, plaintiff may have judgment as on failure to answer.

For other proceedings in which to obtain such order, see Volume I, p. 540, &c., and pp. 416 and 480 of this Volume.

II. STRIKING OUT PLEADING, &c., AS SHAM, &c.

Form No. 1052.

Affidavit to move to strike out sham answer or defense.¹

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is the plaintiff herein [*or state connection with the cause, means of knowledge, &c.*].

II. That he has read the answer of the defendant Y. Z. herein, and that the defense of [payment] therein set up is wholly and absolutely false; [*state facts as thus*] that the defendant has never paid, or in any way satisfied the demand set up in the complaint, nor any part thereof; nor has he ever paid, by himself or his agents, to the plaintiff, or to any of his agents, any part of the sum alleged by the said answer to have been paid.

III. That the only person ever authorized by deponent to ask or receive money from the defendant is one M. N., whose affidavit is hereto annexed; and that, to the best of deponent's knowledge and belief, no other person ever asked or received anything from the defendant for account of this deponent.

[*Jurat.*]

[*Signature.*]

[*Affidavits in corroboration should be annexed.*]

Form No. 1053.

Notice of motion to strike out a sham answer or defense.²

[*Move the court, as in Form 488, p. 1, of this Volume,*

¹ A verified general denial cannot be struck out as sham. *Wayland v. Tysen*, 45 N. Y., 281, rev'g *id.* as *Wayland v. Lysen*, 9 Abb. Pr., N. S., 79. Nor can a verified denial of a material and essential allegation of the complaint. *Roby v. Hallock*, 5 Abb. N. C., 86; s. c., 55 How. Pr., 412.

A denial on information and belief, or of knowledge or information sufficient to form a belief, may be struck out on evidence that the trans-

actions alleged were had personally with the verifying defendant. *Sherman v. Boehm*, 15 Abb. N. C., 254; s. c., 1 How. Pr., N. S., 278; 7 Civ. Pro. R., 34.

So held also where they were matter of record in the county where the party resided. *Wheaton v. Briggs*, 35 Minn., 470; s. c., 29 Northwestern Rep., 170.

² This motion should be made to the court. *N. Y. Code Civ. Pro.*

substituting for the italic matter between the ‡ and the ¶ as follows:] striking out the answer herein as sham [or as thus: the first defense¹ in the answer herein as sham, and the second defense as irrelevant—and, if the case is one in which application to the court for judgment is proper, add and for judgment;—or if, only part being struck out, the remainder is frivolous, may say: and for judgment on the answer as frivolous].²

[*May add: And if such relief be denied, that the said defense in said answer be made more definite and certain as to—specifying what.*]

Form No. 1054.

Order striking out sham answer or defense.

[*Caption (court order) and recitals, according to the case; see Form 493, p. 4, of this Volume.*]

ORDERED, that the answer³ of the defendant Y. Z. in this

§ 538; *Larco v. Casaneuva*, 30 *Cal.*, 560. It may be made any time before trial. *Barker v. Foster*, 29 *Minn.*, 166. And even though the plaintiff has obtained time to reply. *Miln v. Vose*, 4 *Sandf.*, 660.

Delay, if it is not unreasonable, and does not appear to have prejudiced the defendant, is not ground for denying the motion. *Tibballs v. Selfridge*, 12 *How. Pr.*, 64.

¹ A counter-claim, since it is not a mere "defense," cannot be stricken out as sham. *Collins v. Suau*, 7 *Robt.*, 94; s. p., *Briggs v. Freedman*, 9 *Civ. Pro R. (Browne)*, 73. Nor a demurrer. *Kain v. Dickel*, 46 *How. Pr.*, 208. Nor allegations of the complaint. *Lowe v. Thompson*, 86 *Ind.*, 503.

² It is common practice to include in an order striking out the whole answer as sham, a direction for judgment. Whether this is proper, or whether the plaintiff should be left to apply to the clerk, or to move on notice, as the case may require, for judgment for failure to answer, compare *Fuller v. Claffin*, 93 *U. S.*, 14; *Kreitz v. Frost*, 5 *Abb. Pr.*, N. S., 277; *People v. McCumber*, 18 *N. Y.*, 315, aff'd 27 *Barb.*, 632, which was aff'd in *id.*, 638; s. c., 15 *How. Pr.*, 186;

Potter v. Carreras, 4 *Robt.*, 629; *Leferts v. Snediker*, 1 *Abb. Pr.*, 41; *Tharin v. Seabrook*, 6 *S. C.*, 113; *De Forest v. Baker*, 1 *Abb. Pr.*, N. S., 34; s. c., 1 *Robt.*, 700.

A motion to strike out as sham may be joined with a demand for judgment for frivolousness of the answer. *People v. McCumber*, 18 *N. Y.*, 315 (see *supra*). Or, in the alternative, to make more definite and certain. *Sherman v. Boehm*, 15 *Abb. N. C.*, 254.

A motion to strike out a defense as sham may be joined with a demand for judgment for frivolousness of another defense. *Kay v. Whittaker*, 44 *N. Y.*, 565. And in such a case it is best to state which portions are objected to as sham and which frivolous. *Bailey v. Lane*, 13 *Abb. Pr.*, 354; s. c., 21 *How. Pr.*, 475. See also *Jarvis v. McBride*, 18 *Wisc.*, 316.

As to what relief will be granted under the prayer for general relief, see Volume I, pp. 184, 185, and *Fellows v. Muller*, 38 *Super. Ct. (J. & S.)*, 137.

³ Part of an entire answer or separate defense cannot be struck out. *Winslow v. Ferguson*, 1 *Lans.*, 436; *Collins v. Coghill*, 7 *Robt.*, 81; *Bell v. Ogden*, 13 *Abb. Pr.*, 93, note; s. p.,

action be stricken out¹ as sham [or if the motion be to strike out one defense as sham, and for judgment on another as frivolous:² that the first defense be stricken out as sham, and that the plaintiff have judgment on the second defense as frivolous], with dollars costs of this motion.

Enter: [signature of judge by initials of name and title.]

III. IRRELEVANT, REDUNDANT, AND SCANDALOUS MATTER.

Form No. 1055.

Notice of motion to strike out irrelevant, redundant, or scandalous matter.³

[As in Form 488, p. 1, of this Volume, substituting for the italic matter between the ‡ and ¶ the following:] striking out [designate what,⁴ as thus:] all of the third paragraph⁵ of

Sherman v. Boehm, 15 Abb. N. C., 254.

¹ If the answer is frivolous, the order should not be that it be struck out, but that it be overruled, and plaintiff have judgment. Briggs v. Bergen, 23 N. Y., 162; People v. McCumber, 18 id., 315 (see last Form).

It is not usual to give leave to answer anew.

² If anything of the answer is left, an order granting judgment absolutely in favor of the plaintiff would be improper. Strong v. Sproul, 53 N. Y., 497. See also note to last Form.

³ Directions as in note 1 to Form 1049

Under the present practice the court, in the exercise of its discretion, usually denies the motion unless it appears that the matter aggrieves or embarrasses the moving party; for clear irrelevancy or redundancy is regarded as presumptively harmless. Town of Essex v. The New York & Canada R. Co., 8 Hun, 361. Therefore, if the matter is not scandalous, nor on its face embarrassing, facts showing how the party is embarrassed should be stated in an affidavit.

It is the better practice to state also the condition of the cause so as to show that the motion is in time; but it is held that this is not essential, for objection to delay is matter of oppo-

sition. Barber v. Bennett, 4 Sandf., 705; Roosa v. Saugerties & Woodstock Turnpike-road Co., 8 How. Pr., 237.

⁴ The notice must specify the precise parts which are to be stricken out. Blake v. Eldred, 18 How. Pr., 240; Benedict v. Dake, 6 id., 352; Bryant v. Bryant, 2 Robt., 612; People v. Empire, &c., Mining Co., 33 Cal., 171; Pearce v. McIntyre, 29 Mo., 423; Jackson v. Bowles, 67 id., 609; Robinson v. Rice, 20 Mo., 229 (holding that a designation of the objectionable matter by a reference to the line and page of the original pleading is not sufficient; see Volume I, p. 95); O'Connor v. Koch, 56 Mo., 253.

A counter-claim cannot be stricken out as irrelevant or redundant. Fetterich v. McKay, 47 N. J., 426; Walter v. Fowler, 85 N. Y., 621; Harway v. Mayor, 1 Hun, 628.

Nor an entire answer or defense. Fasnacht v. Stehn, 5 Abb. Pr., N. S., 328.

Separate allegations should not be struck out so as to leave what remains unintelligible, or consisting of admissions which are qualified by matter struck out. Collins v. Coggill, 7 Robt., 81.

Nor the prayer for relief. Averill v. Taylor, 5 How. Pr., 476; 1 Code R., N. S., 213.

⁵ If the motion relates only to a

the complaint [*or, answer*] herein, and so much of the fifth paragraph as follows the words [*quote a few preceding words*], and precedes the words [*quote a few subsequent words*], as irrelevant¹ [*or, redundant—or, as irrelevant and redundant¹—or if the application be in whole or in part for scandalousness, substitute or add: as scandalous²*].

Form No. 1056.

Order striking out irrelevant, redundant, or scandalous matter from a pleading.

[*Caption (court order) and recitals, according to the case, as in Form 493, p. 4, of this Volume.*]

ORDERED, that so much of the matter³ contained in the paragraph of the [complaint] in this action as follows the words [*quote a few preceding words*], and precedes the words [*quote a few subsequent words*], in said paragraph, be stricken out as redundant [*or, irrelevant—or, redundant and irrelevant—or add or substitute: as scandalous*].

[*If the pleading is on file, and if the omission does not affect verification, and leaves the pleading sensible, may add direction to clerk, as in second paragraph of Form 23, Volume I, p. 60. Otherwise may allow amendment as thus:*] That within days after the service of this order, and upon payment of the costs hereinafter mentioned, the [plaintiff] may⁴ re-serve upon the [defendant] the said [complaint] herein, amended by the omission of the aforesaid matter stricken out as herein ordered [and with such other amendment as he may be advised], and thereupon the [defendant] shall have days

part of a cause of action or defense, indicate it distinctly and not merely by the folios. Volume I, p. 95; Commonwealth v. Melugin, 4 Ky. L. Rep., 265.

¹ The ground of objection must be specified. Bowman v. Sheldon, 5 Sandf., 657; Lucas v. Smith, 54 Ind., 530; Ricketts v. Dorrell, 59 id., 427.

² See Volume I, pp. 93, 94; N. Y. Code Civ. Pro., § 545; Bowman v. Sheldon, 5 Sandf., 657. Opdyke v. Marble, 44 Barb., 64; 18 Abb. Pr., 266; aff'd, id., 375.

As to charging attorney with costs,

see Cracknall v. Janson, L. R., 11 Ch. D., 1; 48 L. J. Ch., 168; 39 L. T., 31; 27 W. R., 55; and for form of direction on this point, Volume I, p. 288.

³ Unlike a demurrer, which admits the allegations, this motion may be sustained as to part and denied as to the residue. De Santes v. Searle, 11 How. Pr., 477.

⁴ It is in the discretion of the court to compel the service of an amended pleading. Dorch v. Chipewa County, 60 Wisc., 227.

in which to plead or demur thereto [or make such application as he may be advised thereon].

[*If the matter be scandalous, may direct removal from files; see Volume I, p. 322, Form 147. For direction charging attorney with costs, same page, paragraph 2.*]

IV. COMPELLING ELECTION.

Form No. 1057.

Affidavit in support of motion to compel election.¹

[*Title of court and action.*]

[*Venue.*]

Y. Z. being duly sworn, says:

I. That he is the defendant herein [*or state relation to cause, and means of knowledge.*]

II. That only one transaction of the nature mentioned in either of the supposed causes of action set up in the complaint ever occurred between said defendant and the plaintiff, and that the allegations in both of the said supposed causes of action relate in reality to one and the same transaction.

[*Jurat.*]

[*Signature.*]

Form No. 1058.

Notice of motion to compel plaintiff to elect between several counts setting forth the same cause of action.

[*As in Form 488, p. 1, of this Volume, omitting clause in brackets after the †, and substituting for the italic matter*

¹ Since recognition of a plaintiff's right to state the same demand, in separate causes of action, whenever there is doubt as to the aspect in which he is entitled to relief (*Velie v. Newark City Ins. Co.*, 12 *Abb. N. C.*, 309; s. c., 65 *How. Pr.*, 1), this motion is rarely to be sustained.

Misjoinder of distinct causes of action is not ground for this motion (*Woodman v. Davis*, 32 *Kans.*, 344; 4 *Pacif. Rep.*, 263), but the remedy is demurrer. See p. 460 of this Volume.

To sustain the motion it must be clear from the moving papers that but one cause is really pleaded. *Smith v. Douglass*, 15 *Abb. Pr.*, 266. An affidavit is unnecessary (*Ford v. Mattice*, 14 *How. Pr.*, 91), except when the cause of action or defense is repeated in such manner that the pleading does not show upon its face that the two are really identical (*Lackey v. Vanderbilt*, 10 *id.*, 155), or unless an order to show cause is asked (see p. 2), or an extension or stay (see p. 447).

between the ‡ and the ¶ the following:] requiring the plaintiff to elect between the first stated cause of action and the second stated cause of action in the complaint, and state which he will rely on ; and that on such election the other cause of action be stricken out ; or in default of so electing, then the second cause of action be stricken out as redundant.

Form No. 1059.

Order requiring election between several counts setting forth the same cause of action.

[Caption (court order) and recitals according to the case, as in Form 493, p. 4, of this Volume.]

ORDERED, 1. That the plaintiff, within days after the service of a copy of this order, elect between the first stated cause of action and the second stated cause of action in his complaint herein [by paying the costs hereinafter mentioned and serving upon the defendant's attorney an amended complaint containing only a statement of the cause of action so elected].

2. That in default of so electing, the [second] cause of action be stricken out as redundant [*or, irrelevant, or both*].

3. That the plaintiff pay to defendant's attorney dollars costs of this motion.

Enter : [*signature of judge by initials of name and title.*]

ARTICLE X.

REQUIRING REPLY.

FORMS.

(1060.) Affidavit to move to compel a reply (to an answer setting up statute of limitations).

(1061.) Notice of motion to compel reply.

(1062.) Order compelling a reply.

Form No. 1060.

Affidavit to move to compel a reply (to an answer setting up statute of limitations).¹

*[As in Form 1028, to the *.]*

II. That the summons and complaint herein were served upon him on the day of , 18 , which is more than six years from the time the cause of action accrued on the promissory note referred to in said complaint as the first cause of action therein.

III. That on the day of , 18 , the attorney for deponent served upon the plaintiffs' attorney an answer setting up the statute of limitations to the said cause of action on said promissory note.

IV. That the deponent is advised by counsel that it is necessary for the proper defense of this action that he should be informed before the trial in what way the plaintiff expects to defeat the operations of the statute of limitations, and that a reply for that purpose is necessary and proper.

V. *[Oath to merits as on pp. 446-7, paragraph VII.]*

VI. *[If order to show cause is asked, add as directed on p. 2.]*

[Jurat.]

[Signature.]

Form No. 1061.

Notice of motion to compel reply.

[Title of court and action.]

Please take notice, that upon [the affidavit, a copy of which

¹ See *Hubbell v. Fowler*, 1 *Abb. Pr.*, N. S., 1.

is herewith served, and] the pleadings in this action, the undersigned will move this court at a special term thereof, to be held [at chambers] at the county court house [or, city hall], in the city of , on the day of , 18 , at the opening of the court [or, at o'clock in the noon], or as soon thereafter as counsel can be heard, for an order requiring the plaintiff to reply to the answer herein [or if to a part only, indicate what,¹ as thus: to the new matter set up in the answer herein—or, to the first defense in the answer herein—or, to such of the answer herein as sets up the statute of limitations as a defense to this action], or for such other and further relief as may be just.

[Date.] [Signature and office address of],
Attorney for [moving party].
[Address], To
Attorney for [adverse party].

Form No. 1062.

Order compelling a reply.

[Title (court order) and recitals, according to the case. See Form 493, p. 4.]

ORDERED, That within twenty days from service of a copy of this order, the plaintiff reply to the new matter contained in the answer herein [or, to the new matter contained in that part of the answer herein which commences with the words "the defendant further answering," in paragraph VI, to and including the words "with all interest thereon," to paragraph X].¹

And it is further ordered, that the defendant recover of the plaintiff dollars costs of this motion.

Enter: [signature of judge, by initials of name and title.]

¹ It is not safe to rely on a reference by the folios. See Vol. I, p. 95.

ARTICLE XI.

JUDGMENT ON THE PLEADINGS.

I. ON ADMISSIONS.

FORMS.

- (1063.) Notice of motion for judgment on complaint and answer, which raise only a question of law.
- (1064.) Notice of motion for judgment for relief admitted by the answer to be due.
- (1065.) Order for judgment for sum admitted by the answer to be due.
- (1066.) Admission by plaintiff of defendant's counter-claim.
- (1067.) Judgment entered by clerk

on admitted cause of action, less admitted counter-claim.

(1068.) Order for judgment by the court, on admitted cause of action, less admitted counter-claim.

II. ON FRIVOLOUS PLEADING.

- (1069.) Notice of motion for judgment on a frivolous pleading.
- (1070.) Order for judgment on a frivolous pleading.
- (1071.) The same; granting leave to amend.

[For judgment on default of pleading, or on a trial of the issues whether of law or fact, see Trial and Judgment.]

I. ON ADMISSIONS.

Form No. 1063.

Notice of motion for judgment on complaint and answer, which raise only a question of law.¹

[*Title of court and action.*]

Please take notice, that on the pleadings [*and may specify other proceedings*] in this cause [and on the records of this court, referred to in the complaint and answer], the undersigned will move this court, at a special term thereof, to be held [at chambers] at the county court house [*or*, city hall], on the day of , 18 , at the opening of court [*or*, at o'clock in noon], or as soon thereafter as counsel can be heard, for judgment as prayed for in the complaint, or for such further or other relief, or such order as to the court may seem proper.

[*Date.*]

[*Signature and office address of*],
Plaintiff's attorney.

[*Address*] To ,
Attorney for .

¹ Where there is no issue to be determined by evidence, and no trial being necessary, beyond an application of the law to the facts, plaintiffs

apply to the courts, at special term, for judgment on the pleadings. *People v. Northern R. R. Co.*, 42 N. Y., 217; aff'g 53 Barb., 98.

Form No. 1064.

Notice of motion for judgment for relief admitted by the answer to be due.¹

[*Title of court and action.*]

Please take notice, that on the pleadings in this cause² the undersigned will move this court at a special term thereof, to be held [at chambers] at the county court house [or, city hall], on the day of , 18 , at the opening of court [or, at o'clock in the noon], or as soon thereafter as counsel can be heard, for an order granting judgment for [the sum of dollars³], admitted by the answer herein to be due the plaintiff [and directing that the action herein be severed; and, if the plaintiff so elect, that it be continued as to the remainder of the claim set up in the complaint, with like effect, as to all subsequent proceedings, as if it had been originally brought for the remainder of the claim], or for such other and further relief as may be just [with the costs of this motion].

[*Date.*]

[*Signature and office address of*],

Attorney for [moving party].

[*Address*] To ,

Attorney for [adverse party].

Form No. 1065.

Order for judgment for sum admitted by the answer to be due.

[*Title (court order) and recitals, according to the case; see Form 493, p. 4.*]

ORDERED, that the above-named action may be severed; that judgment be entered for the plaintiff for [*specify precisely the relief to which the plaintiff is entitled by reason of the*]

¹ Under *N. Y. Code Civ. Pro.*, § 511, application for this discretionary order must be made to the court, and upon general principles should be made upon notice, although the statute does not expressly provide for notice. See Vol. I, pp. 118-120. And the court have power to grant it without notice. *Shaw v. Coleman*, 3 *N. Y. State Rep.*, 534.

For another remedy, where possession is admitted, and an order en-

forcible by proceedings for contempt may be had, see p. 248 of this Vol.

² Usually an affidavit is not essential, unless an order to show cause is asked, in which case, under the New York rule, there should be an affidavit, for the requirement of which see Form 490, p. 2, of this Vol.

³ May ask special or equitable relief if the ground therefor is admitted. *Hall v. Holt*, 25 *Hun*, 277.

*admission*¹], and that, if the plaintiff within days after the entry of this order shall so elect, and shall within that time serve upon defendant's attorney notice of such election [and shall stipulate, &c., *as may be required*], the action may be continued against the defendant with like effect as to the subsequent proceedings as if it had been originally brought for the remainder of the claim made in the plaintiff's complaint and not thus admitted.

And in default of such election the action as to the remainder of said claim shall be dismissed, with costs and disbursements as upon a final judgment, together with dollars costs of this motion.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1066.

Admission by plaintiff of defendant's counter-claim.

[*Title of court and action.*]

The plaintiff in the above-entitled action hereby admits the counter-claim interposed by the defendant's answer to the [first] cause of action stated in plaintiff's complaint.

[*Date.*] [*Signature and office address of*],
[*Address*] To , Plaintiff's attorney.
 Defendant's attorney.

[*Under N. Y. Code Civ. Pro., § 512, notice of this is not necessary; filing it justifies entry of judgment as to the excess, as if on default.*]

Form No. 1067.

Judgment entered by clerk on admitted cause of action, less admitted counter-claim.

[*Title of court and action.*]

The plaintiff having filed with the clerk a statement dated the day of , 18 , admitting the counter-claim contained in the answer of the defendant [*or, defendants, naming them*], now, on motion of A. T., attorney for the plaintiff:

¹ For the rule where the recovery is less than 50 dollars, see *Rice v. Childs*, 28 *Hun*, 303.

IT IS ADJUDGED, that the plaintiff recover of the defendant [or, defendants, *naming them*] dollars, being the excess of the plaintiff's claim over the said counter-claim, with dollars costs of this action and dollars disbursements, making together dollars.

[*Under N. Y. Code Civ. Pro., § 511, this is the proper Form in a case where judgment can be entered by the clerk without application to the court; see § 1212.*]

Form No. 1068.

Order for judgment by the court, on admitted cause of action, less admitted counter-claim.

At a special term [*&c.*,
as in Form 493, p. 4].

[*Names of parties.*]

The defendant herein, Y. Z., having by his answer admitted the plaintiff's claim, but setting up a counter-claim for the sum of dollars, which is less than the claim set forth in plaintiff's complaint herein, and the plaintiff having filed with the clerk of this court an admission in writing of the said counter-claim, duly signed according to the rules and practice of this court, now, on motion of A. T., attorney for said plaintiff:

IT IS ORDERED AND ADJUDGED, that A. B., the plaintiff herein, recover from Y. Z., said defendant, the sum of dollars, with interest from the day of , 18 , being the excess of said plaintiff's claim over and above the amount of said counter-claim, together with his costs and disbursements of this action to be taxed by the clerk of this court, and that the plaintiff have execution therefor.

Enter: [*signature of judge, by initials of name and title.*]

[*Under N. Y. Code Civ. Pro., § 511, this is the proper Form where application to the court for judgment is necessary; see § 1215.¹*]

¹ S. P., under Code Pro., § 246; Robbins v. Watson, 22 How. Pr., 293.

II. ON FRIVOLOUS PLEADING.

Form No. 1069.

Notice of motion for judgment on a frivolous pleading.¹

[*As in Form 488, p. 1, of this Volume, substituting for the italic matter between the ‡ and the ¶ as follows:*²] overruling the answer [or, demurrer—or, reply³] herein as frivolous, and for judgment thereon⁴ [or, striking out the defense in the answer herein as sham,⁵ and for judgment on the remainder as frivolous].

Form No. 1070.

Order for judgment on a frivolous pleading.

[*Caption and recitals according to the case; see Form 492 or 493, p. 4, of this Volume.*]

IT IS ORDERED AND ADJUDGED, that the answer [or other pleading] of the [defendant] herein be overruled⁶ as frivo-

¹ By *N. Y. Code Civ. Pro.*, § 537, this motion may be made to the court or judge thereof upon five days notice to the adverse party; and in the City Court of New York two days notice. *Id.*, § 3161.

And the court cannot shorten this time by order to show cause. *Law v. Maher*, 9 *Week. Dig.*, 38; *Foot v. Carpenter*, 7 *Wisc.*, 395.

The motion is not premature before the adverse party's time to amend of course has expired. *Ross v. Ross*, 25 *Hun.*, 642. Nor too late after that time. *Darrow v. Miller*, 5 *How. Pr.*, 247; s. c., 3 *Code R.*, 241.

² On motion for judgment on the answer "as frivolous," no affidavit is necessary or available to show the frivolousness. *Darrow v. Miller* (*above*). But one is necessary if order to show cause, or extension of time to reply, is asked. As to its requisites, see pp. 2, 466, and 467.

³ A counter-claim cannot be struck out as frivolous. *Fettretch v. McKay*, 47 *N. Y.*, 426; s. c., 11 *Abb. Pr.*, *N. S.*, 453.

The remedy in such a case is by

demurrer (461) or motion to make definite (p. 482). *Cooper v. Howe*, 16 *Hun.*, 502; *Curtis v. Sprague*, 41 *Cal.*, 55.

⁴ Where the prayer was for such other order as the justice shall deem proper, held that judgment for the frivolousness of the answer could not be granted. *Darrow v. Miller*, 5 *How. Pr.*, 247; s. p., *Rae v. Washington Mutual Ins. Co.*, 6 *id.*, 21.

⁵ The application may be joined with a motion to strike out as sham, but in such case the application must be made to the court. *Berrigan v. Oviatt*, 3 *How. Pr.*, *N. S.*, 199; *Howell v. Ferguson*, 87 *N. C.*, 113; and affidavit will be necessary.

It is better to specify which are claimed to be frivolous and which sham, but in *Bailey v. Lane*, 13 *Abb. Pr.*, 354, modifying 21 *How. Pr.*, 475, this was held not essential.

⁶ A frivolous pleading is not struck out for frivolousness. *Briggs v. Bergen*, 23 *N. Y.*, 162; *Strong v. Sproul*, 53 *N. Y.*, 497, rev'g 4 *Daly*, 326. *Contra* in Wisconsin. *Malone v. Ro-by*, 62 *Wisc.*, 459.

lous *; and that the [plaintiff] have judgment thereon for the relief demanded in the complaint [*or*, counter-claim], with the costs of this action, and dollars costs of this motion.¹

[*Authentication; see Form 491, p. 3, of this Volume.*]

Form No. 1071.

The same; granting leave to amend.²

[*As in preceding Form to the asterisk*] with leave to the defendant to answer [*or*, to the plaintiff to reply—anew] within days after service of this order, upon [*state terms as thus*: the payment of dollars costs of this motion³]; and that if he fail to do so, the [plaintiff] have judgment thereon for the relief demanded in the complaint [*or*, counter-claim], with costs of this action, and dollars costs of this motion.

[*If a writ of inquiry is necessary to assess damages,⁴ may add:*] And it is further ordered and adjudged, that if the said [defendant] fail within days after service of this order, to serve an amended answer as aforesaid, the damages sustained by the [plaintiff] be assessed by a jury, and that a writ of inquiry be for that purpose issued, directed and delivered to the sheriff of the [city and] county of , and that for his damages so assessed, together with his costs to be taxed, plaintiff have judgment against the defendant.

[*Authentication; see Form 491, p. 3, of this Volume.*]

¹ Compare *Hill v. Simpson*, 11 *Abb. Pr.*, *N. S.*, 343; *Whitman v. Nicoll*, 16 *id.*, 329; *s. c.*, 49 *How. Pr.*, 88; *N. Y. Code Civ. Pro.*, §§ 3251, 537, as am'd in 1879, and § 3239.

² Where it appears that the answer was put in, in good faith, and merits are properly sworn to, an amended answer may be allowed upon terms. *Witherspoon v. Van Dolar*, 15 *How. Pr.*, 266; *Fales v. Hicks*, 12 *How. Pr.*,

153. But an oath to merits is required in order to get leave. *Appleby v. Elkins*, 2 *Sandf.*, 673; 2 *Code R.*, 80; *Bk. of Lowville v. Edwards*, 11 *How. Pr.*, 216. For Form see pp. 466, 467, VII.

³ *N. Y. Com. Pl., Sp. T.*, 1871; *Bernhard v. Kapp*, 11 *Abb. Pr.*, *N. S.*, 342.

⁴ *Lane v. Gilbert*, 9 *How. Pr.*, 150; *Gilbert v. Rounds*, 14 *id.*, 46.

CHAPTER XI.

PRACTICE IN REFERENCE TO PARTIES.

ARTICLE I.—OBTAINING ADDRESS OF ADVERSE PARTY.

II.—PROCEEDINGS AS TO CHANGES IN PARTIES.

ARTICLE I.

OBTAINING ADDRESS OF ADVERSE PARTY.

Form No. 1072.

Order that attorney disclose his client's address.¹

[*Title (court order) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, 1. That the plaintiff hereby is required to disclose to the defendant's attorney the place and street and number of plaintiff's residence within days after service on plaintiff's attorney of a copy of this order.

¹ The power of the court to require a party to disclose his residence is the subject of some difference of opinion. It is clear that the court may require either party to disclose his address as a condition of being allowed to proceed actively in the cause, and this will usually be effectual with a plaintiff, or a defendant seeking affirmative relief. In an unreported case, Lawrence, J., denied a motion to compel the attorney to give his client's address, because the attorney made affidavit that he was unable to do so, his client being absent; but nevertheless stayed all proceedings on the client's part until he should return to the city and submit to examination under the order which it was sought to serve on him. See also Olmstead v. Wehle, 18 *Weekly Dig.*, 486.

For such purpose the order may be served on the attorney.

It is the better opinion that in those cases where the fair administration of justice requires it, the court may order an attorney, being its officer, to disclose his client's address, and punish him for contempt if he refuses.

Whether the pleading of a concealed defendant can be struck out (see p. 484) for the refusal of his attorney to disclose the address, is another question.

In any case the application will be made on affidavit showing necessity, and inability to ascertain the address, and if stay or order to show cause is asked, the usual allegations. See p. 2 and p. 466.

2. That until such address be furnished to defendant's attorney all the proceedings on the part of the plaintiff herein are hereby stayed.

[3. That plaintiff pay to defendant's attorney dollars costs of this motion.]

Enter: [*signature of judge by initials of name and title.*]

ARTICLE II.

PROCEEDINGS AS TO CHANGES IN PARTIES.

[Proceedings to ascertain proper defendants to be joined, and the mode of bringing them in, are in Volume I, p. 699.]

SECTION I.—PLAINTIFF'S PROCEEDINGS AS TO CHANGE.

II.—DEFENDANT'S PROCEEDINGS AS TO CHANGE.

III.—PROCEEDINGS OF A THIRD PERSON TO COME IN.

- | | |
|---|--|
| 1. Actions survive if the cause of action does. | virtue of a new right or liability arising in the action. |
| 2. Power of the court; on assignment, assumption, &c. | 7. — bringing in originally omitted party. |
| 3. — on death. | 8. — bringing in one who has acquired the interest of an original party. |
| 4. — on death of a co-party. | 9. Mode of objecting to omission. |
| 5. — on death of a sole party. | |
| 6. The practice; bringing in one by | |

1. *Actions survive if the cause of action does.*]—Under the new procedure¹ actions no longer abate by any event,² if the cause of action survives.³

In general the cause of action survives if it is on contract⁴ or involves a claim to property,⁵ or is for a wrong done to

¹ *N. Y. Code Civ. Pro.*, § 765. This was also the rule in equity before the Code. *Clarke v. Mathewson*, 12 *Pet.*, 164.

² For the exception recognized in case of the absolute dissolution of a corporation, see *McCulloch v. Norwood*, 58 *N. Y.*, 562; and *Sturges v. Vanderbilt*, 73 *id.*, 384, modifying *Sturges v. Drew*, 11 *Hun*, 136.

³ For the similar test as to assignability, see Vol. I, p. 513.

⁴ *Holsman v. St. John*, 90 *N. Y.*, 461; rev'g 48 *Super. Ct. (J. & S.)*, 306; s. c., 2 *Civ. Pro. R. (Browne)*, 48; and *id. (McCarty)*, 146 (action for money paid).

Otherwise of an action for breach of promise of marriage. *Wade v. Kalbfleisch*, 16 *Abb. Pr., N. S.*, 104; s. c., 58 *N. Y.*, 282; 17 *Am. R.*, 250; aff'g 15 *Abb. Pr., N. S.*, 16 (holding action for breach of promise of marriage not to survive, because not technically "on contract," nor concerning "property rights or interests").

The liability of a surety does not always survive. *N. Y. Code Civ. Pro.*, § 758 *Wood v. Fisk*, 63 *N. Y.*, 245; rev'g 4 *Hun*, 525; *Smith v. Kibbe*, 31 *Hun*, 390, and cases cited.

⁵ Action for accounting. *Halstead v. Cockcroft*, 40 *Super. Ct. (J. & S.)*, 519; rev'g 49 *How. Pr.*, 342.

So an action for dissolution of a partnership and an accounting, although it may abate as to the dissolution, by the death of a partner, continues as to the accounting.

Replevin does not abate by death. *N. Y. Code Civ. Pro.*, § 1736; *Roberts v. Marsen*, 23 *Hun*, 486.

property rights or interests,¹ as for instance deceit by which plaintiff is injured in property.² An action for damages to the person,³ or for any purely personal injury,⁴ or for purely personal relief,⁵ does not survive. One for damages both to the person and the estate, or to property rights or interests, survives in respect to the latter part⁶ of the damages, but not in respect to the former.

2. *Power of the court; on assignment, assumption, &c.*—Upon a transfer of right or devolution of liability⁷ (except by

¹ *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 *N. Y.*, 192; s. c., 31 *Am. R.*, 549; 56 *How. Pr.*, 465; aff'd *id.*, 32; reaff'd in 83 *N. Y.*, 595; rev'g 19 *Hun*, 341 (husband's action for loss of wife's services by injury by defendant's negligence, and for medical expenses, survives, for this affects pecuniary rights).

But a parent's action for damages for seduction of daughter was held not to be within this rule, but to abate, in *Holliday v. Parker*, 23 *Hun*, 71.

Heinmuller v. Gray, 13 *Abb. Pr.*, *N. S.*, 299; s. c., 35 *Super. Ct. (J. & S.)*, 196 (trespass to personal property).

² *Moore v. McKinstry*, 37 *Hun*, 194 (fraud by which defendant gained a pecuniary advantage).

Shale v. Schantz, 35 *Hun*, 622 (slander affecting credit of firm plaintiff).

So an action for a conspiracy to cheat and defraud survives because it affects property rights. Otherwise of an action of a penal nature to hold a trustee of a corporation liable to its creditor for making a false annual report. *Brackett v. Griswold*, 103 *N. Y.*, 425. Otherwise also of failure to file annual report. *Stokes v. Stickney*, 96 *id.*, 323. But after judgment personal representatives of the deceased can be substituted. *Blake v. Griswold*, 104 *id.*, 613.

But the individual liability of a stockholder for the debts of his corporation by reason of the stock not being full paid, survives. *Chase v. Lord*, 6 *Abb. N. C.*, 258; s. c., 77 *N. Y.*, 1; rev'g 16 *Hun*, 369.

³ *Hegerich v. Keddle*, 99 *N. Y.*, 258 (negligence causing death of intestate). *Moriarty v. Bartlett*, *id.*, 651; rev'g 34 *Hun*, 272 (wife's action under Civil Damage Act); s. p., *Boor v. Lowery*, 103 *Ind.*, 468, 1 *Western Rep.*, 548; s. c., 3 *Northeastern Rep.*, 151, 154.

⁴ *Price v. Price*, 75 *N. Y.*, 244; s. c., 31 *Am. R.*, 463; aff'd 11 *Hun*, 299 (deceit inducing void marriage). Otherwise after verdict, report or decision, in action for damages for a personal injury (*N. Y. Code Civ. Pro.*, § 764), unless it be set aside (*Kelsey v. Jewett*, 34 *Hun*, 11, and cases cited).

⁵ *Johnson v. Elwood*, 82 *N. Y.*, 362; rev'g in effect 15 *Hun*, 14 (action merely for injunction against a trespass by defendant abates on his death).

Hopkins v. Hopkins, 21 *Weekly Dig.*, 174 (holding that after the death of a party in divorce, the attorney could not proceed to enforce a previous order).

⁶ *Scott v. Brown*, 24 *Hun*, 620 (action for injury to plaintiff's person and family abates as to the personal damages, but not as to damages and expenses of children's sickness).

So, although ejectment by a tenant for life does, upon plaintiff's death, abate as to the claim of possession, it does not abate as to damages for detention. *De Lisle v. Hunt*, 36 *Hun*, 620. Compare *McKeen v. Fish*, 33 *Hun*, 28, where a widow's action for dower was held to abate by her death, notwithstanding stipulation made to accept a gross sum in lieu thereof.

⁷ *N. Y. Code Civ. Pro.*, § 756.

death) the court may, in its discretion, direct the transferee or person becoming liable to be substituted or joined.

Such direction may be given on the application of either party or of the third person.

If no such direction is given, the action will continue in the original names, unless the transfer or devolution resulted from death or from the absolute dissolution of a corporation.

In all cases infants brought in must have a guardian *ad litem* appointed.

3. — *on death.*—Death of a defendant before process is served upon him, or appearance by him, is still held to abate the action so far at least as he is concerned (except in case of a joint debtor against whom judgment could go without service)¹; for as to him the action is not deemed commenced; and a revival or continuance against his representatives without service of summons on them or appearance by them, is not allowed.²

Death of either party before verdict, report, or decision, actually rendered, absolutely prevents the rendering of a valid verdict, report, or decision *against* him;³ but judgment in favor of a person deceased before verdict, report, or decision in his favor, is merely irregular.⁴

In general, death after an accepted offer of judgment or a verdict, report, or decision actually rendered, or interlocutory judgment entered, on an adjudication of issues, does not prevent final judgment thereon in the names of the original parties.⁵

¹ Long v. Stafford, 103 N. Y., 274.

² Compare Palmer v. Ensign, 19 Alb. L. J., 399; and Barron v. South Brooklyn Saw Mill Co., 18 Abb. N. C., 352 (the latter case holding that the conditional jurisdiction acquired under N. Y. Code Civ. Pro., § 638, by the levy of a valid attachment upon property of a non-resident defendant, and the due commencement of service of summons by publication, is divested, and the attachment falls by the death of the defendant before such service is made complete by the continuance of the publication for the required period).

³ N. Y. Code Civ. Pro., § 765.

⁴ Smith v. Joyce, 11 Civ. Pro. R. (Browne), 257 (refusing to discharge a purchaser under such judgment). *Contra*, McCreery v. Everding, 44 Cal., 284 (setting a judgment aside in favor of a dead person, as a nullity).

⁵ N. Y. Code Civ. Pro., § 763. This does not apply to judgments by default. Grant v. Griswold, 21 Hun, 509, 513; Smith v. Joyce, 11 Civ. Pro. R. (Browne), 257. It contemplates an adjudication on the rights of the parties.

4. — *on death of a co-party.*—If a plaintiff dies leaving a co-plaintiff, or a defendant dies leaving a co-defendant, the action may proceed in favor of or against the survivors, as to whatever cause of action or any part thereof survives to or against the latter; but the court have power to require or allow the successor or representative of the deceased to come in.¹

If no one is to be brought in, it is usual simply to suggest the death upon the record.²

5. — *on death of a sole party.*—If the cause of action, or one of several causes of action³ survives the death of a sole plaintiff or a sole defendant—and this applies to the death of a sole surviving plaintiff or defendant⁴—the continuance of the action by bringing in the representative or successor must now⁵ be effected by motion and order, without putting the applicant to a supplemental pleading, unless there are other facts, beside the succession, which should be alleged; but in other respects the right to continue such a cause depends in equity upon the settled equity practice;⁶ and the courts still exercise the same legal discretion as formerly to refuse the application in case of laches such that, by analogy to the Statute of Limitations, revival ought to be precluded.

The period prescribed by the Statute of Limitations for bringing an action has usually been regarded, in equity,—if allowed to lapse after the right to revive and continue an ac-

A report on the usual reference to compute amount, in foreclosure, where no issues are raised in the pleadings, other than by the usual general answer on behalf of an infant defendant, is not within the statute. *Smith v. Joyce* (*above cited*). Whether death, after leave to withdraw demurrer and answer has been granted, but before the lapse of the time allowed for so doing, is within § 763, seems unsettled. *Affirmative*—*Clark's Estate*, 5 *Dem.*, 397. *Neg.*—*Simmons v. Vanderbilt*, *N. Y. Daily Reg.*, Feb. 6, 1883. As to entry *nunc pro tunc*, see *Mitchell v. Overman*, 103 *U. S.*, 62; s. c., with note, 22 *Am. L. Reg.*, 607; *Tuomy v. Dunn*, 77 *N. Y.*, 515; *Long v. Stafford*, 103 *id.*, 274.

¹ *N. Y. Code Civ. Pro.*, §§ 758, 759. As to Partition, see § 1588; Ejectment, §§ 1521–3. If the liability is purely several, as in case of maker and indorser, it is usual to sever the action. In case of tort, plaintiff is usually left to bring a new action against the representatives of the deceased.

² See Volume I, p. 459.

³ *Brackett v. Griswold*, 103 *N. Y.*, 425.

⁴ *Coit v. Campbell* (*below cited*).

⁵ *N. Y. Code Civ. Pro.*, § 757.

⁶ *Coit v. Campbell*, 82 *N. Y.*, 509; *aff'd* 20 *Hun*, 50. But see 13 *Hun*, 273, 277.

tion has accrued, and before applying to do so,—as sufficient reason for refusing the revival;¹ but even in a legal action the lapse of that time is not necessarily, and as matter of law a flat bar, if the original action was seasonably brought.² And the better opinion is that the principles formerly applied in equity will still sustain the discretionary power of the court to refuse to allow a substitution for the purpose of continuance, alike in legal and in equitable actions, unless the case has been such that the court might, under the statute—as in the case of the death or marriage of the plaintiff³—have ordered that the action abate if not continued by the proper parties within a specified time; for this remedy affords a sufficient protection to the survivors, alike in common law and equity actions.⁴

6. *The practice; bringing in one by virtue of a new right or liability arising pending action.*—Where one is to be brought in as defendant, not by way of substituting him in respect of a right or liability already represented by other parties, but because events occurring pending the action have created a new liability or right—as for instance if, pending foreclosure, a stranger to the action has covenanted for the payment of the mortgage debt,⁵ or if, in partition, a devisee of an estate in expectancy is born,⁶ or, in a patent infringement suit, a third person takes an interest with defendant, and infringes⁷—he should be brought in by supplemental summons and complaint,⁸ unless he applies himself, or submits to come in by way of amendment; in which case actual amendment of the record is desirable.

7. — *bringing in originally omitted party.*—One who should originally have been made a defendant, but was then

¹ Coit v. Campbell (*above cited*).

² Evans v. Cleveland, 72 N. Y., 486; rev'g 12 Hun, 140.

³ N. Y. Code Civ. Pro., § 761.

⁴ Compare Coit v. Campbell; Evans v. Cleveland (*above cited*); and Greene v. Martine, 84 N. Y., aff'g 21 Hun, 136, merely on the authority of Coit v. Campbell.

⁵ S. P., Prouty v. Lake Shore, &c., R. R. Co., 85 N. Y., 272. Compare previous decision in 52 *id.*, 363.

⁶ For the English rule, see Peter v. Thomas Peter, L. R., 26 Ch. Div., 181.

⁷ Parkhurst v. Kinsman, 2 Blatchf., 72; s. c., 8 N. Y. Leg. Obs., 73.

⁸ See Volume I, p. 700.

omitted, is brought in by plaintiff by supplemental summons and complaint, or by amendment in the manner stated in Volume I, p. 700.

8. — *bringing in one who has acquired the interest of an original party.*]—Where the person proposed to be brought in, whether as a plaintiff or a defendant, is to be joined merely because, pending the action, he has acquired an interest in the subject of litigation from one who was an original party, effectually joined as such, the court have power to bring him in under the process and pleading already existing;¹ and this is done by an order of substitution.

9. *Mode of objecting to omission.*]—A defect of parties, which existed at the commencement of the action, is waived by not taking it by answer or demurrer as the case may require,² unless the defect is one which prevents the court from doing justice to the party before it,³ in which case the court may direct the action to stand over whenever the defect appears, until the necessary parties be brought in.

A defect of parties not existing at the commencement of the action, but which arose thereafter—as for instance by the death of one originally joined, may be objected to without pleading; and if objected to at the trial, it is error if the absent parties be necessary parties, to overrule it as too late and allow the action to proceed.⁴

SECTION I.

PLAINTIFF'S PROCEEDINGS AS TO CHANGE OF PARTIES.

FORMS.

(1073.) Affidavit to move to strike out a defendant who has died, leaving neither representative nor assets subject to the jurisdiction.

(1074.) Affidavit to move to strike out and substitute parties after new trial ordered, and for leave to serve supplemental complaint, or for leave to amend.

¹ See *Savage v. Sherman*, 87 *N. Y.*, 277.

² *N. Y. Code Civ. Pro.*, § 499.

³ *Bear v. Am. Rapid Tel. Co.*, 36 *Hun*, 400.

⁴ *Hasbrouck v. Bunce*, 62 *N. Y.*, 475; rev'g 3 *Supm. Ct. (T. & C.)*, 309; *S. P., N. Y. Code Civ. Pro.*, § 759 (death of one of several tenants in common, plaintiffs in ejectment).

- (1075.) Notice of motion (or order) that an unnecessary party be struck out.
- (1076.) Notice of motion (or order) for leave to change a plaintiff to a defendant.
- (1077.) Affidavit to obtain leave to add formal parties (with leave to amend).
- (1078.) Order granting leave to add formal parties (and to amend).
- (1079.) Affidavit to move for leave to bring in a new-born infant.
- (1080.) Notice of motion (or order) to bring in new-born infant.
- (1081.) Affidavit to move to bring in one who, pending the action, has made himself liable to suit and injunction.
- (1082.) Affidavit to move to substitute executor or administrator of deceased defendant (short Form).
- (1083.) Order that executors or administrators of deceased defendant show cause why action should not continue against them.
- (1084.) Order continuing action against surviving defendants on the death of one.
- (1085.) Order granting leave to continue action against successors in interest of a defendant.
- (1086.) Order for leave to serve a supplemental complaint, bringing in as an additional defendant a third person who has assumed defendant's obligation.
- (1087.) Affidavit of attachment issued, and death of defendant before publication of summons completed.
- (1088.) Affidavit to move for substitution of public officer's successor.
- (1089.) Notice of motion for substitution of public officer's successor.
- (1090.) Order substituting public officer's successor.
- (1091.) Affidavit to move to continue action against receiver in place of corporation.
- (1092.) Order granting leave to proceed against receiver of dissolved corporation.
- (1093.) Notice to creditors to exhibit demands.

Form No. 1073.

Affidavit to move to strike out a defendant who has died, leaving neither representative nor assets subject to the jurisdiction.¹

[As in Form 1077 to the *] II. That this action was brought in 18 to compel the defendants above named to make contribution for losses sustained [or, money paid] by the plaintiff on behalf of himself jointly with defendants in [stating ground briefly], as appears by the complaint herein on file [or, a copy of which is annexed]. That the summons was served on the defendant Y. Z. on the day of , 18 [and state condition of the cause as to him]. That at the commencement of this action as aforesaid the defendant W. X. was and

¹ Adapted from the precedent in *Angell v. Lawton*, 14 Hun, 70; appeal dismissed in 76 N. Y., 540, without deciding that such an order was necessary. Compare *Mosgrove v. Kountz*, 14 Fed. Rep., 315; *Hays v. Thomas*, 56 N. Y., 521. The better opinion is that

the court would have power to strike out the name on the trial. In *Angell v. Lawton* plaintiff by the same order had leave to bring in the representatives of another deceased defendant, which is not noticed in the report.

thereafter continued to be a resident of _____, in the State of _____, until his death, which occurred at _____, in _____ last.

That said W. X. was never during this action a resident of this State, nor to the knowledge of deponent within this State. That there were not at the time of his death, nor have there since been, nor are there now, any assets or property of said W. X., or of his estate, within this State, and that for want of any jurisdiction, power or authority in any surrogate or other officer within this State in respect thereto, the plaintiffs are unable to procure the appointment within this State of any personal representative of said W. X.

III. [*Conclude as in Form 1077.*]

Form No. 1074.

Affidavit to move to strike out and substitute parties after new trial ordered, and for leave to serve supplemental complaint, or for leave to amend.¹

[*Title of court and action.*]

[*Venue.*]

R. P. G. being duly sworn, says:

I. That he is one of the plaintiffs in this action [*or as in Form 1077*].

II. That the action was brought for the purpose of rescinding a contract alleged by the plaintiffs to have been fraudulent, and to recover the moneys contributed or paid by the plaintiffs under and in pursuance of said contract.

III. That prior to the commencement of this action the plaintiffs, believing that they had been defrauded, but not understanding the exact method and nature of the fraud by which they had been induced to part with their money, caused some investigations to be made, the substantial results of which were embodied in the original complaint in this cause; but that afterwards, when the cause came to be tried, the plaintiffs found that, while the matters of fact stated in the complaint were substantially true, yet that the complaint was not as full and as

¹ Sustained by the Supreme Court in *Getty v. Spaulding*, 3 *Supm. Ct. (T. & C.)*, 174; mem. s. c., 1 *Hun.* 115; aff'd in 58 *N. Y.*, 636, holding that the court had power in its discretion to make the order. See also *Glenville Woolen Co. v. Ripley*, 11 *Abb. Pr., N. S.*, 87.

In equity omitted parties or parties not duly served may be brought in even after judgment and sale, by opening the judgment. See *Rice v. Barrett*, 99 *N. Y.*, 403, rev'g 35 *Hun.* 366; *Wood v. Kroll*, 43 *Hun.* 328.

- accurate in all relating to the details of the fraud as the proofs upon the trial.

IV. That on the trial the plaintiff's counsel prepared and submitted to the court proposed findings of fact, intending to ask the court, in case said findings of fact should be adopted by the court, to confirm the pleadings thereto, but that the court rendered judgment for the defendants, which judgment was affirmed by the general term, upon appeal. But the judgment of the special term and of the general term has been reversed, and a new trial granted by the commission of appeals, on appeal.

V. That after the commencement of this action, J. H. H. and J. A. A., who were originally co-plaintiffs, transferred and assigned their shares and interests in the cause and causes of action set forth in the complaint to the plaintiffs R. P. G. and S. E. G.

VI. That the proposed amended and supplemental complaint hereto annexed, embodies the facts which, as deponent believes, were substantiated by the proofs given on the trial of this cause, and that while the said proposed amended and supplemental complaint embodies substantially the same cause of action set forth in the original complaint, and does not involve any abandonment of such cause or such original complaint, it states more accurately and fully than the original complaint did, the details of the fraud complained of by the plaintiffs, and the connection of the defendants therewith.

VII. [*If order to show cause is asked, &c., state as on p. 2.*]
 [Jurat.] [Signature.]

Form No. 1075.

Notice of motion (or order) that an unnecessary party be struck out.¹

[*As in other Forms (see 488, p. 1, 493, p. 4), stating relief thus:*] That the summons and complaint [*and other proceedings if necessary*] herein be amended by striking out the name of W. X.; and that the plaintiff A. B. may proceed with this action hereafter, omitting the name of W. X. as a [defendant] therein, without prejudice to the proceedings already had.

¹ If the only relief sought is the dropping of the name, this order that the action continue is enough. Such was the direction on this point in *Getty v. Spaulding*, cited on p. 509. See Volume I, pp. 699, 700, and Form 704.

Form No. 1076.

Notice of motion (or order) for leave to change a co-plaintiff to a defendant.

[*As in other Forms (see No. 488, p. 1, No. 493, p. 4), stating relief thus:*] allowing the plaintiff A. B. to amend the summons and complaint herein, by striking out C. D. as plaintiff, and making him a defendant herein, without costs as to the other defendants¹ [and to issue a supplemental summons against said C. D.²].

Form No. 1077.

Affidavit to obtain leave to add formal parties (with leave to amend).³

[*Title of court and cause.*]

[*Venue.*]

A. B. being duly sworn, says :

I. That he is the plaintiff [or, defendant] above named [*or if otherwise, state relation to the cause and means of knowledge, unless implied ; and if leave to do more than add or strike out a formal party is asked, state reason why the applicant's affidavit is not presented, unless proposed new pleading duly verified is annexed*]. *

II. [*State facts constituting ground of application as thus:*] That this action is brought to foreclose a mortgage upon the property of the defendant, the _____ Company, including certain real property in the city and county of New York ; that the summons and complaint in this action were duly filed in the office of the clerk of the city and county of New York, on the _____ day of _____, 18 ____ and the notice of pendency of this action was duly filed in said clerk's office on the _____ day of _____, 18 ____, at about _____ o'clock _____ m. ; that the defendant, the _____ Company, has appeared herein by A. & G., its attorneys.

¹ *Newl. Ch. Pr.*, 161.

² This may not always be necessary.

³ The application is frequently made *ex parte*, where the change is merely formal ; but if it be such that any party who has been served could be affected in right, in the scope of the controversy, or in relief, by the order,

he ought to have notice even if he has not appeared ; for a failure to appear in response to a summons to appear and answer in a suit for specified relief between A. and B. ought not to deprive defendant of the opportunity to litigate a substantial question brought in by joining C., or by asking different relief, or relief on different facts.

That since the said complaint and notice of pendency of action were filed, it has been ascertained by deponent, through an official search, that the following persons have, or claim to have some lien upon, or interest in the premises and property sought to be foreclosed in this action, which lien, if any, accrued subsequently to the lien of the mortgage sought to be foreclosed herein, viz., F. A. and B. C.

That it is now desired to amend the summons, complaint, and notice of pendency of action, and all the papers herein, by adding the above-named persons as parties defendant herein [*and if other allegations are desired to be made, add:* and to make such changes in the complaint as are contained in the annexed amended complaint]; and that a supplemental summons issue directed to such additional defendants, to the end that they may be brought in as parties hereto.

[*If changes in the allegations of the complaint are proposed, indicate the substance concisely, as thus:*] That the amount of the bonds certified by the plaintiff is correctly stated in the annexed proposed amended complaint, as deponent has ascertained after careful examination of the facts; that in other respects there is no difference between the said proposed amended complaint and the complaint as already filed herein.

III. [*If order to show cause is asked, or application is ex parte, state as to condition of cause, reason, and no previous application, &c., as required; see p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1078.

Order granting leave to add formal parties (and to amend).

At a special term [*&c., as in Form 493, p. 4.*]

[*Title of action.*]

Upon reading and filing the annexed amended complaint, and the affidavit of A. T., verified the day of , 18 , and on motion of A. T., attorney for the plaintiff:

ORDERED, 1. That the summons, complaint, and notice of pendency of action, and all the papers and proceedings herein be, and the same hereby are amended, by adding as defendants herein F. A. and B. C.

2. That the plaintiff be, and hereby is, allowed to file [and serve] the annexed amended complaint and notice of penden-

cy of action amended so as to include the parties who are added as defendants by this order, and to make all the amendments as in said annexed amended complaint contained, and that the said annexed amended complaint stand as the complaint herein.

3. That a supplemental summons issue herein, directed to the parties who are added as defendants by virtue of the provisions of this order, to the end that they may be brought in as parties defendant in this action.

4. That all proceedings had herein stand with the same force and effect as if this action had been brought originally against the defendants as constituted by the amendment [but without prejudice—*may insert saving clause if necessary*¹].

Form No. 1079.

Affidavit to move for leave to bring in a new-born infant.²

[*Substitute in Form 1077*] II. That this action was brought [*stating object, as thus:*] for the partition of lands between the parties hereto as heirs [*or, for the construction of the will*] of M. N. mentioned in the complaint herein [*and state condition of cause, as thus:*] That on the day of , 18 , the cause being at issue, and all the parties to this action appearing before the court at special term, the cause was heard upon the merits and fully argued and submitted to the decision of the court. That thereafter, and on or about the day of , 18 , the case was decided by Mr. Justice D., but no judgment or decree has yet been entered herein. That after the hearing and argument of the cause, and pending its consideration by the court, an infant daughter was born to the defendants W. X. and V. X. his wife, and the said infant has some interest under the trusts created in and by the will of M. N., mentioned in the complaint herein.

That [the deponent is advised by his counsel, A. T., of street, in , that] the said infant daughter is a necessary party defendant to this action, and that a supplemental summons ought to issue for the purpose of making her a party defendant, and that a supplemental complaint should be made accordingly.

¹ See *Bond v. Smith* (*below cited*).

² See *Peter v. Thomas Peter, L. R.*, 26 *Chan. Div.*, 181.

As to barring the rights of unborn infants by action, see *Bowman v. Tallman*, 27 *How. Pr.*, 212; *aff'd*, 40 *Id.*, 1;

s. c., 2 *Robt.*, 385; *aff'd*, 41 *N. Y.*, 619; *Mead v. Mitchell*, 17 *N. Y.*, 210; *Chinn v. Keith*, 4 *N. Y. Supm. Court (T. & C.) Rep.*, 126; s. c., *sub nom. Chism v. Keith*, 1 *Hun*, 589; *Brevoort v. Grace*, 53 *N. Y.*, 245.

Form No. 1080.

Notice of motion (or order) to bring in new-born infant.

[*As in other Forms, No. 488, p. 1, 493, p. 4, stating relief thus:*] allowing plaintiff to bring in C. D. as a defendant herein [the name C. being fictitious and the real first or Christian name, if yet given, being to said plaintiff as yet unknown], and that the [second] supplemental summons and complaint annexed may be filed and served herein [*or, that a—second—supplemental summons issue for that purpose, and that a—second—supplemental complaint may be made in accordance with the facts set forth in the annexed affidavit, and in such manner and form as fitly to set forth and charge the interest of the said C. D.*].

Form No. 1081.

Affidavit to move to bring in one who, pending the action, has made himself liable to suit and injunction.

[*As in Form 1077, to the **] II. That this action was commenced by the service upon defendant Y. Z., on or about the day of , 18 , of the summons, complaint, affidavits and order to show cause, containing a temporary injunction, which enjoined the defendant from doing the things sought to be restrained permanently by judgment in the action, which order is still in full force; and a motion thereon made to continue the said injunction during the pendency of the action, is now pending and undetermined [*or otherwise according to the fact*]. That since said order was made and served, the defendant Y. Z. has executed the contract with W. X., which is set forth in the proposed supplemental complaint annexed hereto; and deponent believes, that unless enjoined and restrained, the said defendant and said W. X. will act upon said contract, to the great injury of the plaintiff as in said supplemental complaint set forth. That it will be necessary to issue a supplemental summons herein against said W. X., or to amend the summons in this action, by adding the name of the said W. X. as a defendant therein, and to make and serve a supplemental complaint substantially like that hereto annexed.

It is also necessary that this court issue a temporary injunction restraining the defendant and said W. X. from doing or suffering, pending this action, the things sought to be permanently restrained by judgment herein.

That grounds for such temporary injunction are also set forth in the annexed supplemental complaint, and the allega-

tions thereof are true to deponent's knowledge. Grounds of such injunction are also set forth in the affidavit of M. N., verified herein on the day of , 18 , and on file in this court, to which affidavit deponent refers as part of the affidavits for plaintiff on this motion.

III. [See Form 1077.]

Form No. 1082.

Affidavit to move to substitute executor or administrator of deceased defendant (short Form).¹

[As in Form 1077, to the *] II. That this action [here state its nature and condition as above, or as thus:] was commenced by the service of the summons and complaint upon the above-named defendant, on or about the day of , 18 , to recover damages for the breach of a contract [indicating its nature; see Forms 1077 and 1081] theretofore, and on or about the day of , 18 , made by said defendant with this deponent.

III. That on or about the day of , 18 , issue was joined herein by the service of an [amended] answer; and thereafter, and on or about the day of , 18 , this cause was duly noticed for trial by this plaintiff, and duly placed upon the calendar of this court [in the county of , where the same is triable], and is still pending, and that the next term or circuit at which it could be tried is appointed to be held on the day of next [or may state trial as in Form 1079].

IV. That thereafter, and on or about the day of , 18 , [and if trial has been had, add: and before verdict—or, report—or, decision actually rendered²] as deponent is

¹ *N. Y. Code Civ. Pro.*, §§ 757, 758. Appropriate also in case of the death of a sole surviving defendant. *Coit v. Campbell*, 82 *N. Y.*, 509; *aff'd* 20 *Hun*, 50.

Or of a surviving partner sued as such. *Carrere v. Spofford*, 15 *Abb. Pr.*, *N. S.*, 47; *s. c.*, 46 *How. Pr.*, 294.

But if he was defendant as executor, administrator, assignee for benefit of creditors, trustee, committee of lunatic, &c., his successor, not his personal representatives, should be brought in.

If the substitution desired is of a public officer as successor of one orig-

inally a co-defendant, may pursue Form 1088.

For suggestion of death, where the entire cause of action continues against the survivors only, see Volume I, p. 459, and *N. Y. Code Civ. Pro.*, § 758.

² If the death was not before such determination, judgment will be entered in the name of the original defendant (*N. Y. Code Civ. Pro.*, §§ 763, 765), with a suggestion of the death. *Id.*, § 1210; *Long v. Stafford*, 103 *N. Y.*, 274. And such suggestion can even be supplied after judgment *nunc pro tunc*. *Id.*

informed and believes, said defendant, being then the sole defendant herein, died, leaving a will, by which he appointed W. X., who resides at _____, his executor. That said will was admitted to probate on or about the _____ day of _____, by the surrogate of the county of _____, and that letters testamentary thereon have been issued to the said executor by the said surrogate, and he has undertaken the execution thereof and now is such executor [*or*, died intestate, and that letters of administration upon his estate were, on or about the _____ day of _____ last, duly issued by the surrogate of _____ county to W. X., who resides at _____, and that he has undertaken the administration thereof and now is such administrator].

III. [*&c.*; see *Form 1077.*]

Form No. 1083.

Order that executors or administrators of deceased defendant show cause why action should not continue against them.

[*Title of court and action.*]

Upon the annexed affidavit, and on the pleadings [*here may specify any other proceedings relied on*], let M. N. and O. P., the executors of the last will and testament [*or*, the administrators of the goods, chattels and credits] of Y. Z., deceased, show cause before one of the justices of this court, at a special term thereof, to be held [*at chambers*] in the City Hall [*or*, County Court House], in the city of _____, county of _____, N. Y., on the _____ day of _____, 18____, at _____ o'clock in the _____ noon of that day, or as soon thereafter as counsel can be heard, why an order should not be granted therein, directing the above-entitled action to be continued against them, the said M. N. and O. P., as the executors [*or*, as administrators] as aforesaid [*without prejudice to the proceedings already had*], in the place of said deceased defendant [*and amending the summons and proceedings accordingly—and granting leave to this plaintiff to amend the complaint—or, to file and serve a supplemental complaint—herein, as he shall be advised*], and why such further or other relief should not be granted as may be just.

Service of this order shall be sufficient if made upon said M. N. and O. P. [*or*, upon either said M. N. or said O. P.] personally [*or*, if such service be not practicable, by leaving the same at their residence, and by service on the attorney for the deceased defendant Y. Z.—*and, if shorter time than eight days is asked, add* _____ days before it is returnable [*or*, on or before the _____ day of _____].

[*Authentication, see Form 491, p. 3.*]

Form No. 1084.

Order continuing action against surviving defendants on the death of one; or directing severance.¹

[*Caption (court order) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, that the said action be, and the same is hereby continued against such surviving defendants, without prejudice to the proceedings heretofore had therein [and that the cause proceed on days notice, with service of this order—*or*, and that the cause be set down for trial at the circuit commencing the day of next].

[*Or, if severance is directed*, that the action be severed; and that it proceed [*if as to part only say*, as to the claim for—*stating what*] against Y. Z., the surviving defendant alone; and that it proceed [*if as to part only, state what*] against said executor of W. X., as a separate action with like effect as to all subsequent proceedings, as if separate actions had been originally and seasonably brought against them respectively.]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1085.

Order granting leave to continue action against successors in interest of a defendant.

At a special term [*&c.*, as in
Form 493, p. 4.]

[*Title of action as originally.*²]

Upon reading and filing the notice of motion [*or*, order to show cause] on behalf of the plaintiff herein, dated , 18 , and the affidavit of A. B. verified on the same day [and the proposed supplemental complaint of A. B., each] annexed thereto [and proof of due service of such notice and copies of all said papers upon M. N., the executor—*&c.*, according to the fact—of Y. Z., deceased, and upon the attorneys for the respective defendants U. V. and W. X. herein], and after hearing A. T., of counsel for the plaintiff, and Z. T., of counsel for the defendants U. V. and W. X., and said M. N. as executor [*or*, and no one appearing] in opposition, and due deliberation being had; now, on motion of A. T., attorney for plaintiff:

ORDERED, that said action be and the same is hereby continued in the name of the plaintiff herein against and in

¹ Compare *Lachaise v. Libby*, 13 *Abb. Pr.*, 6.

² *Rogers v. Paterson*, 4 *Paige*, 450.

the name of the said M. N. as executor of the last will and testament of Y. Z., deceased [and said U. V. and W. X.], with costs of this motion [to be paid by], and that the summons and pleadings in this action be and hereby are amended so as to make said executor a party defendant in this action as above provided, without prejudice to any proceedings heretofore had in the said action.

[Or, and that the plaintiff be allowed to serve a supplemental summons and complaint herein as he shall be advised, and that the service of said supplemental summons and complaint be without prejudice to any of the proceedings already had herein, and upon service thereof, this action shall proceed with like effect as if such executor had been originally named as a party thereto.]

[May add saving clauses, as thus: without prejudice to the right of said M. N. to move to strike out any evidence given on the trial of this action.¹]

[Or thus: And the said M. N. as executor as aforesaid, is hereby allowed to file and serve a supplemental answer to the complaint in this action within twenty days after service of a copy of this order; otherwise the answer of his testator to stand as the answer in the cause on that behalf.]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1086.

Order for leave to serve a supplemental complaint, bringing in as an additional defendant a third person who has assumed defendant's obligation.²

At a special term [*&c., as in Form 493, p. 4, of this Volume*³].

[*Title of action as originally.*]

On reading and filing the affidavit of A. B., verified the

¹ See *Bond v. Smith*, 4 *Hun*, 48; s. c., 6 *Supm. Ct. (T. & C.)*, 239.

² Sustained in *Prouty v. Lake Shore, &c., Ry. Co.*, 85 *N. Y.*, 272, the third party here having assumed the liability of the defendant by a contract made pending the action. Compare previous decision in 52 *id.*, 363, where it was held that a motion to substitute, *after trial*, new defendants, on the ground of an assumption by them of the liability established on the trial, and without prejudice to the proceedings, is not the remedy, but they

should be made parties to a new action or at least a fresh trial.

A verbal order of the court upon the trial, without any actual amendment of the pleadings, or any allegation in the pleadings relating to the new parties, or any appearance on the record for them, or issue joined as to them, *Held*, notwithstanding the presence of the parties in court, not to make them parties to the record. *Hood v. Hood*, 85 *N. Y.*, 561, *rev'g* 19 *Hun*, 300.

³ Under *N. Y. Code Civ. Pro.*, § 122,

day of _____, 18 [and thus enumerate all the motion papers]; and after hearing A. T., of counsel for the said plaintiff, in support of the motion, and Z. T., of counsel for the defendant Y. Z.,¹ in opposition thereto; now, on motion of A. T., attorney for plaintiff:

ORDERED, that said plaintiff have leave [within _____ days after entry of this order²] to file a supplemental complaint in this action against W. X., bringing him in as a party co-defendant in the action, with such allegations as the said plaintiff may be advised [or may specify nature or scope of the amendment], and serve a copy of the same, with a supplemental summons, in proper form, on the said E. F.;³ and that the said W. X. be permitted to answer or demur to the said complaint within twenty days after the service thereof, as he may be advised [the answer of the defendant Y. Z. to stand as his answer herein—all questions of costs to be reserved until the determination of the issues to be joined on such supplemental complaint and other pleadings].

[It is further ordered, and as a condition of this order, and as a condition precedent to the plaintiff having or deriving any relief under or pursuant to this order, that the said plaintiff—here state conditions.]

Enter: [signature of judge by initials of name and official title.]

Form No. 1087.

Affidavit of attachment issued, and death of defendant before publication of summons completed.⁴

[Commencement as in other cases, and stating the nature of the cause of action.]

II. That on the _____ day of _____, 18 _____, he commenced

a referee was held to be without power to order a new party to be brought on by compulsory process. *Newman v. Marvin*, 12 *Hun*, 236. Compare, for present statute, *N. Y. Code Civ. Pro.*, § 1018. The better practice, in case of reference, is to move in court, and take an adjournment of the reference, meanwhile, if necessary.

¹ Notice of application for leave to file supplemental summons and complaint need not be given to the party sought to be brought in. So held where, after a decree in foreclosure, and a sale thereunder, plaintiff, on

discovering that a person liable to pay the mortgage debt had not been made a defendant, applied at a special term for leave to bring in and to file a supplemental summons and complaint. *Ebbets v. Martine*, 19 *Hun*, 294.

² When the court have fixed the time within which they give leave to file a supplemental complaint to continue an action, or within which the plaintiff must file such a complaint or submit to a dismissal, they have no longer power to enlarge it. *N. Y. Code Civ. Pro.*, § 785.

³ See Volume I, p. 699.

⁴ Whether the action can be con-

proceedings for the purpose of bringing this action thereon against the defendant Y. Z. by publication of the summons herein against him, pursuant to the provisions of the statute, the said defendant being a non-resident of the State of New York, and residing in the town of _____, in the State of _____; which publication commenced on the _____ day of _____ last.

III. That deponent procured an attachment to be duly issued in his favor, in said action, against the property of said Y. Z.; upon which, during the lifetime of the said Y. Z., and on or before the _____ day of _____ last, the sheriff of the [city and] county of _____ seized a large quantity of goods, the property of the said Y. Z., of the value of _____ dollars; and after the said goods were so seized by the said sheriff, and before the said publication was completed, the said Y. Z. died, on or about the _____ day of _____, 18 _____.

[*Allege appointment of executor, or administrator; see Form 1082—and conclude as in other cases.*]

Form No. 1088.

Affidavit to move for substitution of public officer's successor.¹

[*Title of court and cause.*²]

[*Venue.*]

A. T., being duly sworn, says that he is the attorney³ of the plaintiff [*or, defendant*] in this cause; that on the _____ day of _____

tinued in such case under the present statute, see *Barron v. South Brooklyn Saw Mill Co.*, 18 *Abb. N. C.*, 352, and cases cited.

¹ This remedy is statutory. 2 *R. S.*, 447, § 100; revised in *N. Y. Code Civ. Pro.*, § 1930, § 766. In the absence of statute the action may abate unless the officer is really the representative of the State or of a municipality, or quasi-municipality. See *U. S. v. Boutwell*, 17 *Wall.*, 604; *Thompson v. U. S.*, 103 *U. S.*, 480, and cases cited; and see *Barker v. Norton*, 3 *Hill*, 474.

The statute does not authorize an action on an individual or personal liability of the deceased or outgoing officer to be continued against his successor (*Lament v. Haight*, 44 *How. Pr.*, 1); nor, according to *Hitchman v. Baxter*, 5 *Civ. Pro. R.*, 226, does it allow substitution against objection of a

defendant who if successful would have execution for costs against the original party personally. Compare *Pratt v. Seeley*, 20 *Week. Dig.*, 280.

Under the New York statute the proceeding may continue in the original names, if no application for substitution is made. *Manchester v. Herrington*, 10 *N. Y.*, 164; and see *Griggs v. Griggs*, 56 *N. Y.*, 504, *aff'g* 66 *Barb.*, 287.

The statute is not mandatory on the court. *Farnham v. Benedict*, 29 *Hun*, 44.

² This remedy is applicable to special proceedings. *N. Y. Code Civ. Pro.*, §§ 766, 1930. Compare, *contra*, under Revised Statutes, *People ex rel. Wicks v. Oswego Ct. of Sess.*, 2 *Supm. Ct. (T. & C.)*, 481.

³ If the successor applies, the affidavit should be by him.

last, C. D., of _____, was duly elected [or, appointed] to the office of _____ of the [town of _____, in the] county of _____, in place of the plaintiff [or, defendant—*naming him or them*], who died at _____ [or, whose term expired] on the day of _____, 18 ____; and that on the day of _____ last the said C. D. qualified and has entered upon the duties of said office, and still holds the same.

[*Jurat.*]

[*Signature.*]

Form No. 1089.

Notice of motion for substitution of public officer's successor.

[*Title of court and cause.*]

Please take notice, that on the pleadings herein and the affidavit [or, certificate], of which a copy is herewith served, the undersigned will move the court, at a special term thereof to be held [at chambers] at _____, in the _____, on the day of _____, 18 ____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, to substitute [name] as supervisor of the town of _____ [or other official designation].¹ in the place of Y. Z., as plaintiff [or, defendant] in this action; or for such other relief as may be just.

[*Date.*] [Signature and office address of],

Attorney of [moving party or successor].

[Address], To [the successor;² or if the motion is by him, to the attorney of the adverse party].

Form No. 1090.

Order substituting public officer's successor.

At a special term [&c., as
in Form 493, p. 4].

[*Names of original parties.*]

On reading and filing the affidavit of A. T., verified the

¹ Where the action is against officers whose terms expire together—*e. g.*, the commissioners of highways of a town—but one application ought to be made to substitute the successors of all. *People v. Sage*, 3 *How. Pr.*, 56.

² The notice should be served on the successor, where the motion is by the adverse party. If the successor is to be made defendant, give fourteen days notice, or get consent.

day of _____, 18 [and mention any other papers], and proof of due notice of this motion [adding, if successor is made defendant and has not consented: fourteen days previous to the hearing], and after hearing A. T., of counsel for _____, and Z. T. [or, no one appearing, for _____ in opposition—or, and _____ consenting thereto]; now, on motion of A. T., attorney for _____:

ORDERED, that _____, of _____, as [official designation], be and hereby is substituted as plaintiff [or, as defendant] herein in place of said _____ deceased [or, whose term has expired], without prejudice to the proceedings already had [or may give leave to plead,¹ &c.; see preceding Forms].

Enter: [signature of judge by initials of name and title.]

Form No. 1091.

Affidavit to move to continue action against receiver in place of corporation.²

[Name of court.]

Title of action in which receiver was appointed. Also, if in same court, of action in which substitution is sought.³

[Venue.]

I. [As in Form 1077, to the *.]

II. That on or about the _____ day of _____, 18 _____, an action was commenced by A. B. against the _____ Company, in the

¹ See Board of Supervisors v. Tweed, 3 Hun, 682 (favoring the view that defendant is not entitled to answer anew where the complaint remains unchanged).

The statute requires the order to be annexed to the judgment roll (§ 766, providing for case of plaintiff), and in practice this is regarded as dispensing with necessity of amendment of the summons and complaint. Proceedings subsequent to the order are entitled with the new name.

² See McCulloch v. Norwood, 58 N. Y., 562; Kincaid v. Dwinelle, 59 id., 548; Sturges v. Vanderbilt, 73 id., 384; People v. Knickerbocker Life Ins. Co., 43 Hun, 574; People v. Universal Life Ins. Co., 17 Weekly Dig., 563.

Give notice to the attorney-general, as directed on p. 127 of this Vol.

³ If this cause is in another court, this order will give leave, and the other court should be applied to for an order of substitution.

Court [*or, in this court, the title whereof is secondly above given*], to [*here state object showing that it is not a demand which should be left to be disposed of on a reference under the dissolution, but requires separate trial*].

III. [*State condition of the cause.*]

IV. That on the day of , 18 , deponent was served with an injunction order to show cause in this action brought by the People of the State of New York, at the instance of their attorney-general, against the above-named defendant, for the purpose of dissolving the latter and for winding up its affairs, and that on , 18 , the said company was so dissolved by an order or decree of this court, and one N. D. W. was constituted a receiver of the property and effects of said company with the powers usual in such cases.

V. That deponent believes it is desirable, from the nature and importance of the questions involved, that the action referred to should be continued by substituting the said receiver as defendant, as proposed in said complaint, and further this deponent says that he believes that the nature of the action brought by his client A. P. is such that the same can be more properly tried by a court than a referee, and that for such among other reasons it should be continued.

VI. [*If order to show cause is asked, state as on p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1092.

Order granting leave to proceed against receiver of dissolved corporation.

[*Court order, with double title, as in last Form, and recitals according to the case, including notice to or appearance of the attorney-general.*]

ORDERED, that the injunction order heretofore granted herein, and referred to in said affidavit be, and the same is hereby modified so as to permit the continuance of said action against said receiver; and the proceedings in the second above entitled action are amended by substituting said receiver as defendant in place of said Company, without prejudice to the proceedings already had [*or, and all other orders and proceedings herein inconsistent herewith, are hereby amended*]

so as to permit the said A. P. to apply to the Court for such relief as to proceeding with her said action against said receiver in place of said Company as she may be advised.

[The foregoing order is granted with ten dollars costs to the applicant A. P. or her attorney, to be paid by the receiver of said Company.]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1093.

Notice to creditors to exhibit demands, &c.¹

[*Title of court and cause.*]

Pursuant to an order of the court, made in the above-entitled action, dated the day of , 18 , notice is hereby given to the creditors of [the late limited partnership of J., M. & Co., of the city of], that they are required to come in and exhibit their respective demands against the said [partnership], and prove the same before me, the referee named in the said order, at my office, No. street, in the city of , on or before the day of , at o'clock A. M., or they will be excluded from the benefit of the said order and from sharing in the distribution of the fund in the hands of the assignees.

[*Date.*] [*Signature of*], Referee.

[*Signature and office address of*],
Plaintiff's attorney.

[*As to publication, see Volume I, p. 368. N. Y. Code Civ. Pro., § 786.*]

SECTION II.

DEFENDANT'S PROCEEDINGS AS TO CHANGE.

FORMS.

(1094.) Notice by defendant to a third person primarily liable, requiring him to defend.

(1095.) Affidavit on motion to declare

action abated, unless the representatives continue it.

(1096.) Notice of motion (or order to show cause) thereon.

(1097.) Order thereon.

¹ From *Kerr v. Blodgett*, 48 *N. Y.*, 62. See *N. Y. Code Civ. Pro.*, § 786; *Harmony Fire Ins. Co.*, 45 *N. Y.*, 310, superseded as to enlarging time, by Amendment of 1887 to § 1807.

- (1098.) Affidavit to obtain order on behalf of defendant continuing action.
- (1099.) Notice of motion (or order to show cause) thereon.
- (1100.) Affidavit to obtain order interpleading third person and discharging defendant on payment into court, &c.
- (1101-1105.) Statements of ground for interpleader suitable to insert in foregoing Form.
- (1106.) Order to show cause (or notice of motion) for interpleader.
- (1107.) Order of interpleader; short Form allowing answer.
- (1108.) Another Form; requiring plaintiff to serve a complaint.
- (1109.) Another Form; discharging defendant without determining the mode of interpleading.
- (1110.) Another Form; as in foreclosure.
- (1111.) Order of interpleader, on delivery of specific property, and appointing receiver therefor.
- (1112.) Another Form; securities to be delivered to a trust company.
- (1113.) Affidavit to obtain order that plaintiffs in two causes in the same court interplead.
- (1114.) Order to show cause thereon.
- (1114a.) Affidavit and order to substitute successor of public officer co-defendant.

Form No. 1094.

Notice by defendant to a third person primarily liable, requiring him to defend.¹

Please take notice, that A. B. [by M. N., of _____, his attorney] has commenced an action against me in the [name the court], for [here designate the ground of action, describing it sufficiently to give adequate information to the person addressed²]; and I hereby request you to defend said action³ at your own expense and cost, for if I am liable at all it is only as surety [or, only secondarily], you being primarily liable; and I claim to be indemnified and held harmless by you.

[Date, signature, and address.]

¹ This does not contemplate substitution, but only taking the burden and control of the defense.

Such a notice is appropriate, not only to the case of a surety, but also that of a person sued for another's negligence. *City of Rochester v. Montgomery*, 72 N. Y., 65, 67, and cases cited. Such a notice may be given by one party to one who is already a party. *Albany City Savgs. Inst. v. Burdick*, 87 N. Y., 40.

Compare, as to effect of the notice, 20 Abb. N. C., 15, and cases cited; *Fake v. Smith*, 2 Abb. Ct. App. Dec., 76; *Barmon v. Lithauer*, 1 *id.*, 99.

² If it is his contract, a brief designation may suffice. If negligence, details of time, place and circumstance

may be necessary. Such a notice has been held insufficient if it neither stated the cause or nature of the action, nor showed in what way the person addressed might be interested in the result. *Town of Lebanon v. Mead*, (N. H., 1886) 2 *New Engl. Rep.*, 279; s. c., 4 *Atl. Rep.*, 392. But compare *Chicago v. Robbins*, 2 *Black*, 418; again, 4 *Wall.*, 657, holding that express notice to defend is not necessary to fix such a person's liability, if he knows the suit to be pending and can defend it.

³ A request to join in the defense is sufficient to make the judgment competent evidence against the one notified. *Farmers', &c., Bk. v. Erie Ry. Co.*, 72 N. Y., 188, 196.

Form No. 1095.

Affidavit on motion to declare action abated unless the representatives continue it.

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is the defendant in the above-entitled action.
[*Or otherwise state relation to the cause, showing means of knowledge, &c.*]

II. That this action is brought to recover [*state nature and object of action briefly, and the condition of the cause.*]

III. That, as deponent is informed and believes [after issue was joined], in this action, to wit, on the day of , 18 , and before any verdict, report or decision rendered herein,¹ the above-named plaintiff died [*allege will or intestacy, letters, and representative's assumption of duty, as in Form 1082, par. IV.*].

IV. That to the best of deponent's information and belief said [executor] has failed to make any application to have the above-entitled action continued by him as plaintiff.

V. [*If an order to show cause be asked, allege as to previous application, reason, &c.; see p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1096.

Notice of motion (or order to show cause) to declare action abated, unless the representatives continue it.

[*As in Form 488 or 489, pp. 1, 2, omitting the matter in brackets following the †, and substituting for the matter between the † and the ¶ the following:*] requiring this action to be continued by the [executor] of the above-named A. B., deceased, as plaintiff herein, within a time to be fixed by the court, or that, in default thereof, the action shall be deemed abated.²

¹ See *N. Y. Code Civ. Pro.*, § 765.

mode of service, and on whom. *N. Y. Code Civ. Pro.*, § 761.

² An order to show cause is desirable in order that the court may direct

Form No. 1097.

Order declaring action abated unless the representatives continue it.¹

[Title (court order) and recitals, including service of notice, according to the direction of the court; see Form 493, p. 4.]

ORDERED, that C. D., [executor] of the above-named A. B., deceased, be at liberty to continue this action as plaintiff therein in place of the said A. B., and that in the event of his failure to appear and proceed therein as such, within months after service of a copy of this order upon , this action be deemed abated.²

Enter: *[signature of judge by initials of name and title.]*

Form No. 1098.

Affidavit to obtain order on behalf of defendant continuing action in name of representative or successor of plaintiff deceased³ or assigned.

[As in Form 1082, adding allegations to show that substitution is necessary to defendant's rights; see below.]

[In case of assignment of cause of action substitute, for allegation of death, &c., appropriate allegation of assignment, &c., as thus :⁴] II. The plaintiff is entirely insolvent and has no pecuniary responsibility. In the month of , 18 ,

¹ As to the right of dismissal, compare *Banta v. Marcellus*, 2 Barb., 373; *N. Y. Code Civ. Pro.*, § 761.

² The English practice requires a separate application, subsequent to dismiss, if default be made. *Wingrove v. Thompson*, 27 Weekly Rep., 911. Under our statute it is proper to take an order of dismissal as in other cases of conditional orders. Volume I, p. 259. See also Form 1150.

³ The representatives of a sole plaintiff who has died pending the action, have no right to elect whether it shall stand revived or not; the defendants are entitled to have the suit

continued in the name of the plaintiff's representatives, if the cause of action survives. *Ridgeway v. Bulkley*, 7 How. Pr., 269; *N. Y. Code Civ. Pro.*, § 757. See also *Rogers v. Patterson*, 4 Paige, 409. For the rule where a part only of the plaintiffs died, and the cause of action did not survive to the survivors, compare *N. Y. Code Civ. Pro.*, § 758, and *Williamson v. Moore*, 5 Sandf., 647.

⁴ The allegations here given are sustained as sufficient ground for compelling substitution in *De Bost v. Albert Palmer Co.*, 1 How. Pr., N. S., 508.

M. N., of _____, was appointed receiver in supplementary proceedings of all said plaintiff's property, and has duly qualified.

There are also judgments on record against the plaintiff in this county upon which executions appear by the record to have been issued and returned wholly unsatisfied. The plaintiff, when examined in supplementary proceedings in _____, 18 _____, testified under oath that he had no property whatsoever, and had no interest in this cause of action.

As deponent is informed by the said receiver and believes, he has no property of the plaintiff whatsoever in his hands, and does not claim to have any right, title or interest to the cause of action set forth herein, because the assignment to H. D. hereinafter set forth preceded his appointment by nearly two years.

III. That plaintiff is not the real party in interest, and since about _____, 18 _____, this action has not been prosecuted in the name of the real party in interest.

After the appeal was taken, and before a decision was rendered, being about three months ago, deponent and the officers of the defendant learned, for the first time, that in the month of _____, 18 _____, the plaintiff sold and transferred his entire interest in the cause of action herein to one H. D., of No. _____ street, in _____, who since that time has been continuously and now is the sole owner of the said cause of action, and that the said H. D., while the real and sole party in interest, is prosecuting this action in the name of the plaintiff who is, as before stated, entirely insolvent and of no pecuniary responsibility.

Deponent further alleges, that upon information and belief, based on the statement of said H. D. to deponent, that he refused either to apply to the court, or upon the application of another, to consent to be made party plaintiff in this action.

The defendant is compelled to litigate this action with a plaintiff entirely irresponsible, for the benefit of the said H. D., who is the real party in interest, and whom the defendant desires to be made the real party plaintiff.

III. [*If order to show cause is asked, state as to previous application, &c.; see p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1099.

Notice of motion (or order to show cause) on behalf of defendant, to continue action in name of representatives of deceased plaintiff.¹

[*As in Form 488 or 489, pp. 1, 2, omitting the matter in brackets following the †, and substituting for the matter between the † and the ¶ the following:*] continuing the above-entitled action in the name of C. D. as executor [*or, assignee—or otherwise*] of A. B. deceased.

Form No. 1100.

Affidavit² to obtain order interpleading third person and discharging defendant on payment into court, &c.³

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says :

I. That he is the defendant⁴ [*or, the president—or, cashier of the defendant*] above named [*or otherwise state relation to the cause, indicating means of knowledge, &c.*].

II. That the complaint herein was served on the day of last, and said defendant's time to answer will not expire until the day of instant.⁵

¹ Appropriate where defendant desires judgment on the merits, notwithstanding plaintiff's death, &c. For alternative order, where he is content to have dismissal, see Forms 1096, 1150.

Where the defendant is desirous, for any reason, to compel the continuance of the action (*e. g.*, where the answer prays affirmative relief), the order of continuance will be absolute; and a certified copy should be served upon the representatives or assignees of the plaintiff; and whether they appear or not, defendant may proceed to judgment on the merits.

² Where a savings bank asks interpleader after answer, by virtue of *L. 1882, c. 409, p. 679, § 259*, it is better to apply by petition, which will contain the same allegations as in this affidavit, and differ only in caption, conclusion and verification. See Volume I, p. 381.

³ The provision of the Code under which this motion is made (*N. Y. Code Civ. Pro.*, § 820, revised from *Code Civ. Pro.*, § 122) relates to cases where an

action has been already commenced by one of several adverse claimants. Where no action has been commenced, a person vexed by adverse claims may institute an interpleader suit. See *Dorn v. Fox*, 61 *N. Y.*, 264, rev'g 6 *Lans.*, 162. The remedy prescribed by the Code is merely concurrent, that is to say, an alternative remedy. See *Lancey v. Murphy*, 24 *Hun.*, 503; *Beck v. Stephani*, 9 *How. Pr.*, 193; and see *Parker v. Linnett*, 2 *Dowl. P. C.*, 562.

Where a party is sued in two courts, he may obtain interpleader orders in both. *Allen v. Gilby*, 2 *Dowl. P. C.*, 143. In one he may, in a proper case, have an order requiring the plaintiff there to consent to be interpleaded in the other. *Johnston v. Stimmel*, 26 *Hun.*, 435 (where such an order, conditional, was made against the United States).

⁴ It is decidedly advisable, if not indispensable, that the affidavit should be made by defendant, if possible.

⁵ The statute, *N. Y. Code Civ. Pro.*, § 820, contemplates application before

III. [*Here indicate cause of action on contract or for recovery of specific real or personal property;*¹ *see Forms 1101, 1105 (below).*]

IV. That the claims of the plaintiff and of said have been made without collusion of this defendant with either of them;² and that the defendant has no interest in the sum [*or, property*] claimed, except to pay [*or, deliver*] to the person rightfully entitled thereto;³ that he cannot safely determine⁴ to which of said claimants it should be paid [*or, delivered*], and is ready and willing to deposit the same [*or, to deliver the same as the court may direct*⁵] upon being

answer. The court may of course on cause shown allow later application (§ 783). Under the N. Y. Banking Act of 1882 (*L. 1882*, p. 679, c. 409, § 259), a savings bank is allowed to apply after answer. If extension of time to answer or stay is asked, see allegations necessary in Form 981, p. 446.

¹ The Code of Civil Procedure, by substituting for the phrase in the statute the words "ejectment" and "action to recover a chattel," should not be deemed to have taken away the power of the court to grant this remedy in equitable actions.

² Denial of collusion with the third person is required. *N. Y. Code Civ. Proc.*, § 820.

If the defendant is a corporation, the affidavit must aver that the *defendant*, and not merely the *deponent*, is not in collusion with the claimant. *Bignold v. Audland*, 11 *Sim.*, 23.

³ If defendant contests his liability to the amount claimed, the order must be denied. *Baltimore & Ohio R. R. Co. v. Arthur*, 90 *N. Y.*, 234, rev'g 10 *Abb. N. C.*, 147; *Patterson v. Perry*, 14 *How. Pr.*, 505; *Chamberlain v. O'Connor*, 8 *id.*, 45. Compare *Sherman v. Partridge*, 4 *Duer*, 646; s. c., 1 *Abb. Pr.*, 256, where it is said that a reference might be ordered to adjust the amount.

But an adverse claimant cannot by joining another cause of action with the one adversely claimed, prevent the interpleader.

Contest of a clearly unfounded claim to interest does not necessarily prevent ordering an interpleader. *Barnes v. Mayor, &c., of N. Y.*, 27 *Hun*, 236.

⁴ The allegation that defendant is

in doubt as to the right is no longer essential. *Tauton v. Groh*, 4 *Abb. Ct. App. Dec.*, 358. But it must appear that he cannot safely pay. *Baltimore & Ohio R. R. Co. v. Arthur*, 90 *N. Y.*, 234; rev'g 10 *Abb. N. C.*, 147.

The language of the cases is not harmonious, but the true rule is clear that a case of sufficient doubt for judicial determination should appear; but defendant's opinion as to that doubt is not the test. No matter how clear he may be of the truth of one claim and the falsity of the other, if he cannot safely determine the controversy he may ask the court to do so. If the affidavits leave no doubt, the motion should be denied. *Morgan v. Fillmore*, 18 *Abb. Pr.*, 217; s. c., 1 *Sheld.*, 62; s. p., *Mohawk & Hudson R. R. Co. v. Clute*, 4 *Paige*, 384; *Shaw v. Coster*, 8 *id.*, 339; *Wilson v. Duncan*, 11 *Abb. Pr.*, 3, rev'g 8 *id.*, 354.

⁵ The party must bring the money into court, or offer to do so. *Mohawk & Hudson R. R. Co. v. Clute*, 4 *Paige*, 384; *Shaw v. Coster*, 8 *id.*, 339; *Atkinson v. Manks*, 1 *Cow.*, 691. He must be prepared to surrender the entire fund, or pay the whole debt in controversy, without claim of title against either party. *Hoggart v. Cutts*, 1 *Craig & Ph.*, 197, 204. By the fact of his application, he admits that both claimants have title as against him. *Slingsby v. Boulton*, 1 *Ves. & B.*, 334. If he claims to deduct anything (except his costs) from the fund, he cannot have an order of interpleader. *Mitchell v. Hayne*, 2 *Sim. & Stu.*, 63.

In case of specific property, the fact that the applicant is not in a position to deliver it is a sufficient answer to his application. *Vosburgh v. Hunt-*

discharged from liability to either claimant [*and if discharge of a lien on defendant's property is involved, may add, as thus:* and upon said mortgage being discharged of record].

[*For allegations where order to show cause is asked, see p. 2; where extension or stay is asked, see p. 446.*]

[*Jurat.*]

[*Signature.*]

STATEMENTS OF GROUND FOR INTERPLEADER SUITABLE TO INSERT IN FOREGOING FORM.

1101. *Allegation of conflicting claims to money deposit.*—Insert in above Form.]—III. That said action is brought to recover the sum of dollars, deposited with said defendants on or about the day of , 18 , by one M. N.; and that the plaintiff claims to be entitled to said moneys so deposited, under an assignment thereof to him by the said M. N.

That on the day of , 18 , one O. P. gave to said defendants notice that he had been appointed receiver of all the property of the said M. N., and demanded of said defendants that they pay the said deposit to him.¹

1102. *The same; another Form.*]—III. That said action is brought to recover certain moneys heretofore deposited with defendant by one M. N., amounting to about the sum of dollars.

That the same moneys are claimed by one O. P., under [an order of the Court], of which a copy is hereto annexed.²

1103. *Goods claimed by purchaser from consignor and by general assignee.*]—III. That the property which is claimed by the complaint herein was consigned to this defendant by one M. N., of , subject to his order; and the plaintiff herein claims under a general assignment of all the property of the said M. N. to him, executed by the said M. N. on the day of , 18 .

That the same property is claimed by one O. P., of , under a written order of the said M. N., dated the same day, and directing its delivery to him as the alleged purchaser thereof; and he has demanded delivery from this defendant. [*If in writing, annex and refer to a copy.*]

1104. *Foreclosure.*³]—III. That this action is brought to foreclose a mortgage for \$, made by this defendant to O. P., and recorded in the office of the of county, on the day of , 18 , in Liber of Mortgages, p. , which plaintiff alleges by his complaint herein was assigned to him by said O. P. on the day of , 18 , by assignment recorded [*&c.*].

That at various times [before and since the service of the summons herein] M. N., now residing in the city of , and a person of full age, not a

ington, 15 *Abb. Pr.*, 254 (holding that as the statute requires certain things to be done in order to entitle the party to relief, the court has no power to dispense with these conditions)

¹ This Form is sustained by *Fletcher v. Troy Savings Bank*, 14 *How. Pr.*, 383.

² Sustained by *Wehle v. Bowery Savings Bank*, 40 *Super. Ct. (J. & S.)*, 97; s. p., *German Exch. Bank v. Commissioners of Excise*, 6 *Abb. N. C.*, 394.

³ Sustained by *Tauton v. Groh*, 4 *Abb. Ct. App. Dec.*, 358. See also *Caulkins v. Bolton*, 31 *Hun*, 458.

party to this action, has demanded of this defendant payment of the amount due on the bond and mortgage mentioned in the complaint herein, and has given this defendant, personally, notice not to pay the same to any person but her, claiming herself to be the sole and lawful owner of said bond and mortgage. [*If demand was in writing, annex and refer to a copy.*]

1105. *Municipal award, claimed by mortgagee.*¹—III. That this action is brought to recover \$7,424 awarded to the plaintiff in proceedings had upon the application of the department of parks to acquire title to certain streets and avenues, known as 138th and various other streets; that as appears by the complaint herein, that said sum was awarded by the report made by the commissioners appointed in said matter, and confirmed by the court, for premises acquired therein for avenue, and designated in said report by the damage map No. . That on or about the day of , there was served on the Department of Finance a notice of claim on behalf of one M. N., claiming an interest in said award, by virtue of a mortgage held by said M. N. for the sum of \$, the interest on which sum it was stated had not been paid since the day of , 18 , of which notice a copy is hereto annexed.

Form No. 1106.

Order to show cause (or notice of motion) for interpleader.¹

[*Title, &c., as in other cases, see pp. 1-4, stating relief thus:*] substituting M. N. as defendant in the above entitled action, in the place and stead of Y. Z. [*and further relief if desired*], and discharging Y. Z. from liability to either A. B. or M. N., on paying into court [*or otherwise; see next Forms*] the amount claimed in the complaint herein to be due on said bond and mortgage for principal and interest, less costs of this motion [*or, action*], and directing such other or further order as may be just.

Let the time to answer [*or, demur—or, make such motion as defendant may be advised*] be extended until [ten] days after the hearing and determination of this motion.

[Service of a copy of this order, with the papers on which it is granted, shall be sufficient if made, both on the attorney for the plaintiff and personally on said M. N., on or before day next.]

[*Authentication, see Form 491, p. 3.*]

¹ Sustained by *Barnes v. Mayor, &c.*, of N. Y., 27 *Hun*, 236; *s. p.*, *Pollock v. Morris*, 51 *Super. Ct. (J. & S.)*, 112.

² It is usual to take an order to show cause directing mode of service

on the third person. But under *N. Y. Code Civ. Pro.*, § 820, perhaps the ordinary notice may be enough, irrespective of whether the adverse claimant sought to be substituted will appear voluntarily.

Form No. 1107.

Order of interpleader; short form allowing answer.¹

[*Title (court order) and recitals, according to the case; see Form 493, p. 4.*]

ORDERED, 1. That, on payment² by the defendant to the clerk³ of the county of [or, the chamberlain of the city of New York], of the sum of \$, the amount claimed in the summons and complaint herein, principal and interest, to date [less ten dollars costs of this motion, hereby awarded to defendant⁴], to the credit of this action, within [five] days from the entry of this order, O. P. be substituted as defendant in this action in place of Y. Z., the defendant above named, and [that the summons and complaint be deemed amended accordingly⁵] that said Y. Z. thereupon be discharged from liability therefor to either the plaintiff above named or said O. P.*

2. That if the said O. P. does not appear and defend this action within twenty days after service upon him of a copy of this order, together with a copy of the complaint herein [so amended], the plaintiff may apply *ex parte* for an order that the money so deposited be paid over to him.

Enter: [*signature of judge by initials of name and title.*]

¹ This is the usual form where new allegations in the complaint are not needed. It is supported by *Van Buskirk v. Roy*, 8 *How. Pr.*, 425; *Fletcher v. Troy Savings Bank*, 14 *id.*, 383.

The court may, however, in many cases order a reference forthwith without new pleadings.

Kirby v. Fitzpatrick, 18 *N. Y.*, 484.

² The order will be conditional on the money being paid into court. *Van Buskirk v. Roy*, 8 *How. Pr.*, 425; *Fletcher v. Troy Savings Bank*, 14 *id.*, 383.

The fund is sometimes deposited in a trust company before settling the order, and the terms of the above clause are then varied, thus: The defendant having deposited in, &c., pursuant to leave of this court, hereby granted, the sum of, &c., O. P. is hereby substituted, &c.

³ Or a trust company may be

named. *N. Y. Gen. Rules*, No. 68, of 1884.

Where defendant is a savings bank sued for a deposit, the following direction is sometimes substituted: That defendant retain the amount claimed in the summons and complaint herein, principal and interest to date, the same to be held by it at interest at the rate of per cent, per annum, subject to the further order of this court, and that O. P. be substituted, &c. See *L. 1881, c. 409, p. 679, § 259*.

⁴ The costs of the action, to be taxed, have in some cases been awarded, but this is unusual except in an action of interpleader.

In some cases the costs are not directed to be paid out of the fund, but by plaintiff. See Form 1111.

⁵ This clause is often omitted in simple cases requiring no change of allegation.

Form No. 1108.

Another Form ; requiring plaintiff to serve a complaint.

[*As in last Form, substituting for paragraph 2 the following:*] 2. That the plaintiff have leave to amend the summons and complaint [*or, to serve a supplemental complaint*¹] herein in such manner as he may be advised within twenty days after the service upon him of a copy of this order, or within such further time as may be allowed;² and that he serve a copy of such amended summons and complaint upon the said O. P., substituted as defendant as aforesaid, and that unless the said substituted defendant, O. P., shall answer or demur to said complaint within twenty days after the service thereof, or such further time as may be allowed, the said defendant shall be debarred from all claim or title to the fund deposited as aforesaid.

Form No. 1109.

Another Form ; discharging defendant without determining the mode of interpleading.³

[*Substitute for paragraph 2:*] That said contesting parties interplead between themselves as to their respective claims or rights to be in said fund, and that such proceedings be had thereupon as are required and provided for by the usual practice of this court, and that either of them have leave to apply on the usual notice for further order of the court in this behalf.

Form No. 1110.

Another Form ; as in foreclosure.

[*As in Form 1107, to the * at end of paragraph 1.*]

2. That said M., within [ten] days from the service of this order and the payment of said money to said clerk, execute and deliver to said Y. Z., in due form, a satisfaction-piece of the mortgage mentioned in said complaint, which was made by

¹ *Wilson v. Lawrence*, 8 *Hun*, 593.

² As to allowing further time to serve supplemental complaint, see *N. Y. Code Civ. Pro.*, § 784.

³ On awarding an interpleader in equity, the court may determine as to the burden of allegation and proof.

said M. G. and J. G., bearing date the day of , 18 , to said M., to secure the payment of the sum of dollars, on the day of , 18 , with interest thereon at seven per cent. per annum, payable semi-annually, which said mortgage was recorded in the office of the Register of , on the day of , 18 , in Liber of Mortgages, page , at o'clock and minutes in the noon.

3. That upon production to the clerk of this court of a proper affidavit that said deposit has been made, with a copy of this order, and the exhibition of a duplicate receipt for said deposit, the notice of pendency of this action filed on the day of , 18 , in the office of said clerk, be by him cancelled and discharged of record.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1111.

Order of interpleader, on delivery of specific property, and appointing receiver therefor.

[*Title (court order) and recitals according to the case; see Form 491, p. 4.*]

ORDERED, I. That the defendant deliver the property mentioned in the complaint herein to R. C., Esq., of , who is hereby appointed receiver thereof.

II. That O. P., of , be substituted as defendant in this action, in place of the above-named Y. Z., who shall, upon delivery of the said property to the said receiver, be discharged from all liability therefor, either to the plaintiff or to the said O. P.

III. That the said receiver hold the said property, subject to the further direction of this court. [*Add special directions if needed, as to bond, income, to sell or rent, &c.; see pp. 145, 152, 156, &c., of this Volume.*]

IV. That, within days after notice of this order, the plaintiff serve a summons and a copy of his complaint, amended as he may see fit [with a copy of this order], upon the said O. P.; and that the said O. P. answer such complaint within days thereafter.

V. That if the plaintiff neglect to serve his summons and complaint and this order as herein directed, the defendant Y. Z. may apply to the court for an order dismissing the action,

and that the said property be delivered by the receiver to the said defendant Y. Z.; and if the said O. P. neglect to answer such complaint, if served as herein directed, the plaintiff may apply, on notice, for an order that said property be delivered by the receiver to the plaintiff.

VI. That dollars costs be allowed to the said Y. Z., to be deducted by him out of the fund [*or*, to be paid by the plaintiff, and allowed to him in case of his final recovery of judgment].

Enter: [*signature of judge by initials of name and title*].

Form No. 1112.

Another Form; securities to be delivered to a trust company.

[*Substitute for the direction to pay:*] That the said The M. B. L. I. Co. deliver to, and leave with The F. L. & T. Co. the certain certificate numbered , bearing date the day of , 18 , issued by the C., C., C. and I. R. Co., a corporation organized under the laws of the State of , whereby it was certified by the said last mentioned corporation that W. & R. were the owners of shares of the capital stock of said last mentioned corporation; to the credit of this action, within days after the entry of this order, subject to the further order of this court.

And that the said The M. B. L. I. Co. be and it hereby is discharged from all liability to either party on account of said certificate, on the delivery as aforesaid.

Form No. 1113.

Affidavit to obtain order that the plaintiffs in two causes in the same court interplead.¹

[*Title of court and both actions.*]

[*Venue.*]

E. P. C., being duly sworn, says:

I. I am a member of the firm of C. & C., and one of the defendants in the actions above entitled.

¹ Held, in *Tynan v. Cadenas*, 3 *How. Pr., N. S.*, 78, error to deny the motion on this affidavit citing *Baltimore, &c., R. R. Co. v. Arthur*, 90 *N. Y.*, 234. It had been denied on the authority of *Sherman v. Partridge*, 4 *Duer*, 646; and *Trigg v. Hitz*, 17 *Abb. Pr.*, 436. If actions are in different courts, proceed as in note 2, p. 529.

II. Each action is brought to recover the price of certain tobacco, which is the same tobacco in each case, alleged to have been sold and delivered to my firm by the plaintiff in each action.

III. A copy of the complaint in each action is annexed to this affidavit. The debt alleged in the same complaint is the same debt. The action in which J. H. T. is plaintiff was commenced by the service of a copy of the summons and complaint, on the day of , 18 . The action in which J. R. H. and another are plaintiffs was commenced by the service of the summons and complaint on the day of , 18 . The said defendants have not answered or pleaded in either action, nor has their time so to do expired. As to the action in which J. R. H. and another is plaintiff, it will expire on the day of . As to the action in which J. H. T. is plaintiff, it will expire on the day of .

IV. The demand by each of the said plaintiffs against the defendants is made without collusion on the part of the defendants with them, or either of them.

V. The defendants are entirely ignorant of the rights of the adverse claimants to the purchase price of said tobacco, and ask therefore that the said plaintiffs may be respectively substituted in the place and stead of said defendants in said actions, and that they may be discharged from liability to either on paying into court the sum of dollars, with interest on the sum of dollars, from the day of , 18 , and on the balance of dollars from the day of , 18 , the amount of the debt.

VI. An order to show cause is asked why the said plaintiffs should not be so substituted for the reason that the defendants' time to answer in the action in which H. is plaintiff expires on the inst., as aforesaid. No previous application for such an order has been made.

[*Jurat.*]

[*Signature.*]

Form No. 1114.

Order to show cause why plaintiffs in two causes should not interplead.

[*Entitle in both actions if in the same court.*]

[*May state relief thus: why the plaintiffs should not be respectively substituted in the place and stead of the defend-*

ants in said actions, and why the defendants should not be discharged from liability to either plaintiff on paying into court the sum of dollars, with interest on the sum of dollars, from the day of , 18 , and on the balance of dollars, from the day of , 18 , the amount of the debt, and why the said defendants should not have such other and further relief as to the court may seem just.

And it is further ORDERED, that said defendants' time to answer each of said complaints is hereby extended to days after the determination of this motion.

Service of a copy of this order on the attorneys for the plaintiffs in said actions respectively on or before the day of , 18 , to be sufficient.

[*Authentication, see Form 491, p. 3.*]

Form No. 1114a.

Affidavit and order to substitute successor of public officer co-defendant.

[*Adapt from Forms 1088 to 1090.*]

SECTION III.

PROCEEDINGS OF A THIRD PERSON TO COME IN.

I. SUBSTITUTION OF A THIRD PERSON IN PLACE OF ONE NAMED ON THE RECORD AS A PARTY.

FORMS.

- (1115.) Affidavit for motion on behalf of executor or administrator, heir, devisee, assignee, receiver, &c., to be substituted for original plaintiff or defendant.
- (1116-1123.) Statements as to death, or other transfer, suitable to be inserted in the foregoing Form.
- (1124.) Request for substitution annexed to affidavit of attorney or agent.
- (1125.) Affidavit of former attorney in corroboration of moving affidavit.
- (1126.) Notice of motion to be substituted for a party already named on the record.
- (1127.) Order to show cause why applicant should not be substituted.
- (1128.) — substituting applicant.
- (1129-1139.) Special directions suitable to be inserted in foregoing Form.
- (1140.) Order substituting infant heir and guardian *ad litem* to prosecute appeal after sole plaintiff's death.
- (1141.) Petition by receiver for leave to be substituted for a party in an action which was pending when he was appointed.
- (1142.) Affidavit on behalf of successor in administration or trust, to move to continue action brought by his predecessor.
- (1143.) Notice of motion thereon.
- (1144.) Order thereon.
- (1144a.) Motion by successor in office to come in as a party in place of his predecessor.
- (1145.) Affidavit to move to substitute indemnitor as defendant in place of sheriff.

(1146.) Consent of indemnitors to be substituted.

(1147.) Order to show cause (or notice of motion) thereon.

(1148.) Order thereon.

(1149.) Order for severance.

II. BRINGING IN ADDITIONAL PARTY ON HIS OWN APPLICATION: INTERVENING. See p. 554.

I. SUBSTITUTION OF A THIRD PERSON IN PLACE OF ONE NAMED ON THE RECORD AS A PARTY.

Form No. 1115.

Affidavit for motion on behalf of executor or administrator, heir, devisee, assignee, receiver, &c., to be substituted in place of original plaintiff or defendant.¹

[*Title of court and action.*]

[*Venue.*]

E. F., being duly sworn, says :

I. That he was the attorney for the plaintiff [*or, the defendant W. X.*] in the above-entitled action, and has been retained herein by and appears for [*name of applicant*] below named [*or otherwise state relation to the cause and means of knowledge, unless clearly implied*]. *

II. That this action was brought by said A. B. against said Y. Z. for the purpose [*here state nature of cause of action sufficiently to show that it is one that would not abate by death,² or is assignable, &c., as the case may be,³ and if at issue, indicate defense*].

III. [*State death, assignment or other ground of the application; see following Forms.*]

IV. [*If additional grounds of relief occurred pending the action, on which the representative is entitled to recover, are relied on as ground for asking leave to serve supplemental complaint⁴ or answer, annex and refer to copy of such proposed pleading.*]

V. [*State situation of the cause at the time of the death or transfer, and now ; and, if order to show cause is asked, state as on p. 2.*]

¹ *N. Y. Code Civ. Pro.*, §§ 756-759. The representatives of a defendant deceased may come in under this statute as well as those of a plaintiff. *Pierson v. Morgan*, 44 *Hun.*, 517.

And the statute extends to a case

where both parties are dead. *Holsman v. St. John*, 90 *N. Y.*, 461.

² See pp. 502, 503.

³ See Volume I, p. 513.

⁴ As in *De Lisle v. Hunt*, 36 *Hun.*, 620.

VI. [*If extension of time or stay is asked, allege merits, &c., as on p. 447.*]
 [Jurat.] [Signature.]

STATEMENTS AS TO DEATH, OR OTHER TRANSFER, SUITABLE
 TO BE INSERTED IN THE FOREGOING FORM.

1116. *Where the application is by executors or administrators, insert in last Form.*—**III.** That pending said action, and on or about the day of , 18 , said A. B. died at , having first duly made and published his last will and testament, by which, among other things, he appointed E. F., of , his executor; that said will has been duly proved, and letters testamentary thereon [*or, died intestate, and that letters of administration on his goods, chattels and credits*] were duly issued to said E. F. by the surrogate of the county of , on the day of , 18 , and that said E. F. has undertaken the execution [*or, administration*] thereof, and now is such executor [*or, administrator*].

That, at the time of his death, the said claim for damages was still owned by the said A. B., and the amount thereof is still due from the said defendants, and the said claim is now held by this deponent as part of the assets in his hands belonging to the estate of the said A. B., deceased.

1117. *Application by assignee of representative of sole plaintiff deceased.*¹—*After alleging death, qualification of representative, &c.*—That on or about the day of , 18 , the said executor [*or, administrator*], in due course of administration, and for value, assigned and transferred all the cause of action and demand, and the bond and mortgage in the complaint in said action alleged, to the deponent, who is now the sole owner thereof.

1118. *The same; another Form.*³—*After alleging death and qualification of representative.*—That said estate and administration has been settled and closed, and by assignment duly executed by all parties interested therein, the said [*name of assignee applying*] has become and now is the owner in his own right and individually of the said cause of action against said [*defendants*], upon which the above entitled action was brought. No proceedings have been taken in said action by any party to revive, continue or dismiss it; but it stands at issue and untried as above set forth; and all the said defendants are living.

1119. [*Application by heirs.*—That pending said action said [*name*] died intestate at , on or about the day of , 18 , and leaving this deponent and C. B., his only children, who are both of full age [*or state ages*], his heirs at law, and as such they inherited all his interest and estate in the lands which are the subject of said action.

¹ It is only necessary for those to join to whom letters testamentary have been granted, and who have qualified. *N. Y. Code Civ. Pro.*, § 1818; *Moore v. Willett*, 2 *Hilt.*, 522. Formerly the rule was otherwise. *Bodle v. Hulse*, 5 *Wend.*, 313. In a suit to foreclose a mortgage, where a plaintiff in foreclosure died leaving two executors, one of whom was the mortgagor defendant, held that the other

might continue the suit against him. *McGregor v. McGregor*, 35 *N. Y.*, 218.

² Sustained by *Schlichter v. South Brooklyn Saw Mill Co.*, 35 *Hun.*, 339; *aff'g Dock v. The Same*, 6 *Civ. Pro. R. (Browne)*, 144.

³ Sustained in *McLachlin v. Brett*, 2 *Civ. Pro. R. (Browne)*, 194; *s. c.*, 14 *Weekly Dig.*, 360.

⁴ As to guardians *ad litem* for infants, see Volume I, pp. 582-588.

1120. *Where the attorney of the deceased is also dead, add:*—That H. W. R., who was the attorney of the defendant in the above-entitled action, has departed this life, and that no attorney has been substituted of record in his place.

1121. *Application by assignee of cause of action.*¹—III. That pending said action, and on the day of , 18 , said A. B., plaintiff in said action, duly assigned and transferred [the note] in the complaint mentioned, for a valuable consideration, to this deponent, who is now the lawful owner and holder thereof.

1122. *The same; another Form.*²—III. That on or about the day of , 18 , said A. B. executed and delivered to deponent a written transfer and assignment, for his own use absolutely, of the claim and demand of the said A. B. in controversy in this cause [a copy of which assignment is hereto annexed]; and deponent has ever since been and now is the owner thereof.

1123. *Death of assignor excusing non-joinder of representatives.*³—*Add to last Form:*—That deponent knew the said A. B. in his lifetime, and for upwards of years prior to his death, which occurred on the day of , 18 . That said A. B. died intestate, as deponent has been informed by Mrs. C. B., of this city, the widow of said A. B., and as he verily believes, and left no issue, and had never had any children; and that the only next of kin surviving said intestate are his brothers [*naming them*], and his sister, E. F., widow of L. S. F., all of whom reside in .

That as deponent is informed and verily believes, the said R. S. left no property, real or personal, whatever.

That deponent derived such information from said R. S. in his lifetime and from his said widow since his decease.

One of several heirs may be allowed to continue the action as to his share. *Van Horne v. France*, 32 *Hun*, 504.

As to when the widow should join, compare *Ash v. Cook*, 3 *Abb. Pr.*, 389; *More v. Deyoe*, 22 *Hun*, 208.

¹ Plaintiff's general assignee for the benefit of creditors, by an assignment made pending the action, may cause himself to be substituted. *Lawson v. Town of Woodstock*, 37 *Hun*, 352 (*dictum*).

If the original plaintiff is living, and there is a counterclaim against him, the applicant should not usually be substituted for the plaintiff, against defendant's objection, because defendant has a right to pursue his original debtor; but in a proper case the applicant may be added, or the court may require security as a condition of sub-

stitution. If the sole plaintiff is dead, a counterclaim of course does not prevent substitution of his executor or administrator, and the same is held of the assignee of his executor or administrator. *Schlichter v. South Brooklyn Saw Mill Co.*, 35 *Hun*, 339; *aff'd Dock v. The Same*, 6 *Civ. Pro. R. (Browne)*, 144.

² Sustained by *Schell v. Devlin*, 82 *N. Y.*, 333.

Notice of the motion, however, was given to the widow and next of kin, as it should be. *Franklyn v. Graham*, MS.; *McLaughlin v. Mayor, &c.*, 8 *Daly*, 474; s. c., 58 *How. Pr.*, 105.

³ Upon this allegation the court has a right to substitute the assignee and proceed without the appointment of an administrator of the original plaintiff. *Schell v. Devlin*, 82 *N. Y.*, 333.

Form No. 1124.

Request for substitution annexed to affidavit of attorney or agent.¹

To the Court.

Upon the foregoing affidavit I request to be made [*plaintiff*] as therein set forth, in place of A. B. deceased.

[*Date.*]

[*Signature of*],

Administrator, &c., of .

[*Acknowledgment as in Form 495, p. 6.*]

[If the application is not made by the attorney for the former party, it is desirable to obtain and annex his consent to substitution, if there can be any question as to his right to a lien.]

Form No. 1125.

Affidavit of former attorney in corroboration of moving affidavit.¹

[*Title of court and cause.*]

[*Venue.*]

A. T., of , being duly sworn, says that he was the attorney of A. B. in his lifetime, in the action mentioned in the annexed affidavit; and that the said action was commenced, issue joined therein, and was pending and undetermined at the time of the death of the said A. B., as stated in said affidavit; and that Z. T., of , aforesaid, is the attorney of the said defendant in said action.

[*Jurat.*]

[*Signature.*]

Form No. 1126.

Notice of motion to be substituted for a party already named on the record.

[*Title of court and cause.*]

Please take notice, that on the annexed affidavit [*or, petition*], and on the summons and [*pleadings*] in this cause,² the

¹ The court may, in its discretion, act on appearance by attorney in all ordinary cases at least without personal request (see *Cox v. James*, 45 *Law Times R.*, N. S. (Q. B. Div.), 471), except perhaps in ejectment. See Vol-

ume I, p. 521. If request is presented, as is the practice, it should be acknowledged.

² Suitable where the main affidavit is by the applicant.

³ This is one of the exceptional

undersigned will move the court at a special term, to be held [at chambers] at the county court house [or, city hall], in , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order directing that [name of applicant, and, if he is to appear in an official or trust capacity, indicate it by adding, as supervisor—or, as executor of—&c., as the case may be] be substituted as plaintiff [or, defendant] herein, in the place of [name of decedent or predecessor]. [May add—or directing that the said—name of applicant—be joined as a plaintiff—or, defendant—in this cause.] And that the summons and complaint be amended accordingly [or, and that said have leave to file and serve the amended summons and amended—or, supplemental—complaint, of which a copy is annexed], and that the action continue, without prejudice to the proceedings already had [if other relief is desired, state it; see Forms 1127–1139], and for such other and further relief as may be just.

[Date.] [Signature and office address of],
Attorney for [moving party].

To [address],
Attorney for [all who have appeared,¹ and any others having an interest²].

Form No. 1127.

Order to show cause why applicant should not be substituted for a party already named in the record.

[Title as in Form 492 or 493, omitting the matter in brackets following the †; and substituting for the italic clause between the † and the ¶, statement of relief as in last Form; or thus:] directing that this action may be revived and continued against the above-named defendant, by and in the name of C. D., as successor in interest of the above-named plaintiff, deceased; that the complaint and answer heretofore served herein stand as the pleadings in said action as so continued; with such sug-

cases in which it may be proper to move "on all the proceedings in a cause." Compare Vol. I, p. 154, and p. 252.

¹ White v. Buloid, 2 Paige, 475; Douglass v. Sherman, *id.*, 358. But where the surviving defendants have no interest in the question, and would have no right to resist the motion, notice is unnecessary. Gordon v. Ster-

ling, 13 How. Pr., 405. But compare Vol. I, p. 119.

² As, for instance, one who is heir, but does not join in application of a co-heir; or next of kin where an assignee applied and there is no executor or administrator; and the attorney of a deceased party, if he may have a lien.

gestion or amendment on the record as to change of parties plaintiff as may be made in said order, unless the court shall deem it necessary to serve a supplemental complaint herein, in which case that the date of issue remain the same as heretofore, to wit: , 18 . And that A. T., of , be substituted as the attorney for the plaintiffs in the place and stead of B. T., attorneys for said deceased plaintiff.

[*If other relief be desired, specify it. See last Form and Forms 1128-1139.*]

[And in the meantime, and until the decision of this motion, let all proceedings on the part of the plaintiffs be stayed.]

Service of a copy of this order, and the annexed papers [*may direct on whom, and how*], on or before , 18 , shall be sufficient.

[*Authentication as in Form 491, p. 3.*]

Form No. 1128.

Order substituting applicant for a party already named on the record.

[*Title (court order) and recitals according to the case. See Form 493, p. 4.*]

ORDERED, that the said C. D. be and he is hereby substituted as [plaintiff] in this action in the place of the said [name], and * [that the title of the proceedings herein be amended accordingly,¹ and] that the said action be continued by [or, against] and in the name of the said C. D., without prejudice to the proceedings already had in this action² [*or otherwise, as in next Form*].

Enter: [*signature of judge by initials of name and title.*]

¹ The court may, in its discretion, order an amendment of the pleadings on such a motion. *Smith v. Zalinski*, 94 N. Y., 519.

If the order is a mere formal substitution, entering and filing the order and annexing it to the judgment roll is enough.

If allegations of devolution of title are necessary as matter of pleading, service of pleadings should be provided for. *Seear v. Lawson*, 29 *Weekly Rep.*, 45.

If contest by pleading is necessary

as to the right of the alleged representative to succeed, a clause should be inserted in the order of continuance allowing or directing the plaintiff to amend his complaint, or to file a supplemental complaint, so that his interest to the property in controversy may be properly litigated in the action. See next Form.

² *Moore v. Hamilton*, 44 N. Y., 666; *Kreischer v. Haven*, 23 *Weekly Dig.*, 66.

Compare *Matter of N. Y., Lackawanna, &c*, R. R. Co., 26 *Hun*, 194.

SPECIAL DIRECTIONS SUITABLE TO BE INSERTED IN FORE-GOING FORM.

1129. *Leave to answer.*—that he have leave to appear and answer, and to defend the action, provided he so answer within days from the day of , 18 [or, from the service of this order].

1130. *Clause requiring appearance.*—that on said C. D. causing a notice of appearance for himself herein to be given to plaintiff's attorney within days from the entry of this order, a copy of the complaint as amended be served upon his attorney within twenty days thereafter, and the cause thereupon proceed in like manner as if said C. D. had been originally made a party-defendant herein.

1131. *Answer to stand, but with leave to amend.*—that the answer of the said Y. Z. be deemed the answer of the said W. X., as administratrix as aforesaid, with leave to the said W. X. to serve an amended answer within days after service of this order, if so advised.

1132. *Order that amendment be deemed to have been made.*—that the complaint in this action be taken and considered as amended by substituting the name of J. R. as executrix under the last will and testament of J. R., deceased, in the place of J. R., wherever the same occurs, and also adding the following clauses to said complaint:

That upon the day of , 18 , the said J. R. died, leaving a last will and testament.

That upon the day of , 18 , said will was duly proved before and admitted to probate by the surrogate of the county of , and on said day letters testamentary were duly granted and issued to this plaintiff, who has ever since, and is now, performing her duties as such executrix.

And that said complaint be taken and considered as amended, by inserting in the place of the word "plaintiff," wherever it occurs, the words "one J. R."

1133. *Leave to make supplemental complaint. Insert or substitute at the * in Form 1128:*—with leave to said [name of applicant] to file and serve the amended summons and the supplemental complaint above mentioned¹ within days after service of this order.

1134. *Condition that supplemental pleading be made. Insert or substitute in Form 1128:*—This order is made upon condition that said [name] files and serves a supplemental complaint [or, answer] within days after service of this order.²

1135. *Direction to answer.*—This order is made on condition that said [applicant] serve a verified answer herein within days.

1136. *Saving clause as to attorney.*—But said [name of applicant] shall make no change of attorney of record for the [plaintiff; if receiver may add: nor of counsel] in the conduct of the cause, unless upon application to the court, and upon showing satisfactory cause therefor.³

¹ De Lisle v. Hunt, 36 Hun, 620, allowing supplemental complaint by administrator to recover rents and profits in ejectment, although the intestate's estate terminated by her death.

² The court may require the applicant to make a supplemental pleading

if justice entitles the adverse party to take issue on the applicant's right. Smith v. Zalinski, 94 N. Y., 519.

³ Matter of Wilds, 6 Abb. N. C., 307. Or a substitution may be expressed to be without prejudice to the lien of the attorney, and that he shall be continued as plaintiff's attorney un-

1137. *Direction to enter nunc pro tunc.*¹—that this order be entered *nunc pro tunc*, as of the day of , 18 .

1138. *As to evidence.*]—that the evidence already taken in the cause stand as the evidence in the cause so continued. See Form 1128, note 1.

1139. *Direction as to date of issue.*]—that issue shall be of the day of .

Form No. 1140.

Order for substituting infant heir and guardian ad litem² to prosecute appeal after sole plaintiff's death.

At a special term [*dec., as in Form No. 493, p. 4*].

[*Title of cause.*]

On reading and filing the petition, duly verified, dated the day of , 18 , of S. H. M., infant son of the plaintiff in this action, from which it appears that said plaintiff died on the day of , 18 , leaving said S. H. M. his sole heir [*or, leaving a last will and testament, by which he devised the lands affected by this action to said petitioner*], and praying that J. M. G., the attorney for the said plaintiff, may be appointed the guardian *ad litem* or next friend of the petitioner, to continue his action, and prosecute the appeal herein, in the name and on behalf of said petitioner; together with the consent of the attorneys for the defendant :

ORDERED, that the said J. M. G. be and he is hereby appointed the guardian *ad litem* or next friend of the said S. H. M., to continue this action and prosecute the appeal therein, and that said action and the appeal therein stand continued in the name of said S. H. M., as his said next friend or guardian *ad litem*.

Enter : [*signature of judge by initials of name and title.*]

til his lien is satisfied. *Edwards v. City of Watertown*, 23 *Weekly Dig.*, 230.

¹ See Vol. I, p. 270.

² See Vol. I, p. 582.

Form No. 1141.

Petition by receiver for leave to be substituted for a party in an action which was pending when he was appointed.¹

Name of court

[*Title of cause in which he
was appointed.*]

[*Title of cause in which
he asks substitution.*]

To the Court of .

The petition of R. C. shows :

I. That by order in the first above-named cause, made the day of last, your petitioner was duly appointed receiver of [*briefly indicating what; or if appointment was by referee, say :*] it was referred to R. F., of , to appoint a receiver of [*briefly indicating what*], and pursuant thereto the said R. F. appointed your petitioner receiver thereof.

[*Or where appointed in supplementary proceedings:*] I. That on the day of , 18 , upon application duly made by M. N., a judgment-creditor of the above-named A. B. in proceedings supplementary to execution, your petitioner was, by the order of Hon. , one of the justices of the Supreme Court [*or, county judge for the county of*], duly appointed receiver of the property of said A. B.

II. That thereafter he duly qualified as such, and entered on his duties as such, and now is such receiver.

III. [*Allege pendency and nature of action; and of defense, if at issue; and condition of cause,² and other matters, as in Form 1115.*]

¹ Matter of Wilds, 6 *Abb. N. C.*, 307. As to receiver's petition for instructions, see page 218 of this Vol.

The above Form is appropriate where the appointment of the receiver was in the same court as the action in which substitution is asked. If they are in different courts, entitle petition in the first court and cause, and ask leave there. After leave is granted, move in the second court and cause, to be substituted, on an affidavit alleging the grounds for substitution as well as the fact of leave granted. The latter allegation is not essential, for

the receiver may apply on his own responsibility without leave.

As to the right to proceed in the name of his debtor, see *Phoenix Warehousing Co. v. Badger*, 6 *Hun*, 293; *Ross v. Wigg*, 100 *N. Y.*, 243; *Matter of Lansing*, 17 *Weekly Dig.*, 288.

As to how far bound if not substituted, see *Spencer v. Berdell*, 45 *Hun*, 179; *People v. Knickerbocker, &c., Ins. Co.*, 43 *id.*, 574; *Platt v. Ashman*, 32 *id.*, 230; *Mount v. Manhattan Co.* (*N. J.*, May, 1887), 8 *Centr. Rep.*, 573.

² If collusion between the parties be relied on, allege evidence. A gen-

WHEREFORE your petitioner asks leave to prosecute [*or, defend*¹] said second above entitled cause, and that for that purpose he be substituted as plaintiff [*or, defendant*] in place of said [*name*], and for such other or further relief as may be just.

[*Date.*]

[*Signature.*]

[*Verification as in Form 494, p. 5.*]

[*Notice of presentation or order to show cause, see Vol. I, pp. 347, 348.*]

Form No. 1142.

Affidavit on behalf of successor in administration or trust, to move to continue action brought by his predecessor.²

[*As in Form 1115, to the *.*]

II. That this action was brought by A. B. and C. D. as [executors of and trustees under the will of M. N., deceased] for the purpose of [*state object and nature of action*].

III. [*State condition of cause, death, &c., as thus:*] That said action being at issue on the pleadings, the same, and all the issues therein, were, by order made , 18 , referred to R. F., Esq., as referee to hear and determine the same.

IV. That while the trial of said action was pending before the referee, and on or about the day of , 18 , the said A. B. died, and that said action was continued by the said C. D., as sole surviving executor of and trustee under said will, until on or about the day of , 18 , when he also died, leaving the said suit undetermined.

eral allegation upon information and belief, without stating any fact or the sources of information, is insufficient; and an order granting such petition against a positive denial by plaintiffs is erroneous. *Honegger v. Wettstein*, 13 *Abb. N. C.*, 393; s. c., 94 *N. Y.*, 252; rev'g 47 *Super. Ct. (J. & S.)*, 125.

¹ Or to defend said, &c., action so far as necessary for the protection of the fund of which he is receiver.

See *Honegger v. Wettstein*, 13 *Abb. N. C.*, 393; s. c., 94 *N. Y.*, 252; rev'g 47 *Super. Ct. (J. & S.)*, 125.

As a general rule, in an action for a mere money judgment on a contract, a receiver of the property of the defendant, not being a party to the contract, should not be allowed to come in as a party defendant.

Honegger v. Wettstein (*above cited*). Especially not to be substituted for a defendant against the objection of plaintiff seeking to recover against the defendant. *Ross v. Wigg*, 100 *N. Y.*, 243. Compare note 1 on p. 541.

² Sustained by *Wood v. Flynn*, 30 *Hun*, 444.

V. That by a decree of the surrogate of _____ county, duly made at a surrogate's court, held in and for the said county of _____, in the village of _____, on the _____ day of _____, 18____, E. F. was duly appointed administrator with the will annexed of the goods, chattels, and credits, which were of the said M. N., deceased, and testamentary trustee of the estate of the said deceased; and that thereafter the said E. F. duly qualified as such administrator with the will annexed, and letters of administration were, on the _____ day of _____, 18____, duly issued to him.

VI. That further, by an order of the Supreme Court, made at a Special Term thereof, held at the court house in _____, in the county of _____, on the _____ day of _____, 18____, the said E. F. was duly appointed trustee under the will of said M. N., deceased, in the place and stead of the executors therein named, duly vesting him as such trustee with the trust estate funds, property and securities, and the powers heretofore vested in said executors as trustees under said will.¹

[If an order to show cause is asked, state as required by the rule. See p. 2.]

[Jurat.]

[Signature.]

Form No. 1143.

Notice of motion (on order to show cause) to substitute successor in administration or trust, to continue action brought by his predecessor.²

[Move the court (see pp. 1-3), stating relief thus:] for an order that E. F., Esq., who has been appointed administrator with the will annexed and sole trustee to execute the trusts created in and by the last will and testament of M. N., deceased, be substituted as plaintiff in this action in the place and stead of the executors and trustees named and appointed in the said will, who are now deceased, and that this action be continued in the name of the said E. F. as administrator with the will annexed and trustee as aforesaid, and for such other *[&c.]*.

¹ In some cases, where a testamentary trust involves both realty and personalty, appointment of a successor in the surrogate's court, by virtue of the general jurisdiction to issue letters, and also in the Supreme Court by virtue of the statute devolving trusts on the Supreme Court, is desirable to

avoid doubt. See *N. Y. L.*, 1882, c. 185, entitled an Act in Relation to Trustees of Personal Estate.

² Sign notice as attorney for the applicant named, and serve on the attorneys of all living parties who have appeared.

Form No. 1144.

Order substituting successor in administration or trust, to continue action brought by his predecessor.¹

[*Title (court order) and recitals according to the case. See Form 493, p. 4.*]

ORDERED, 1. That E. F., as administrator of M. N., deceased, with the will annexed, and as trustee under said will, be and he is hereby substituted as plaintiff in this action, in place of A. B. and C. D., the executors and trustees appointed in and by the said will, who are now deceased, and that this action be continued in the name of the said E. F. as administrator with the will annexed and trustee as aforesaid, as sole plaintiff in said action.

2. That the name of said E. F. as aforesaid be substituted in the place and stead of A. B. and C. D., now deceased, upon the record herein,² and that the pleadings herein and the proceedings and evidence already had and taken in the cause stand as the pleadings, proceedings and evidence in the cause hereby revived and continued as aforesaid.³

Enter: [*signature of judge by initials of name and title.*]

Form No. 1144a.

Motion by a successor in office to come in as a party in place of his predecessor.

[*Adapt from Forms 1088 to 1090.*]

Form No. 1145.

Affidavit to move to substitute indemnitor as defendant in place of sheriff.⁴

[*Title of court and action.*]

[*Venue.*]

M. G., being duly sworn, says: I. That on or about the

¹ The question of right to continue the action, if not raised on the motion, is concluded, and then the order need not provide for supplemental pleading.

² This direction is not important where the title to real property is not affected.

³ Sustained in *Wood v. Flynn*, 30 *Hun*, 444.

⁴ Sustained by *Hein v. Davidson*, 96 *N. Y.*, 175, and *Hessberg v. Riley*, 91 *N. Y.*, 377, under *N. Y. Code Civ. Pro.*, §§ 1421-1425. Not necessary in *N. Y. county*, under *L.*, 1888, c. 98.

day of _____, 18____, an action was commenced in the Court of this State, wherein C. D. was plaintiff and W. X. was defendant; and that deponent was the attorney for plaintiff in said action.

II. That on or about the _____ of _____, 18____, an attachment was duly issued in said action to Y. Z., the sheriff of the [city and] county of _____, the defendant in this action, against the property of the said W. X.; that the defendant as such sheriff duly levied on property belonging to said W. X. under and by virtue of said attachment [*or allege judgment and execution in like manner*].

III. That A. B., the plaintiff in the present above-entitled action, claimed said property, and thereupon, and before the commencement of the present action, M. N. and O. P., of _____, duly executed and delivered on behalf of the plaintiff in said action against said W. X., a bond to said sheriff to indemnify him for any loss that he might sustain by reason of the levy under said warrant of attachment, of which bond a copy is annexed hereto.

IV. That A. B., has brought the present action against Y. Z. as sheriff, &c., because of the said levy, and the said indemnitors, M. N. and O. P., desire to be substituted as defendants in this action in place and stead of Y. Z., the present defendant herein.

V. Deponent asks an order to show cause, because, as he is informed and believes [the plaintiff has noticed the cause for trial for the _____ term, and deponent fears that should the same be reached plaintiff will press on the trial].

VI. That no previous application [*&c.*; see p. 2].

[*Jurat.*]

[*Signature.*]

Form No. 1146.

Consent of indemnitors to be substituted.¹

[*Title of court and action.*]

The undersigned M. N. and O. P., the sureties on the bond of indemnity given to Y. Z. as sheriff of the [city and] county of _____, in an action in which C. D. was plaintiff and W. X. was defendant, do hereby consent to be made defendants² in this

¹ *N. Y. Code Civ. Pro.*, § 1423.

² A separate consent of each to be defendants, is perhaps informal, especially where there were several levies, &c. *Hayes v. Davidson (below)*.

action in the place and stead of Y. Z., the defendant above named.

[*Date.*]

[*Signature.*]

[*Acknowledgment as in Form 495.*]

Form No. 1147.

Order to show cause (or notice of motion) why indemnitors should not be substituted as defendants in place of sheriff.

[*Title, &c., as in other cases; see pp. 1-4, stating relief as thus:*] substituting M. N. and O. P. as defendants in the place and stead of Y. Z., the defendant above named, and releasing said Y. Z. from any further liability herein, and for such other and further relief as may be just; and until [days after] the determination of this motion, let all proceedings on the part of the plaintiff be stayed.

Service of a copy of this order to show cause and the accompanying papers on the attorneys for the respective parties hereto, on or before , 18 , shall be deemed sufficient service.

[*For authentication of order to show cause, see Form 491.*]

Form No. 1148.

Order substituting indemnitors for sheriff.¹

[*Title (court order) and recitals, according to the case; see Form 493, p. 4.*]

ORDERED, 1. That M. N. and O. P., of , be and they are hereby substituted as defendants in this action, in the place of Y. Z., defendant above named² [*may add conditions as thus:* upon condition that within five days after service of a copy of this order, said M. N. and O. P. give to the plaintiff a bond, with two sufficient sureties, to justify if required, to pay any judgment which plaintiff may finally recover herein, and

¹ The order and its conditions are discretionary. *Berg v. Grant*, 18 *Abb. N. C.*, 449; *Hayes v. Davidson*, 98 *N. Y.*, 19; rev'g 34 *Hun*, 243.

² May require amended summons and complaint to be served.

adopting all stipulations already entered into, by the parties in this cause, and agreeing to the same preference as if the action had remained in its present condition, and such preference is thereupon accorded by the court; and also pay to Z. T., Esq., attorney and of counsel for said Y. Z. above named, the sum of dollars in full for professional services rendered said Y. Z. above named, in the above-entitled action].

[2. That said M. N. and O. P. may have days from the entry and service of this order in which to serve an answer—*may add*: or demur or make such motion as they may be advised—herein.]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1149.

Order for severance.¹

[*Title (court order) and recitals, according to the case. See Form 493, p. 4.*]

ORDERED, that [*if the executor, &c., has not appeared*, said E. X., as executor, &c., as aforesaid, be brought in as a party hereto, and] this action be and it is hereby severed so that it proceed separately against J. H. O. as executor of the last will and testament of the defendant G. G. T., deceased, and against the surviving defendants above named; and it is further ordered, that such severance be without prejudice to the proceedings in this action already had as to the said surviving defendants; and it is further ordered, that the plaintiff serve a supplemental summons and complaint upon the said J. H. O. as such executor, within twenty days from the entry of this order, with suitable allegations in the premises, and that said executor answer said supplemental complaint within twenty days after service thereof upon him; and it is further ordered, that the service of such supplemental summons and complaint, and answer, if any there be, be without prejudice to the original date of issue of the action against the said decedent, G. G. T., which said original date shall stand as the date of issue herein as against said executor, and that this action, as against said executor, be placed upon the calendar for trial as of the same place and position as said original action against the surviving

¹ *Arthur v. Griswold*, 2 *Hun*, 606; appeal dismissed in 60 *N. Y.*, 143, and see p. 464.

defendants; and that the proceedings already had and the testimony taken up to the time of the death of said defendant G. G. T., under the commission issued in the said action in which said G. G. T., deceased, was a party defendant, shall be of like force and effect in this action against said executor as though the same had been taken and had herein; said testimony to be read on the trial, however, without prejudice to the said executor's right to move to strike out such parts thereof as may be incompetent as against him as the personal representative of said defendant G. G. T. deceased.

Enter: [*signature of judge by initials of name and title.*]

II. BRINGING IN ADDITIONAL PARTY ON HIS OWN APPLICATION: INTERVENING.¹

FORMS.

- (1150.) Order on motion by representative of deceased, that action be continued by the plaintiff, or be declared abated.
- (1151.) Petition by husband, after marriage of female plaintiff, to have action continued in joint names.
- (1152.) Affidavit of surety to obtain leave to prosecute action abandoned by principal.
- (1153.) — by judgment-creditor to move to come in before judgment as co-plaintiff in a creditor's action.
- (1154.) Order thereon.
- (1155.) — allowing bondholders to intervene as co-plaintiffs in trustee's action for foreclosure.
- (1156.) — allowing plaintiff in at-

- tachment suit to join in sheriff's action on assets.
- (1157.) Petition by prior purchasers to be brought in as co-defendants in foreclosure.
- (1158.) Order allowing an executor or administrator not served to come in and defend after judgment suffered by his co-executor or administrator.
- (1159.) Notice of motion (or order to show cause) for legatee to come in, in an action to construe a will.
- (1160.) Order thereon.
- (1161.) Order to show cause why creditor should not be allowed to come in after expiration of time limited in action for dissolution of corporation or creditor's action.
- (1162.) Affidavit of landlord to move

¹ For the general doctrine of equity, which is not only adopted but much extended by the New York statute, see note in 6 *Abb. N. C.*, 304, and 10 *id.*, 361; *Hopkirk v. Page*, 2 *Brock. Marsh.*, 20, 42; *Birdsong v. Birdsong*, 2 *Head (Tenn.)*, 289, 302; *Carter v. Mills*, 30 *Mo.*, 432; *Drew v. Harman*, 5 *Price*, 319; *Willett v. Stringer*, 17 *Abb. Pr.*, 152; *Dwight's Case*, 15 *id.*, 259; *Davis v. The May-*

or, 14 *N. Y.*, 506, 526; *Gould v. Mortimer*, 16 *Abb. Pr.*, 448; *Kelsey v. Murray*, 18 *id.*, 294; *Scheidt v. Sturgis*, 10 *Bosw.*, 606.

If leave be refused wrongfully in a State court, the Federal court may treat the applicant as a party notwithstanding, for the purpose of allowing removal. *Hack v. Chicago, &c., Ry. Co.*, 23 *Fed. Rep.*, 356.

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| <p>(1163.) — by owner of chattels to intervene in action for their possession.</p> <p>(1164.) Petition of bondholder to come in as defendant in foreclosure by trustee, on allegations of collusion.</p> | <p>(1165.) Order to show cause (or notice of motion) on asking leave to intervene.</p> <p>(1166.) Order thereon (general Form).</p> <p>(1167.) Order, by consent, substituting executors without prejudice to proceedings already had.</p> <p>(1168.) Consent to entry of order.</p> |
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Form No. 1150.

Order on motion by representative of deceased, that action be continued by the plaintiff, or be declared abated.¹

[Adapt affidavit and notice of motion from Forms 1095, 1096.]

[*Title (court order) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, that within [ten] days after the service on plaintiff's attorney of a copy of this order, the plaintiff cause this action to be revived and continued against W. X. as administratrix of the goods, chattels and credits which were of Y. Z., deceased, as defendant; [*may add other directions as thus*], and placed upon the circuit calendar for trial on the Monday of _____, 18____, the said administratrix hereby consenting thereto, or that within said period the plaintiff serve upon Z. T., attorney for said administratrix, a written consent signed by plaintiff's attorney, that the said action be revived and continued against the said W. X. as administratrix as aforesaid of defendant, and placed upon the circuit calendar for trial on the said day in said part; and that in default of such revivor and continuance by the plaintiff, and of the service of such stipulation within the said period, the said W. X., as administratrix as aforesaid, be and hereby is substituted as defendant in place of the said Y. Z., deceased, and that simultaneously this action and the complaint therein be, and the same are discontinued and dismissed with costs, and an additional allowance of five per cent. upon the amount claimed herein, and that judgment be entered in favor of said W. X. as administratrix as aforesaid, and against said plaintiff for such costs and allowance, and that the petitioner have ten dollars costs of this motion.

Enter: [*signature of judge by initials of name and title.*]

¹ Supported by *Pierson v. Morgan*, 44 Hun, 517.

Form No. 1151.

Petition¹ by husband, after marriage of female plaintiff, to have action continued in joint names.²

[*Title of court and cause.*]

To the Court.

The petition of A. B. and C. D. shows :

I. That this action was brought by your petitioner A. D. in her maiden name of A. B. [*here state object, and condition of cause*].

II. That pending said action, and on the day of , 18 , your petitioner, A. B., was married to your petitioner C. D., above named, who thereby became, and now is, a necessary party plaintiff herein, as your petitioners are advised and believe.

[*If order to show cause is asked, state as to previous application, as in p. 2.*]

WHEREFORE, your petitioners pray the order of this court, that said action may be continued by your petitioners jointly as plaintiffs against said Y. Z., and that the summons be amended accordingly [and that your petitioners may have leave to serve the annexed amended complaint], and for such other relief as may be just.

[*Date.*]

[*Signatures.*]

[*Verification, as in Form 494, p. 5.*]

¹ An application by a third person to come in was formerly usually made by petition, and not unfrequently still is. But the court have power to entertain it on motion on notice and affidavits. See the difference explained in Volume I, p. 331. If petition is adopted, the usual practice is to entitle it in the cause like an ordinary motion.

² As to the few cases in which it may now be necessary that the husband should be joined as co-plaintiff

with his wife, see *Code Civ. Pro.*, § 450; *Quackenbush v. Leonard*, 10 *Paige*, 131; and *Campbell v. Bowne*, 5 *id.*, 34; *Bloodgood v. Mickle*, 5 *Abb. Pr., N. S.*, 103; *Lennox v. Eldred*, 1 *Supm. Ct. (T. & C.)*, 140.

The mere substitution or change of name by the marriage of a female plaintiff is a matter of form, which may be done *nunc pro tunc*, at any time before judgment. *Mapes v. Snyder*, 59 *N. Y.*, 450, aff'g 2 *Supm. Ct. (T. & C.)*, 318.

Form No. 1152.

Affidavit of surety to obtain leave to prosecute action abandoned by principal.¹

[*Title of court and action.*]

[*Venue.*]

C. D., being duly sworn, says :

I. That on or about the day of , 18 , the above-named plaintiff commenced an action in this court against the above-named defendant [*stating cause as thus*], to recover certain property alleged to have been wrongfully taken by the defendant from the plaintiff, a detailed description of which, together with the cause of action, is set forth in the complaint on file with the judgment roll therein in the office of the clerk of this court.

II. That at that time the plaintiff, who resides in , had an agent in this city by the name of B., with whom deponent was acquainted. That said B. applied to this deponent to join in an undertaking to be given in that action in order to enable the plaintiff therein to obtain possession of the said property described in the complaint, and as a matter of friendship for the said B., and relying also upon the reputed responsibility of the plaintiff who resided in , deponent executed the said undertaking in conjunction with said B. and one F. B. Said undertaking was in the usual form prescribed in section 699 of the Code, and was in the penal sum of dollars; a copy of said undertaking is also on file in the office of the clerk of this court.

III. That thereafter, as deponent is informed and believes, the plaintiff obtained the possession of the property by virtue of the requisition issued in this action, and this cause was put in issue by the service of an answer on behalf of the defendant, who appeared by Z. T., of , his attorney.

IV. That on or about the day of , 18 , the plaintiff, as deponent is informed, and as he verily believes, became insolvent, and in his said agent B. left this State.

V. On or about the day of , 18 , this case came on for trial on the calendar of this court, in its regular order before Mr. Justice D. [*here followed allegations of the*

¹ Sustained in *Hoffman v. Steinar*, the motion, and granting leave by opening the judgment.
34 Hun, 239, rev'g order which denied

circumstances of the dismissal of the complaint for non-prosecution, and verdict taken thereon, judgment entered, and execution thereon returned unsatisfied].

VI. That on the day of , 18 , this defendant was served with a summons and complaint in the action brought by said M. S., the defendant in said action, against deponent and his co-sureties on said undertaking, which action was based upon said undertaking and upon the judgment recovered in this action, and seeks to recover from this deponent the amount of said judgment, together with the costs therein.

VII. That said action is still pending, and the time to answer will not expire until the day of , 18 .

VIII. That his co-sureties and co-defendants in said action are, as he is informed and believes, perfectly irresponsible, and this deponent alone, in case this action be pressed, would be compelled to pay the amount of any judgment which may be rendered herein.

IX. That deponent has been endeavoring to induce the plaintiffs' attorney to apply to open and set aside the dismissal of the complaint in this action, and to be permitted to proceed with the trial thereof, but said plaintiffs' attorney has declined to make the said motion, among other reasons, as he believes and is informed, that the said plaintiffs' attorney claims that he has not been fully paid for his services, and does not wish to proceed unless he receives such payment [*allegations of excuse for delay in moving are here omitted*].

X. That if said judgment be set aside and he be permitted to proceed with the trial, he verily believes that the plaintiff can recover herein [*stating details*].

XI. That deponent desires to have an opportunity to present such evidence within his reach as detailed aforesaid, in order that the question as to whether said goods were fraudulently obtained, and as to whether the said assignee has a right as against the plaintiff to retain the possession of the said goods, be fairly submitted to a jury upon evidence on behalf of the plaintiff. That in this way, and only in this way, can he be relieved from his liability as surety on said undertaking; that otherwise if said default be not opened and he be not permitted to prosecute said action on behalf of the plaintiff, this defendant will be compelled to pay the above amount of said judgment out of his own means, and would not be able to recover a single dollar from the plaintiff or from the

said M. B. or his co-surety, all of whom are insolvent, and against whom legal proceedings for re-compensation of this defendant for any loss he may sustain by reason of executing said undertaking will be of no practical value.

XII. Deponent makes this application in perfect good faith; he is perfectly willing to respond to any terms which this court may impose as a condition of setting aside said default.

XIII. [*If order to show cause is asked, state as to previous application, &c.; p. 2. If stay in second action is asked, add oath to merits; see p. 447.*]

[*Jurat.*]

[*Signature.*]

Form No. 1153.

Affidavit by judgment-creditor to move to come in before judgment as co-plaintiff in a creditor's action.¹

[*Title of court and action.*]

[*Venue.*]

C. D., of _____, being duly sworn, says:

I. That this action was brought by the plaintiff above-named as a judgment-creditor of Y. Z., suing on behalf of himself and all others similarly situated, who should come in and contribute to the expenses of the action, to set aside as fraudulent a conveyance made by said Y. Z. to the defendant W. X. [*or otherwise according to the case*].

II. That deponent is a judgment-creditor of said Y. Z., having recovered judgment against him on the _____ day of _____, 18____, in the _____ Court of _____, for \$ _____ damages and costs, on which the sum of \$ _____ is now due, with interest

¹ The court have power to grant such an application (*White's Bank of Buffalo v. Farthing*, 101 *N. Y.*, 344, 348), but should usually deny it (*id.*), unless the applicant shows special grounds, such as delay or miscarriage in the cause. In order to entitle the applicant to interfere by appeal, &c., he should be made a party. *Watson v. Cave*, 44 *Law Times R.*, *N. S.*, 40.

Before judgment, such an order being discretionary, the court can impose conditions.

After judgment, creditors, in an action for common benefit, can as mat-

ter of right come in by mere appearance and prove their claims; and will not be bound by a provision in the judgment requiring them to pay their contribution to costs, as a condition. *Matter of Lewis v. Hake*, 42 *Hun*, 542. Hence neither before nor after judgment is an order making them parties necessary for the mere purpose of allowing them to prove claims. Compare *O'Brien v. Browning*, 11 *Hun*, 179; 49 *How. Pr.*, 109; *Claffin v. Gordon*, 39 *Hun*, 54; *Tremain v. Guardian Mut.*, 11 *id.*, 286; *Derby v. Yale*, 13 *id.*, 273.

from said date [*allege issue of execution, with or without return, unsatisfied, according to nature of case*].

III. That as deponent is informed and believes [*state condition of cause*].

IV. [*State reason for asking leave to intervene, as thus:*¹] That since no proceedings whatever have been taken in said action [the plaintiff's attorney having died and no person appointed in his place], and no steps whatever have been taken by the plaintiff or the said receiver for bringing the said action and proceedings to a close.

V. Deponent is ready and willing to contribute to the expenses of the action on being allowed to be made a party plaintiff, and to prosecute the same.

[*Jurat.*]

[*Signature.*]

[*Notice to attorneys on both sides; see also Volume I, p. 119.*]

Form No. 1154.

Order allowing judgment-creditor to come in as co-plaintiff in creditor's action.

[*As in next Form, adding, if required:*] This order is made on condition that said C. D., within days after the date hereof, and before proceeding herein, pay to the plaintiff A. B. \$, hereby fixed by the court as his proper contribution to the costs and expenses of the action for all proceedings up to this date [*or may order reference to fix the amount, adding:*] and upon confirmation of said report and payment thereunder an order may be entered making this order absolute.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1155.

Order allowing bondholders to intervene as co-plaintiffs in trustee's action for foreclosure.²

[*Title (court order) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, that the said C. D. and E. F. be and they here-

¹ From 3 Barb. Ch. Pr., 721.

² This may secure them notice of proceedings and the right to ask the carriage of the cause if their co-plaint-

by are allowed to come in and be, and hereby are made plaintiffs in this action with the said [*original plaintiff*], and that all orders heretofore made, and all proceedings in this action, shall stand as the orders and proceedings of this court herein, and that this action proceed in the same manner and with the same force and effect as if the said C. D. and E. F. had been made parties plaintiff at the commencement thereof, and that the said summons, complaint and all orders and proceedings herein be and hereby are amended by adding their names as plaintiffs herein.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1156.

Order allowing plaintiff in attachment suit to join in sheriff's action on assets.¹

At a special term [*&c., or the order may be made by the judge who granted the warrant*].

[*Title of attachment action.*]

[*Title of sheriff's action.*]

[*Recitals according to the case; see Forms 492 and 493, p. 4, inserting:*] and it appearing satisfactorily to the court [*or, to me*] that the applicant C. D. might have been allowed to bring the second above named action in the name of himself and the plaintiff, the said sheriff, jointly.

ORDERED, that said C. D. is hereby joined with said sheriff as a co-plaintiff in said second action, and that the summons and complaint [and other proceedings therein] be and hereby are declared to be deemed to be amended accordingly [*or may direct service of amended summons and complaint*].

[This order is made upon condition that within days after the date hereof—and before service of such amended summons and complaint—said C. D. shall pay to said sheriff the sum of dollars expenses already incurred by him therein.]

[*Authentication as in Form 491, p. 3.*]

iff is delinquent; see 46 *L. T. R., N. S.*, 437; 8 *Pac. Rep.*, 184; but it does not facilitate their contesting any of plaintiff's proceedings, as they could more readily if made defendants.

¹ *N. Y. Code Civ. Pro.*, § 679. May adapt affidavit from Form 258, Volume I, p. 545. As to proceeding if the actions are in separate courts, see note 1 on p. 547.

Form No. 1157.

Petition by prior purchasers to be brought in as co-defendants in foreclosure.¹

[*Title of court and cause.*]

To the Court of
The petition of C. D. and E. F., of , shows:

I. That this action is brought to foreclose a mortgage on real estate in the city of , made by Y. Z. to M. N. to secure the payment of dollars, and was begun, as your petitioners are informed and believe, on the day of last. The time of the defendants to answer [has been extended and] continues until the day of next.

II. That the property so mortgaged was conveyed by M. N. to the said Y. Z. on or about the day of , 18 , and the said Y. Z. at the same time gave back the said mortgage to secure a part of the purchase money.

III. At that time your petitioners were partners in business. Your petitioners, as such partners, were the real purchasers of said property, and for convenience took the title to the same in the name of the said Y. Z., who held the same in trust for your petitioners as such partners, and subject to the direction of your petitioners, and on or about the day of , 18 , the said Y. Z. and wife, at the direction of your petitioners, executed and delivered to your petitioner E. F. a proper deed conveying said premises to him, and he has ever since held the title to said premises, in trust for your petitioners as such partners.

IV. That your petitioners have fully and fairly stated the case in this action to their counsel, , who resides at No. street, in , and that they have a good and substantial defense on the merits in said action, as they are advised by said counsel, after such statement made as aforesaid, and verily believe.²

Said defense is based on the following facts, all of which your petitioners expect to be able to prove, and most of which

¹ From *Johnston v. Donovan*, 106 N. Y., 269, where the denial of the petition on the ground that the deed had not been recorded when *his pendens* was filed, was held error.

As to use of petition, see note to

last Form. Compare *Earle v. Hart*, 20 Hun, 75.

² For oath to merits appropriate when the affidavit is made by the attorney, see p. 447.

are within the personal knowledge of your petitioner C. D. [state facts].

V. [If order to show cause is asked, state as on p. 2.]

WHEREFORE your petitioners pray that they may be brought in as parties defendants [if leave to plead anew is desired, ask it; see Forms 1129, &c.], and that they may have such other and further relief as may be just.

[Date.]

[Signatures.]

[Verification as in Form 494, p. 5.]

Form No. 1158.

Order allowing an executor or administrator not served to come in and defend after judgment suffered by his co-executor or administrator.¹

[Title (court order) and recitals according to case; see Form 493, p. 4.]

ORDERED, that [on the above-named—*applicant*—depositing with the clerk of the city and county of _____, within two days from the entry of this order and service of a copy thereof on his attorney C. T., appearing for him on this motion, the amount claimed herein, to wit, the sum of _____ dollars, together with _____ dollars as security for costs, amounting in the whole to _____ dollars, and paying the costs herein] the default herein be opened and said [name] be permitted to defend this action and serve his answer or demurrer herein within the time above limited; otherwise the said motion be and the same is hereby denied with ten dollars costs in favor of plaintiff, to be paid by the said defendant [name].

And the stay contained in said order to show cause is continued to and including the time hereinbefore specified; and upon the failure to perform the conditions above mentioned, the same is set aside and vacated.

Enter: [signature of judge by initials of name and title.]

¹ See *N. Y. Code Civ. Pro.*, § 1818, and p. 710 of Volume I.

An order in the above Form was sustained in *Hertzfield v. Parkes*, 19 *Weekly Dig.*, 238, on evidence of circumstances of collusion or culpable

neglect on the part of the executor or administrator served. Compare, on other circumstances and another form of order, *Guernsey v. Cheyne*, 18 *Abb. N. C.*, 361.

Form No. 1159.

Notice of motion (or order to show cause) for legatee to come in, in an action to construe a will.

[*Statement of relief to be inserted in common Form, pp. 1-3, may be thus:*] directing the Roman Catholic Orphan Asylum in the city of New York, [*naming all*] the beneficiaries under the will of J. H. P., deceased, to be brought in as parties to this action, and that the summons and complaint be amended¹ by inserting the names of the said parties as defendants, and that they have leave to come in and answer, setting forth their respective claims, such order to be without prejudice to the proceedings heretofore had in said action [*or may ask further trial; see Forms 1129, &c., 1166*].

Form No. 1160.

Order thereon.²

[*Title (court order) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, that the Roman Catholic Orphan Asylum, in the city of New York, &c. * * * the beneficiaries under the will of J. H. P., deceased, be brought in as parties defendant to this action; and the summons and complaint be and the same hereby are amended by inserting the names of said parties defendant, and that they have leave to come in and answer within ten days, setting forth their respective claims; this order to be without prejudice to the proceedings heretofore had in said action, and the testimony already taken and proceedings had to stand the same as if taken and had after said answer had been served; and that the said action be considered as tried and submitted, the same as though the trial had been had after the putting in of said answer.

Enter: [*signature of judge by initials of name and title.*]

¹ If the proposed defendant is not ready to come in voluntarily by amendment, or is an infant or otherwise incapable of voluntary appearance, substitute for the words "summons and complaint be amended" the words "plaintiff issue a supplemental summons to said _____, and that the

complaint be amended," continuing as above.

² This was the form of order in *Power v. Cassidy*, 79 N. Y., 602; aff'd 16 Hun, 294. See also *Haas v. Craighead*, 19 Hun, 396. For other directions, see Forms 1129, &c.

Form No. 1161.

Order to show cause why creditor should not be allowed to come in after expiration of time limited in action for dissolution of corporation or creditor's action.¹

[Name of] Court [or, if a court order] At a special term [dec., as in Form 493, p. 4].

On the annexed affidavit of M. N. [and specify other papers, if any others are relied on] let the said R. C., receiver of _____, show cause at a special term of this court, to be held [at chambers] at the County Court House [or, at the City Hall] in the city of _____, on the _____ day of _____, 18____, at _____ A. M., or as soon thereafter as counsel may be heard, why the claim of said M. N., as set forth in said affidavit, should not be allowed and paid to the extent that there are funds left in the hands of the receiver, proportionably applicable thereto, and why such other or further relief as may be just should not be granted. And in the meantime, and until the hearing and decision of this motion, let all proceedings on the part of said receiver or of his said attorneys, or of any other persons with respect to said receivership and the funds thereof, be stayed.

Service of a copy of this order on or before the _____ day of _____, 18____, to be sufficient.

[Authentication as in Form 491, p. 3.]

Form No. 1162.

Affidavit of landlord to move to be made co-defendant in ejectment.²

[Title of action.]

[Venue.]

C. D., of _____, being duly sworn, says:

I. That this action is now pending in this court³ by A. B., plaintiff, against Y. Z., defendant, for the recovery of the possession of certain real property, situated in _____, and

¹ Compare Kerr v. Blodgett, 48 N. Y., 62; People v. Security Life Ins. Co., 79 id., 267; Attorney-General v. Continental Life Ins. Co., 88 id., 77; N. Y. Code Civ. Pro., § 1807.

² This affidavit might be made by

the attorney. Jackson v. Stiles, 1 Cow., 134.

³ For the effect as to removal of the cause, see Phelps v. Oaks, 117 U. S., 236.

known as No. street, and more particularly described in the complaint in said action; which action the petitioner is informed and believes [is at issue, but] has not proceeded to judgment¹ [*or otherwise state condition of cause*].

II. That said Y. Z. occupies said premises as tenant of this deponent, and not otherwise.² That this deponent claims in good faith to be the owner in fee-simple of said premises [*here may briefly indicate source of title,³ e. g., thus*], having purchased the same at a sale by the sheriff of upon a judgment and execution duly issued thereon against the property of one M. N., who, as this deponent is informed and believes, was the owner in fee-simple of said premises at the time of said sale. [*If order to show cause or stay is asked, see pp. 2, 446.*]

[*Jurat.*]

[*Signature.*]

Form No. 1163.

Affidavit by owner of chattels, to intervene in action for their possession.⁴

[*Title of court and action.*]

[*Venue.*]

C. D., being duly sworn, says:

I. That the above-entitled action is brought for the recovery of the possession of certain personal property, to wit [one hundred barrels of flour]; which action has not, as deponent is

¹ The order may be made at any stage of the action. *State of N. Y. v. Mayor, &c., of N. Y.*, 3 *Duer*, 119. It was held that it must be made before judgment, in *Carswell v. Neville*, 12 *How. Pr.*, 445. But the court have power after judgment.

² Plaintiff not allowed to object that lease was not formally correct in respect to the manner of execution. *Carleton v. Darcy*, 90 *N. Y.*, 566.

³ Substitution in ejectment against lessee, of purchaser at foreclosure of mortgage on leasehold, as defendant in place of lessee, allowed, on ground that there was a transfer of interest such as is contemplated by *N. Y. Code Civ. Pro.*, § 756. *Conger v. Duryee*, 23 *Week. Dig.*, 193.

An exhibit of the applicant's title is not essential, it would often be harsh to require it. *Stribling v. Prettyman*, 57 *Ill.*, 371.

⁴ Compare *Carney v. Gleissner*, 62 *Wisc.*, 493; 22 *Northw. Rep.*, 735; *Hornby v. Gordon*, 9 *Bosw.*, 656; *Conklin v. Bishop*, 3 *Duer*, 646.

For illustrations of the principle that an application to intervene, made by one claiming adversely to the plaintiff, will not be so readily entertained as others, see *Rothwell v. Dewees*, 2 *Black (U. S.)*, 613; *Francis v. U. S.*, 5 *Wall. (U. S.)*, 338; *U. S. v. Patterson*, 15 *How. (U. S.)*, 10; *Bellocque v. U. S.*, 8 *Ct. of Claims*, 493; *Roberts v. Ismay*, 51 *Super. Ct. (J. & S.)*, 531.

informed and believes, proceeded to judgment [*or otherwise state condition of cause*].

II. That the defendant received the said [flour] from this deponent for storage, and this deponent is the sole owner thereof.

III. That the claim of the plaintiff in this action is made adversely to deponent's title, and deponent desires to litigate the question directly with him.

[*Jurat.*]

[*Signature.*]

Form No. 1164.

Petition of bondholder to come in as defendant in foreclosure by trustee, on allegations of collusion.¹

[*Title of court and cause.*]

To the Court of .

The petition of C. D. shows :

[*Allege facts as to nature and condition of action, the right of the applicant, and the grounds for asking to come in.*]

[*Also, if order to show cause is asked, state as to previous application.*]

WHEREFORE, your petitioners pray that they may be made parties to this action, and allowed to present charges against

¹ Sustained in *De Betz's Petition*, 9 *Abb. N. C.*, 246, where the form of the order will be found.

See, also, *Williams v. Morgan*, 111 *U. S.*, 684; *U. S. Trust Co. v. N. Y., West Shore, & C. Ry. Co.*, 6 *Civ. Pro. R. (Browne)*, 90, 94; s. c., 67 *How. Pr.*, 390.

Unsecured creditors have not a right to intervene in the foreclosure of a railroad mortgage. *Herring v. N. Y., Lake Erie & W. R. R. Co.*, 105 *N. Y.*, 340; abst. s. c., 19 *Abb. N. C.*, 340, with note.

For recent cases on the rights of stockholders to intervene in an action by or against their corporation, see *People v. Hektograph Co.*, 10 *Abb. N. C.*, 358; *Kimball v. Ives*, 30 *Hun*, 568; *Cudlipp v. Maxim Gas Mach. Co.*, 7 *Weekly Dig.*, 84; appeal dismissed in 75 *N. Y.*, 610; *Brinckerhoff v. Bostwick*,

99 *N. Y.*, 185; rev'g 34 *Hun*, 352; *Smith v. Smith Moquette Loom Co.*, 20 *Weekly Dig.*, 342; *Ithaca Gas-Light Co. v. Treman*, 30 *Hun*, 212; aff'd in 93 *N. Y.*, 660; *People v. Globe Mut. Ins. Co.*, 27 *Hun*, 539; *Fraser v. Cooper Hall & Co.*, 46 *Law Times Rep., N. S.*, noted in *N. Y. Daily Reg.*, June 2, 1882.

For recent cases on the rights of policy-holders to intervene on dissolution of insurance company, see *Attorney-General v. N. A. Life Ins. Co.*, 77 *N. Y.*, 297; s. c., 6 *Abb. N. C.*, 293; rev'g 15 *Hun*, 18; *People v. Globe Mut. Ins. Co.*, 27 *Hun*, 539, and case cited.

Atty.-Genl. v. Continental Life Ins. Co., 27 *Hun*, 195; s. c., 63 *How. Pr.*, 129; *Atty.-Genl. v. N. A. Life Co.*, 91 *N. Y.*, 57.

the said receiver, his management and accounts, and to surcharge and falsify the same, and to apply for his removal; that said accounts may be submitted to a proper examination, at which your petitioners, and all other bondholders in like case, may be allowed to attend by counsel; that the said judgment herein entered may be vacated or amended by striking out the objectionable provisions hereinbefore referred to; and that in the meantime all proceedings for the enforcement of said judgment may be stayed until the further order of this court, and that your petitioners may have such other and further relief as their case may require, and as may be agreeable to equity.

[*Date.*]

[*Signature.*]

[*Verification as in Form 494, p. 5.*]

Form No. 1165.

Order to show cause (or notice of motion) on asking leave to intervene.

[*Title and recitals according to the case, see Form 491, p. 3; and may ask relief, as thus: for an order;—or, why an order should not be made*] directing [*name of applicant*] to be made a party defendant herein [as administrator of M. N.], with leave to appear as such, and directing the summons and complaint to be amended accordingly and a copy thereof served on him, and allowing him to answer or demur to said amended complaint, or take such action thereon as he may be advised, and such other or further relief as may be just. [*See for other Forms Nos. 1129, &c., 1166.*]

[*Stay.*].—Meanwhile all proceedings on the part of the said , for the purpose of [discontinuing this action], are hereby stayed until the entry and service of an order upon this motion.

[*Direction for notice in lieu of stay.*].—And meanwhile and until the decision of this application, ordered that the [plaintiff] herein give notice to said [*name of applicant*] of all proceedings in said action, in the same manner and to the same extent as if said were a party on the record, having duly appeared and demanded service of papers.

Service of this order and the papers on which it is made on the attorneys for the , on the day of , 18 , shall be sufficient.

[*Authentication as in Form 491, p. 3.*]

Form No. 1166.

Order giving leave to intervene (general Form).

[*Title (court order) and recitals according to case; see Form 493, p. 4.*]

ORDERED [*continue as below, or see other Forms 1129, &c., 1166.*]

[*Applicants made defendants.*] That said [names] be and they hereby are made parties' defendant in this action, and that the trial and findings herein and the judgment entered in this action be and the same are hereby set aside, and vacated, and that the said defendants so joined may appear and answer the plaintiff's complaint within [twenty] days after the entry of this order.

[*Or—leave to come in and answer.*] That the said W. X. may become an additional party defendant in this action by serving notice of appearance and an answer herein within days after entry of this order; and that thereupon the summons and complaint shall be deemed amended by naming him therein as a co-defendant.

[*Or—amended summons and complaint to be served.*] That the plaintiff be required to issue, file and serve an amended summons and complaint, inserting the name of said [applicant], and inserting in said complaint the necessary allegations entitling the said [applicant] to participate in this action, and that the summons and complaint so amended, as aforesaid, be served upon the [attorney of the] defendant, Y. Z., within [ten] days after the entry of this order.

[*Speeding the cause; judgment to stand.*] That the cause be placed upon the term calendar, and short notice of trial accepted for the term; also that the said stipulate to try the cause when reached, and that the judgment stand as security.

[*Saving clause as to proceedings had.*] This order is made without prejudice to proceedings already had, except as aforesaid, and except that [*stating particulars*].

[*Or thus:*¹] ORDERED, further, that this order shall not affect the complaint of the plaintiffs, nor the answers and amended answers of the defendants, but the same shall stand as they are; neither shall it affect the depositions already taken in this action; but the same may be read upon the trial of this action against the defendants, and each of them, and against

¹ See Form 1128, p. 544, note 2, and 66; *Matter of N. Y., Lackawanna Krescher v. Haven*, 23 *Weekly Dig.*, & W. R. Co., 26 *Hun*, 194.

the said F. M., as such receiver, with like effect as though the same had been taken after the answer of the said F. M. as such receiver, had been served; and this order is made upon such condition.¹

Enter: [*signature of judge by initials of name and title.*]

Form No. 1167.

Order, by consent, substituting executors without prejudice to proceedings already had.

At a special term [*&c., as in Form No. 493, p. 4.*]

[*Title of action.*]

On reading and filing the affidavit of A. T., verified the day of , 18 , showing the death of A. B., the plaintiff in the above-entitled action, and the granting of letters testamentary under and by virtue of his last will and testament [*or, of letters of administration on his estate*], to C. D. and E. F., by the surrogate of county, and on motion of A. T., attorney for *, the attorney for consenting thereto:

ORDERED, that this action be and the same is hereby continued in the name of the said C. D. and E. F., as [executors of the last will and testament] of A. B., deceased, as plaintiffs; and that the said executors be and they hereby are substituted as plaintiffs in the place and stead of the said A. B., deceased, and that such substitution and continuance be without prejudice to any of the proceedings already had in this action.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1168.

Consent to entry of order.

[*To be underwritten.*]

We hereby consent to the entry of the foregoing order and the substitution therein made.

[*Date.*]

[*Signature of*],
Attorney for .

¹ From the order as settled in *Hon-egger v. Wettstein*, 47 *Super. Ct. (J. & S.)*, 125, 129, which however was reversed in 94 *N. Y.*, 252; s. c., 13 *Abb.*

N. C., 393, on the ground that the receiver was not entitled to come in at all.

CHAPTER XII.

VARIOUS INTERLOCUTORY PROCEEDINGS.

ARTICLE I. ATTORNEYS.

- II. CONSOLIDATION.
- III. CONTEMPT.
- IV. DISCONTINUANCE.
- V. DISMISSAL.
- VI. ELECTION BETWEEN ACTIONS.
- VII. ISSUES.
- VIII. OFFER OF JUDGMENT.
- IX. OFFER TO LIQUIDATE DAMAGES.
- X. PAYMENT INTO COURT.
- XI. PREFERENCES ON THE CALENDAR.
- XII. REFERENCES.
- XIII. SET-OFF ON MOTION.
- XIV. STAY OF PROCEEDINGS.
- XV. TENDER.

ARTICLE I.

ATTORNEYS.

FORMS.

- | | |
|--|---|
| (1169.) Affidavit to move that attorney bringing ejectment produce authority. | (1178.) Affidavit to obtain order for service, by mailing or substitution, of notice to appoint new attorney. |
| (1170.) Order staying ejectment till attorney produces authority. | (1179.) Order thereon. |
| (1171.) Consent to substitution of another attorney. | (1180.) Notice of motion by attorney (or order to show cause) to set aside satisfaction of judgment, &c. |
| (1172.) Order thereon. | (1181.) Order on motion of client referring question between attorney and client. |
| (1173-1176.) Statements of conditions and other directions suitable to insert in an order of substitution. | |
| (1177.) Notice to appoint new attorney in place of one ceasing to act, before judgment. | |

Form No. 1169.

Affidavit to move that attorney bringing ejectment produce authority.¹

[*Title of court and action.*]

[*Venue.*]

Y. Z. being duly sworn, says :

¹ For form of authority, proof and notice, see Vol. I, pp. 521, 522.

I. That he is the defendant above named [*or otherwise state relation to the cause, and reason why party does not make it*].

II. That this action is ejectment for lands in ; and defendant has been served with summons [and complaint] herein, but has not answered, and his time to answer extends to the day of , 18 .

III. No evidence of the authority of plaintiff's authority to commence this action has been served on deponent, nor on his attorney, as he is informed by said attorney and verily believes.

IV. [*If an order to show cause is asked:*] That no previous application [*&c.* See p. 2].

[*Jurat.*]

[*Signature.*]

[*Notice of motion either before court or before a judge of the court.* Form 488, p. 1.]

Form No. 1170.

Order staying ejectment till attorney produces authority.¹

[*Title and recitals as in Form 492 or 493, p. 4.*]

ORDERED, that plaintiff's attorney produce to me [*or, to this court*] at , on the day of , 18 , at o'clock m., duly verified written evidence of his authority to commence this action; and until such production thereof all proceedings herein on plaintiff's part are hereby stayed.

[*Authentication as in Form 491, p. 3, of this Volume.*]

Form No. 1171.

Consent to substitution of another attorney.

[*Title of court and cause; or underwrite upon the proposed order.*]

The undersigned hereby consent that A. T., Esq., of , be substituted in place of , as attorney for , the [*or,*

¹ Turner v. Davis, 2 Den., 187; 2 10 Wend., 568; N. Y. Code Civ. Howard's Pr., 86; Harris v. Mason, Pro., § 1513.

a] defendant [*or*, plaintiff—*or*, petitioner] in this cause [and that the foregoing order be forthwith entered].

[*Date.*] [*Signatures of attorney and of client.*]
[*Acknowledgment by client as in Form 495, p. 6, or proof of execution as in Form 2, Vol. I, p. 14.*]

Form No. 1172.

Order of substitution of attorneys.¹

[*Entitle as a court order or a judge's order, p. 4.*]

On reading and filing the annexed consent of [*name of attorney displaced and of client*], and on motion of A. T. for

ORDERED, that A. T., of , be substituted as the attorney of the plaintiff [*or*, defendant—*or*, petitioner] in the above entitled cause in place of [*name*].

[*If conditions are imposed, see Forms below.*]

[*Serve copy order, with notice of entry.*²]

STATEMENTS OF CONDITIONS AND OTHER DIRECTIONS SUITABLE TO INSERT IN AN ORDER OF SUBSTITUTION.

1173. *Condition of paying displaced attorney.*³ *Insert in last Form.*—upon condition that said [*client, or substituted attorney*], within days after the date of this order, pay, or cause to be paid, to said [*former attorney*], the sum of for [*indicate claim to be satisfied thereby*].

1174. *Condition that security be given,*⁴ *and direction for reference.*—upon condition (1) that within days from the date of this order an undertak-

¹ An order of court or a judge of the court is necessary to name a new attorney on the record (*Mumford v. Murray, Hopk.*, 364, solicitor; *N. Y. Gen. Rules, No. 10, of 1888*; *Ryland v. Noakes*, 1 *Taunt.*, 342, naming in place of deceased attorney).—if the change be made before judgment (*Vol. I, p. 410, &c.*), or in proceedings in which an attorney has appeared after judgment (*Shuler v. Maxwell*, 38 *Hun.*, 240.)

This order must be founded on notice, or order to show cause, or upon consent. Such consent should be signed by the party as well as the attorney. *N. Y. Gen. Rules, No. 10*, as am'd in 1888; *Rules of N. Y. Super. Ct., No. 19*. Otherwise apart from the rule. *Ellis v. Heptinstall*, 8 *W. Va.*, 388.

² Compare *Bogardus v. Richtmeyer*, 3 *Abb. Pr.*, 179; *Parker v. City of Williamsburgh*, 13 *How. Pr.*, 250; *Harrigan v. Bolte*, (*Cal.*, 1885) 8 *Pac. Rep.*, 184; *Quinn v. Lloyd*, 5 *Abb. Pr.*, *N. S.*, 281; *s. c.*, 36 *How. Pr.*, 378; *Wood v. Holmes*, 19 *Weekly Dig.*, 121.

³ A party has a right to change his attorney without showing cause (*Ogden v. Devlin*, 48 *Super. Ct. (J. & S.)*, 631), notwithstanding the attorney has a lien by special contract. 30 *Fed. Rep.*, 228, and *cas. cit.* In such case, however, he must pay or secure the attorney as a condition. *Hoffman v. Van Nostrand*, 14 *Abb. Pr.*, 336.

⁴ Sustained by *Cunningham v. Widing*, 5 *Abb. Pr.*, 414, *n.* And see note in 14 *Fed. Rep.*, 781.

ing in the sum of dollars,¹ executed by two sufficient sureties to be approved by this court, be given to said [displaced attorney], conditioned to pay any sum which may be found due to him for [indicate ground of claim; may add:] a copy of the proposed security to be served on said [displaced attorney] [two] days before presentation of the same to the justice, with notice of the day of its presentation for removal. (2.) That it be referred to R. F., Esq., of , to take the proofs of the respective parties and to determine what amount, if any, is due from plaintiff to said [displaced attorney] for said services and disbursements.²

1175. *Direction for delivery of papers,³ &c.*—Within [one day] after the approval of the undertaking herein required [or, the payment hereinbefore required—*or*, the service of a certified copy of this order], let the said [displaced attorney] sign a consent for the substitution of [name] in his stead as the attorney of said A. B., in the above mentioned action of A. B. against Y. Z., and let him deliver over to said [name] such consent, and the papers, pleadings, copies of deeds, and all other papers, of every character, connected with the said action of A. B. against Y. Z., now in his possession, under oath.

1176. *Condition to stipulate for lien of judgment.*—upon said [name of client] entering into a stipulation in this cause, duly acknowledged, to and with said [attorney] that the sum of dollars due to him [or, that his claim] for his services herein shall be a first lien upon any judgment which may be recovered herein by said [client] or his successors in interest.

Form No. 1177.

Notice to appoint new attorney in place of one ceasing to act, before judgment.⁴

[*Title of court and cause.*]

To [name of party whose attorney has ceased to act.⁵]

Please take notice, that you are hereby required to appoint

¹ This will limit the recovery upon the undertaking, at least against the sureties, to the amount specified, even though more should be proved and found due.

² The report, duly obtained and confirmed, will be conclusive on the client. 7 *Daly*, 7. And the court may order payment and enforce it by execution. Vol. I, pp. 280, 329; *Greenfield v. Mayor, &c.*, of N. Y., 28 *Hun*, 320. But in some cases the attorney may have a right to sue and a trial by jury.

As to requiring attorney to pay costs of unsuccessful reference, see *Bogart v. Electrical Supply Co.*, 27 *Fed. Rep.*, 722.

³ Sustained by *Cunningham v. Widing*, 5 *Abb. Pr.*, 414, note; and see *Matter of Davis*, 7 *Daly*, 1.

The court may, on motion, require the displaced attorney to give his suc-

cessor copies of the entries in his register stating the proceedings had, so far as necessary, for the performance of the latter's duties. This is done, after proper request and unreasonable refusal, subsequent to substitution.

⁴ Where a party before judgment (see Vol. I, p. 416), or in the course of a proceeding by attorney after judgment, loses his attorney by death or other incapacity, the adverse party must give such a notice before proceeding further against him. *Given v. Driggs*, 3 *Cal.*, 150.

Constructive notice is not enough. *Hildreth v. Harvey*, 3 *Johns. Cas.*, 2d ed., 300, and note.

This form is sufficient at common law. *Given v. Driggs* (above). As well as under the statute. *N. Y. Code Civ. Pro.*, § 65; formerly 2 *R. S.*, 287, § 67.

⁵ Notice must be given to each of

an attorney in place of A. T., your former attorney of record herein [*if cessation to act is not already known to the party addressed, state it, as thus: who died on or about the day of , 18 , or otherwise indicate removal,¹ suspension, or other disability*], and notify such new appointment to the undersigned within thirty days after service of this notice, or the cause will proceed without such attorney.²

[*Date.*] [*Signature and office address of*],
Attorney for .

[*Serve personally, or take direction of court how to serve.*]

Form No. 1178.

Affidavit to obtain order for service, by mailing or substitution, of notice to appoint new attorney.

[*Title of court and cause.*]

[*Venue.*]

C. D., being duly sworn, says:

I. That he is managing clerk for the plaintiff's attorney herein, whose office is at .

II. That this action is brought [*here briefly indicate object, and how the defendant, whose attorney has ceased to act, is to be affected by the judgment sought, for instance*] to foreclose a mortgage upon real property, and the defendant Y. Z. is made a party merely as having some lien upon or interest in the mortgaged premises, which lien or interest, if any, accrued since the lien of said mortgage; and no personal claim is made against him.

III. That the defendant Y. Z. appeared in the action by Z. T., his attorney [*here briefly state the condition of the cause*].

IV. That on or about the day of , 18 , said Q.

several parties if more than one was represented by him. *Hickox v. Weaver*, 15 *Hun*, 375.

¹ See *Diefendorf v. House*, 9 *How. Pr.*, 243; *Chautauque Bank v. Risley*, 6 *Hill*, 375; *N. Y. Code Civ. Pro.*, § 60.

² If a new one is not appointed within thirty days, the adverse party may proceed, but must give notice to

the party of any proceeding not in its nature *ex parte*. *Hoffman v. Rowley*, 13 *Abb. Pr.*, 399; *Jewell v. Schouten*, 1 *N. Y.*, 241.

Before the lapse of that time proceedings (if before judgment, *Hall v. Putnam*, 23 *Weekly Dig.*, 513) are stayed by the statute. *Hickox v. Weaver*, 15 *Hun*, 375.

R. died [*or otherwise state how he ceased to act*], and said Y. Z. has not appeared by any other attorney, and has not since then, to the best of deponent's knowledge and belief, taken any steps in the action.

V. That deponent has attempted to make personal service on said Y. Z., who resides at _____, of the annexed notice to appoint another attorney, but such service cannot be made. [*Here state reasons; see Forms in this collection for service of summons by substitution or mailing, Volume I, p. 653, &c.*]

VI. That, as deponent is informed and believes, the defendant Y. Z. has not any general agent or attorney within this State, nor any agent or attorney within this State for any purpose [except M. N., who resides at _____, and who is his agent for the purpose of _____]; and the sources of deponent's information and the grounds of his belief are [*setting them forth*].

VII. That no previous application [*&c.; see p. 2*].

[*Jurat.*]

[*Signature.*]

Form No. 1179.

Order for service by substitution or mailing.¹

At a special term [*&c., as in Form 493, p. 4*].

[*Title of cause.*]

On reading and filing the annexed affidavit of C. D., verified the _____ day of _____, 18____, and copy notice therein referred to, and on motion of A. T., attorney for [plaintiff]:

ORDERED, that said notice be served on Y. Z. by depositing in the post office at [*the place of business of the applicant's attorney*], on or before the _____ day of _____, 18____, a copy of said notice and affidavit, together with a certified copy of this order, contained in a securely closed postpaid wrapper, directed to said Y. Z., at _____ [*or otherwise, as directed by the court*].

[*Affidavit of service, personally or by substitution or mailing (see Forms in Vol. I, pp. 680-682), to be made and filed with the clerk, before further proceedings.*]

¹ Draper v. Holland, 3 *Edw.*, 272; *N. Y. Code Civ. Pro.*, § 65.

Form No. 1180.

Notice of motion by attorney (or order to show cause) to set aside satisfaction of judgment and have leave to prosecute for protection of his lien.¹

[Commencement as in Form 488, p. 1, or 491, p. 3, omitting clause appropriate to motion before a judge, and substituting for the italic clause between the ¶ and the ‡ the following:] vacating the satisfaction of the judgment for \$, which had been entered herein the day of , 18 , in favor of the plaintiff and against the defendant, which satisfaction-piece purports to have been executed the day of , 18 , and was filed in the office of the clerk of this court on the day of , 18 , or vacating said satisfaction of judgment to the extent of \$, and interest thereon from the day of , 18 , and for an order [or if an order to show cause is asked: and why an order should not be made] allowing said A. T. to prosecute said action [and if proceedings after judgment are desired to be resumed, state them as thus: and the appeal to the Court of Appeals taken therein] for the enforcement of his lien upon and interest in said judgment to the amount aforesaid and the collection of the same.

[Date.] [Signature and office address of],
Attorney for .

[Address to the client and to
the attorney for the ad-
verse party.]

Form No. 1181.

Order on motion of client, referring question between attorney and client.²

[Title (court order) and recitals, according to the case; see Form 493, p. 4.]

ORDERED, that the said motion be, and the same is hereby granted.

¹ From Whittaker v. N. Y. & Harlem R. R. Co., 18 Abb. N. C., 11. For a recent collection of the cases on the attorney's lien and his remedies, see 18 Abb. N. C., 23, and 20 Am. L. Rev., 847; 21 id., 70.

² Sustained by Amsdell v. Martin, 20 Week. Dig., 370, where it was held

that under the preceding practice a dispute of this character between a solicitor and his client would in equity have been referred to a master to hear the proofs and report upon them; and that such practice has been continued by the Code, § 827, it having been also provided by § 1015 that a reference

And it appearing to the satisfaction of the court, from the affidavits so presented, that disputes have arisen between the plaintiffs and said E., not only as to the claim or lien of said E. upon the judgment in this action, but as to other matters and things in which it is claimed by the plaintiffs that said E. has collected and has not accounted for certain moneys of the plaintiffs, it is further ordered, that in the meantime, and until the further order of this court, the sheriff retain in his hands a sum sufficient to pay in full the execution issued by said E. herein, and that it be referred to W. C. B., Esq., who is hereby appointed referee for that purpose to hear and determine as follows:

First. What amount of compensation the said E. is entitled to for his services in this action.

Second. What amount, if any, he is entitled to in other matters and proceedings between him and the plaintiffs as compensation for his services in such matters and proceedings.

Third. What amount, if any, should be credited to the plaintiffs in such other matters and proceedings and in this action for moneys paid by them to the said E., or for moneys collected by said E. in this action, or in such other matters and proceedings.

Fourth. To report the amount of the lien, if any, upon the judgment in this action of the said E. for his services in this action, and for his services in such other matters and proceedings, after crediting the plaintiffs with all sums to which they are entitled to credit.

Enter: [*signature of judge by initials of name and title*].

may be made upon a motion to a referee "to determine and report upon a question of fact arising in any stage of the action;" and this section empowers the court to direct the referee to determine the controversy, citing *Brown v. Mayor*, 9 *Hun*, 587, 593.

The concluding part of the order there made, by which it was directed that the attorney should bear the ex-

penses of the reference and pay \$10 costs of the motion in case he failed to establish a lien upon the judgment to the extent of at least a specified sum, was held wrong, because the right to costs and disbursements could not intelligently be determined until the proceeding had terminated before the referee and his report should be brought up for consideration.

ARTICLE II.

CONSOLIDATION.

FORMS.

(1182.) Affidavit to obtain consolidation.

(1182a.) Removal from another court, and consolidation.

(1183.) Notice of motion to consolidate.

(1184.) Order thereon.

(1185.) Order that one action abide the event of another.

Form No. 1182.

Affidavit to obtain consolidation.¹

[Give the title of the several causes, one under the other, naming first the one in the Supreme Court, if any of them are pending in other courts.²]

[Venue.]

Y. Z., being duly sworn, says :

I. That he is the defendant [*or, one of the defendants—or, president,—or other appropriate officer—*of the corporation defendant; *or, if otherwise, state relation to cause, and reason why party does not make the affidavit*] in all the above entitled actions [*which are respectively pending in the courts above named; if the places of trial in the Supreme Court are different, state what they are*³]; and all the parties are the same in each action.

II. That each of said actions is upon a promissory note alleged to have been made by the defendant [*or otherwise show the nature of the causes of action, and that they are such as may be joined in the same action*];⁴ and, if it be the case, that they all accrued before the first action was brought].⁵

¹ Under *N. Y. Code Civ. Pro.*, § 819, either party may apply. *Briggs v. Gaunt*, 4 *Duer*, 664; s. c., 2 *Abb. Pr.*, 77. To same effect under 2 *R. S.*, 383, § 38.

For the cases in which consolidation may be ordered, see 58 *Am. Dec.*, 508 n.

² See Vol. I, p. 117.

³ *Mayor v. Coffin*, 90 *N. Y.*, 312; s. c. as *Mayor v. Mayor*, 11 *Abb. N. C.*, 367; rev'g 27 *Hun*, 610.

⁴ *Mayor v. Coffin* (*above cited*).

⁵ *Pierce v. Lyon*, 3 *Hill*, 450. But this is not essential. *Wilkinson v. Johnson*, 4 *id.*, 46. It only aids on the question of delay. *Dunning v. Bank of Auburn*, 19 *Wend.*, 23.

III. That the defendant does not intend to interpose any defense to said actions.¹

[Or, that the defense is [or, the defenses are] wholly the same in all these actions, namely [*stating the facts concisely,*² *as thus:*] that the notes were obtained by the plaintiff at one time by fraud, in falsely representing to defendant [*&c.*]; and a copy of the answer is hereto annexed. And deponent is advised and believes the questions which will arise and are to be tried are substantially the same in all of said actions.³]

IV. [*State the condition of the causes. See Forms 489 and 1028. And if an order to show cause is asked, state as to previous application. See p. 2.*]

V. That the plaintiff's attorney has refused to consent to the consolidation of these actions upon the request of the defendant's attorney, made since issue was joined in all said causes.⁴

[*Jurat.*]

[*Signature.*]

Form No. 1182a.

Removal from another court, and consolidation.⁵

[*Adapt from last Form and Forms 400, &c., Vol. I, p. 730.*]

Form No. 1183.

Notice of motion to consolidate.⁶

[*Title as in preceding Form.*]

Please take notice, that upon the annexed affidavit and the

¹ This is enough without the following alternative allegation. *Wilkinson v. Johnson (above)*.

² This is necessary; an allegation of identity is not enough. *Dunn v. Mason*, 7 *Hill*, 154; *Crone v. Koehler*, 6 *Abb. Pr.*, 328, n.

³ Oath to merits is not necessary. *Brewster v. Stewart*, 3 *Wend.*, 441. Unless application for a stay requires it. See p. 447 of this Volume.

⁴ This allegation is inserted only to

charge plaintiffs with the costs of motion, and is not needed even for that, if the circumstances show that he brought separate actions to oppress defendant. See *Dunning v. Bank of Auburn*, 19 *Wend.*, 23.

⁵ *N. Y. Code Civ. Pro.*, § 818; *Soloman v. Belden*, 12 *Abb. N. C.*, 58; *Dupignac v. Van Buskirk*, 18 *id.*, 204; *aff'd* in 44 *Hun*, 45.

⁶ Move the court. Motion should not be noticed till after issue unless

pleadings [and proceedings] in the above entitled actions, the undersigned will move the court, at a special term, to be held [at chambers] at¹ the city hall [or, county court house], in , on the day of , 18 , or as soon thereafter as counsel can be heard,* that all [or, both] these actions be consolidated into one,² [may add: or why action No. should not be perpetually stayed; see *Stay of Proceedings*], and for such further or other order as may be just [with costs].

[Date.] [Signature and office address of],
[Address] To , Attorney for [moving party].
Attorney for [adverse party].

Form No. 1184.

Order consolidating actions.

[Title (court order) with names of the several causes as in Form 1182, and recitals according to the case; see Form 493, p. 4].

ORDERED, 1. that the several causes above entitled be, and hereby are, consolidated into one action in this court, and that the several statements of the causes of action in the respective complaints stand as the complaint in said consolidated action [or, that the plaintiff have leave—or, be required—to serve an amended complaint in the consolidated action within days from the service of this order; may add: defendant to have days thereafter to serve an answer thereto, in which the defenses shall be identical as to all the causes of action, and identical with that set up in his answers already served].

2. That the plaintiff pay to defendant's attorney within [see Vol. I, p. 219] the costs of the first action up to the date of this order, and dollars costs of this motion³ [or, that \$10 costs of this motion abide the event of the action].

the affidavit is that defendant will not answer. *Le Roy v. Bedell*, 1 *Code R.*, N. S., 201. Or unless the multiplicity of actions is clearly vexatious. *Percy v. Seward*, 6 *Abb. Pr.*, 326.

¹ As to place of moving, where the actions are in different counties, see *Percy v. Seward*, 6 *Abb. Pr.*, 326, and cases in last note but one.

² If removal is sought will insert: and that for that purpose the above-entitled action in the Court be

removed into the Supreme Court, and so there consolidated.

If change of place of trial, insert: and for that purpose that the place of trial of the action No. be changed to the county of .

³ Costs of the motion should be granted, unless a satisfactory reason is shown for bringing two suits where one would suffice. *Bank of U. S. v. Strong*, 9 *Wend.*, 451. Or costs already accrued may be saved to the

[*If removal or change of place of trial is ordered.*] 3. That upon filing a certified copy of this order with the clerk of the court of [or, of the county of], he deliver all process, pleadings, and proceedings in his office, relating to the second cause above mentioned, to the clerk of the county of [*name the county of the venue of the consolidated cause.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1185.

Order that one action abide the event of another.¹

[*Title (court order), with name of all the causes and recitals according to the fact. See Form 493, p. 4.*]

ORDERED, that all the above-named causes abide the event and final determination of one of them, which the plaintiff may select and notice for trial [or, of the first named], and that proceedings in all the remaining actions be stayed until the trial of such selected action, and that whatever judgment may be finally rendered in the cause notice for trial shall be entered in all the other causes [or, with liberty to the defendant after such trial to move for a consolidation of the remaining suits, and with like liberty to the plaintiff to apply then for a consolidation—or, to bring the remaining suits to trial], unless the defendants consent that such remaining actions abide the event of the action tried, in case the defendants should appeal from any judgment recovered against them.

successful party. *Blake v. Michigan Southern R. R. Co.*, 17 *How. Pr.*, 228.

Where the application was by the plaintiff, he was charged with costs of the first action down to the order, although he was not in fault for hav-

ing brought separate suits. *Briggs v. Gaunt*, 4 *Duer*, 664; s. c., 2 *Abb. Pr.*, 77.

¹ This form is supported by *Jackson v. Stiles*, 5 *Cow.*, 282; *Clark v. Metropolitan Bank*, 5 *Sand.*, 665.

ARTICLE III.

CONTEMPT.

I. IMMEDIATE PUNISHMENT IN VIEW
AND PRESENCE.

FORMS.

- (1186.) Order summarily convicting and committing for criminal contempt in immediate view and presence.
- (1187-1189.) Statements of contumacy suitable to be inserted in foregoing Form.
- (1190.) Commitment for criminal contempt in the immediate view and presence.

II. PROCEEDING FOR CONTEMPT BY ORDER
TO SHOW CAUSE, IN THE ACTION.

- (1191.) Affidavit to obtain order to show cause why accused should not be punished for contempt.
- (1192.) Order by judge, referee or court thereon.
- (1193.) Notice of foregoing order.
- (1194.) Affidavit of service of order to show cause in contempt.
- (1195.) Order convicting of contempt, fining for indemnity of injured party and committing till paid.
- (1196.) —, and fining for punishment, and for costs and expenses.
- (1197.) Order of reference to ascertain measure of fine for indemnity of complainant.

III. PROCEEDING BY ATTACHMENT (A
SPECIAL PROCEEDING).

- (1198.) Affidavit to obtain attachment in the first instance (general Form).
- (1199.) Order for attachment for contempt.
- (1200.) Attachment to bring in the accused to answer to a charge of contempt.
- (1201.) Indorsement on foregoing attachment.
- (1202.) Order for attachment for contempt in disregarding order to submit to examination before trial.
- (1203.) Affidavit to attach witness (common Form).

- (1204.) Attachment against witness.
- (1205.) Affidavit to attach witness not obeying subpoena to attend before sheriff's jury.
- (1206.) Order for attachment to bring witness before sheriff's jury.
- (1207.) Attachment for witness before sheriff's jury.
- (1208.) Undertaking of bail on arrest on attachment to answer for contempt.
- (1209.) Order by court, or judge, or referee, that interrogatories be filed.
- (1210.) Interrogatories as to contempt.
- (1211.) Answers to interrogatories as to contempt.
- (1212.) Verification of answers to interrogatories.
- (1213.) Order of reference as to contempt.
- (1214.) Order convicting of contempt (after attachment) and directing commitment.
- (1215.) Warrant of commitment for contempt.

IV. PROCEEDINGS SUMMARILY TAKEN
AGAINST ATTORNEYS AND OTHER OFFI-
CERS OF THE COURT.

- (1216.) Order to show cause why attorney should not pay over to his client or be punished for contempt.
- (1217.) Notice to sheriff or other officer to return a process or mandate.
- (1218.) Affidavit showing duty of sheriff or other officer to make return.
- (1219.) Affidavit to obtain summary commitment.
- (1220.) Order thereon.
- (1221.) Commitment for contempt on failure to pay money.
- (1222.) Order to show cause (by court) why accused should not be punished for contempt in not paying pursuant to order or judgment.

I. IMMEDIATE PUNISHMENT IN VIEW AND PRESENCE.

Form No. 1186.

Order summarily convicting and committing for criminal contempt
in immediate view and presence.¹

[*Name of*] court [*or, if a court order, which it must be if the proceeding is in court*], At a special [*or, general*] term [*or, at a circuit—&c., as in Form 493 p. 4*].

[*Title of cause.*]

On this day of , 18 , at about the hour of , the above-named cause being on trial [*or, the above named proceeding—indicate briefly its nature being then pending before the undersigned*], M. N., was duly called as a witness for [*here indicate contumacy; see Forms 1187 to 1189, below*].

WHEREUPON, the said M. N. being now still present² in court [*or, before the undersigned*], it is adjudged that said M. N. is guilty of a criminal contempt [*of court*] in refusing to be sworn as a witness [*or, in refusing to answer said question—or, in the disorderly acts aforesaid—or otherwise according to the fact*], and that the said M. N. be imprisoned in close custody in the jail of the county of [*where the court is sitting*]³ for [*not exceeding 30*] days:

[*Or if fine only be imposed:*] that said M. N. pay a fine of dollars, and in default of the payment thereof be imprisoned in close custody in the jail of the county of , * until said fine be fully paid, or until the period of 30 days after the commitment of him to jail shall have expired.

[*Or in case of fine and imprisonment:*] that said M. N. pay a fine of dollars, and be imprisoned in close custody in the common jail of the county of , † for [*not exceeding 30*] days, and, thereafter, in case of default in the payment of the aforesaid fine, until said fine be fully paid or the period of 30 days after the expiration of the period of days above-mentioned shall have expired.⁴

¹ Sustained by *Exp. Richmond Stice*, 70 Cal., 15; *Re Rea*, 14 Cox Crim. Cas., 139; *Matter of Percy*, 2 Daly, 530; *People ex rel. Hackley v. Kelly*, 24 N. Y., 74; *N. Y. Code Civ. Pro.*, § 10.

² The recital of presence is inserted in deference to the ruling in *Clay v. Quarter Sessions, Ky. Dec. (Sneed)*, 189. Interrogatories are not necessary if commitment is immediate. *Matter of Percy*, 2 Daly, 530.

³ See *People ex rel. Sherwin v.*

Mead, 92 N. Y., 415; s. c., 1 N. Y. Crim. R., 417; aff'g 28 Hun, 227; s. c., 64 How. Pr., 41.

⁴ Or under practice in some States—until said fine be fully satisfied in the proportion of one day's imprisonment for every dollar of the fine, and on the payment of such portion of the fine as shall not have been satisfied by imprisonment, at the rate above prescribed, that said [*name*] be discharged from custody.

[*Or if the offense was disobedience under subpoena, or an act which can yet be performed:*¹] be imprisoned in close custody in the common jail of the county of _____, § there to remain until he submits to [*here state the act which he was required to do, for instance, if it be to answer a question recite the question to be answered*],² or is discharged according to law.

[*Authentication as in Form 491, p. 3.*]

STATEMENTS OF CONTUMACY SUITABLE TO BE INSERTED IN FOREGOING FORM.

1187. *Disorderly interruption; insert at the * in last Form.*—M. N. insisted upon interrupting and insulting the court by shouting at the court in a violent and unseemly manner, and, although frequently called upon by the court to cease, continued to do so in such a way that no member of the court was able to continue the discharge of his official functions.³

1188. *Refusal to be sworn.*⁴—M. N. was duly called as a witness for the [plaintiff] in the above entitled action [or, proceeding], and was duly ordered by the court [or, by the undersigned] to be sworn as a witness, and thereupon and now in the immediate view and presence of the court, he refused and still refuses to be sworn as a witness.

1189. *Refusing to answer a question.*—M. N. being duly called and sworn as a witness for the [plaintiff] in the above entitled action [or, proceeding] thereupon and now in the immediate view and presence of the court [wherein the question whether, indicating point which rendered the question competent was in issue⁵] refused and still refuses to answer the following legal and proper interrogatory propounded to him by A. T., the attorney for the said [plaintiff], to wit: [*quote question*].

And the said M. N., though directed by the court [or, the undersigned to answer said interrogatory, wholly refused so to do [or, instead of answering said interrogatory only said—*quote statement*.]⁶

Form No. 1190.

Commitment for criminal contempt in the immediate view and presence.⁷

The People of the State of New York to the Sheriff of the
[City and] County of _____, greeting:⁸

¹ People *ex rel.* Jones v. Davidson, 35 Hun, 471.

² People *ex rel.* Phelps v. Fancher, 2 Hun, 226; rev'g 15 Abb. Pr., N. S., 38.

³ From *re Rea* (above cited); see also Holman v. State, 105 Ind., 513; s. c., 2 Western Rep., 761.

⁴ See People *ex rel.* McDonald v. Keeler, 99 N. Y. 463; Reynolds v. Parker, 2 Dem., 399.

⁵ This clause is inserted in deference to the ruling in Exp. Zechandela (Cal., 1886), 12 Pacif. Rep., 259.

⁶ See People *ex rel.* Jones v. Davidson, 35 Hun, 471; People *ex rel.*

Hackley v. Kelly, 24 N. Y., 74; s. c., 24 How. Pr., 369; aff'g 12 Abb. Pr., 150; s. c., 21 How. Pr., 54, People *ex rel.* Phelps v. Fancher, 4 Supm. Ct. (T. & C.), 467; Lathrop v. Clapp, 40 N. Y., 328.

For form of commitment of attorney for refusing to produce documents as a witness, see People *ex rel.* Mitchell v. Sheriff, 7 Abb. Pr., 96.

⁷ People *ex rel.* Jones v. Davidson, 35 Hun, 471; Matter of Percy, 2 Daly, 530; N. Y. Code Civ. Pro., § 856.

⁸ Matter of Percy, above cited; N. Y. Code Civ. Pro., § 858.

WHEREAS, on the day of , 18 , in an action between A. B., plaintiff, and Y. Z., defendant [*or, a proceeding for—briefly indicating nature*], then pending in the court of in the [city and] county of [*recite contumacy and adjudication as in previous Forms, 1187–1189*].

NOW, THEREFORE, we command you that you take the body of the said M. N., and safely keep him in your close custody in the common jail of the county of [*as in Form 1186, from the *, the † or the §*], and you are to return this writ and to make and return to our said court a certificate, under your hand, of the manner in which you shall have executed the same.

WITNESS: HON. [*here name any justice of the Supreme Court, if the cause in which the writ is issued is in that court, adding*], justice of our said court [*or if the cause is in a superior city court, county court, or New York city court, name any judge thereof, adding, judge of our said court*], at the County Court House [*or, the City Hall*], in , this [*date of issuing*] day of , 18 .

[*Seal, if any.*]

[*Signature of clerk, and seal of court at left, or if issued by a magistrate, his signature.*]

[*If issued at the instance of an attorney, add signature and office address of,*]

Attorney for .

II. PROCEEDING FOR CONTEMPT BY ORDER TO SHOW CAUSE, IN THE ACTION.

Form No. 1191.

Affidavit to obtain order to show cause why accused should not be punished for contempt.

A. T., being duly sworn, says:

I. That he is the [attorney for] the plaintiff in the above action [*or otherwise state relation to the cause*].

II. [*Here state facts constituting duty as thus, for instance, where contumacy occurred in the course of the cause.*] That on the day of , 18 , at o'clock m., deponent attended as such [attorney for said plaintiff] herein, at the of , in the of , and in the presence of , to examine the defendant above named, before trial, pursuant to the order hereto annexed.

III. [*If the contumacy was the disobedience of an order, &c., add, or annex and refer to, proof of service with a copy*

of the order or injunction disregarded, see Vol. I, p. 432, and pp. 99, 100, of this Vol.]

IV. [*Allege the disobedience specifically.*]

V. That no previous application for an order to show cause why said M. N. should not be punished for contempt has been made herein [except, &c., see p. 2].

[*Jurat.*]

[*Signature.*]

Form No. 1192.

Order by court, judge or referee, returnable before himself or before the court, that accused show cause why he should not be punished for contempt.¹

[*Name of*] Court [*or if court order*], At a special term [*&c.*,
as in Form 493, p. 4].

[*Title of the cause in which the misconduct occurred.*]

On reading [*if made by the court, add, and filing*] the annexed affidavit of _____ [*and in same way specify other papers, if any; and may add:* and such other affidavits as may be served by _____ on _____, on or before the day of _____]: Let [*name*] show cause at a special term of this court to be held [at chambers] at the City Hall [*or, County Court House—*or, before me at _____], in the city of _____, on the _____ day of _____, 18 _____ [*allowing at least eight days unless the affidavits show reason for short notice*], at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why he should not be punished as for a contempt for his misconduct in failing to obey the mandate of this court [*or, the subpoena, or otherwise*] as alleged in said affidavit, and why [plaintiff] should not have such other and further relief as may be just, with costs of this motion.

Service of this order on the above-named M. N. personally on or before the _____ day of _____, 18 _____, shall be sufficient.

[*Authentication as in Form 491, p. 3.*]

¹ Under the New York statute an order to show cause is required, instead of notice of motion, unless an attachment is issued, § 2269; but the objection that a notice of motion was used cannot be taken on appeal if not taken below. *Matter of Nichols*, 54 N. Y., 62; *Wilson v. Greig*, 12 *Weekly Dig.*, 73. Compare *Sandford v. Sandford*, 40 *Hun*, 540.

The referee can make such an order if he was appointed by the court, and the offense was committed upon the trial of an issue referred to him, or consists of a witness's non-attendance or refusal to be sworn or to testify before him. *N. Y. Code Civ. Pro.*, § 2272.

Form No. 1193.

Notice of foregoing order.¹

[*Entitle unless it is indorsed on the order.*]

Please to take notice, that the foregoing [*or, within*] is a copy of an order this day made by Hon. J. K. in this cause [*or, duly entered in the office of the clerk of* , at].

[*Date.*]

[*Signature and office address of*]

Attorney for .

Form No. 1194.

Affidavit of service of order to show cause in contempt.

[*Venue.*]

O. P., being duly sworn, says:

I. That he is [*here state his relation to the parties or the attorney; as, for instance, clerk, or otherwise*].

II. That, on the day of , 18 , at No. , street, in the of , in the county of , he personally served a copy of the annexed [affidavit and papers, order and report], together with a notice, a copy whereof is thereon indorsed, upon , to deponent known to be the person mentioned in said order, by delivering the same to, and leaving the same with, the said in person.

III. That, at the time of making said service, he showed to said the annexed original order to show cause, dated the day of , 18 , and the signature of Hon. J. K. thereto [*or if a court order, as on p. 432 of Vol. I.*].

[*Jurat.*]

[*Signature.*]

Form No. 1195.

Order convicting of contempt, fining for indemnity of injured party, and committing till paid.²

[*Title and recitals according to the case; see Form 492 or 493, p. 4.*]

It is hereby ORDERED, and adjudged, and determined,

¹ As to when personal service is necessary, see Vol. I, p. 222. *McCaulay v. Palmer*, 40 *Hun*, 38; *Pitt v. Davison*, 37 *N. Y.*, 235; *Merritt v. Annan*, 7 *Paige*, 151; *Eureka Lake*

Co. v. Superior Ct. of Yuba, 116 *U. S.*, 410.

² *N. Y. Code Civ. Pro.*, § 2284, &c. Interrogatories are not necessary on an order to show cause. § 2283.

I. That [name] is guilty of a contempt of court in having willfully disobeyed the [injunction-order] made in this action on the day of _____, 18____, in that [stating violation; for other Forms, see No. 1187, &c.]. *

II. That said misconduct of said [name] was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the [plaintiff] herein, to his actual loss or injury, in the sum of _____ dollars¹ [indicating how incurred], besides the costs of this motion. §

III. That the said [name] for said misconduct is hereby fined the sum of _____ dollars, to be paid to the [plaintiff], being said sum, together with \$10 costs of this motion.²

IV. That said [name] be committed † by the sheriff of the [city and] county of _____ to the county jail of said county, to be there detained in close custody until he [shall produce said books, and] pay said sum³ or he be discharged according to law [and that a warrant issue to execute this order].⁴

[Authentication as in Form 491, p. 3.]

Form No. 1196.

Order convicting of contempt, and fining for punishment, and for costs and expenses.⁵

[As in last Form, to the *.]

II. That said [name] for said misconduct is hereby fined the sum of [not over \$250] dollars, to be paid to the clerk of this court,⁶ to be disposed of according to law; and also _____ dollars

¹ Sudlow v. Knox, 7 Abb. Pr., N. S., 411; King v. Flynn, 37 Hun, 329.

² The order may, for protection of the party, direct as to the application of the money.

³ For direction for absolute imprisonment, or for imprisonment till act is performed, see also Form 1190.

⁴ The clause in brackets is unnecessary. N. Y. Code Civ. Pro., § 2283; Matter of Percy, 2 Daly, 530. A certified copy of this order is enough.

A warrant of commitment, if desired, may be adapted from Form 1190 or 1215.

Other clauses.—And that his com-

plaint [or, answer] herein be stricken out.

Clark v. Clark, 11 Civ. Pro. R., 7; Diffenbach v. Roch, 22 Weekly Dig., 282.

And that until payment all proceedings on his part in the above-entitled action are hereby stayed.

This is proper even without proof that complainant has suffered loss by the contempt. Stubbs v. Ripley, 39 Hun, 626.

⁵ See King v. Flynn, 37 Hun, 329.

⁶ This is the settled practice, notwithstanding the query in 37 Hun, 331, whether it should not go to the State treasury.

hereby allowed, and to be paid to the [plaintiff] or his attorney as the costs and expenses¹ of the complainant in proceeding for said misconduct, amounting together to _____ dollars.

III. That said [name] be committed [continuing as in last Form, from the †].

Form No. 1197.

Order of reference to ascertain measure of fine for indemnity of complainant.

[As in Form 1195, to the § at the end of II, continuing:]
 III. That it be referred to R. F., of _____, counsellor at law, as referee, to ascertain and report the actual loss or injury produced to the [plaintiffs] by the said misconduct, and also the [plaintiffs'] costs and expenses of this proceeding; all other questions to be reserved until the coming in and confirmation of the report of the said referee.

[Authentication as in Form 491, p. 3.]

[Report; see Reference.]

III. PROCEEDING BY ATTACHMENT (A SPECIAL PROCEEDING).

Form No. 1198.

Affidavit to obtain attachment in the first instance (general Form).

[Entitle in the cause, if any pending.]

[Follow Form 1191, taking care to furnish positive proof as in an affidavit for arrest.² If reason for asking attachment in first instance is not obvious on the papers, may state as thus:] That the deponent asks an attachment in the first instance, because plaintiff has good reason to fear that if defendant is served with a copy of an order to show cause, or any papers showing any intention to procure an attachment on the defendant without holding him to bail, he will immediately leave the country, and thus defeat the object of the proceedings, and deponent is also led to this belief by the repeated assertions made by the defendant to this deponent and others,

¹ People *ex rel.* Garbutt v. R. & S. L. R. R. Co., 76 N. Y., 294.

² Or at least give excuse for affida-

vit on information and belief, and state sources of information. Sargeant v. Warren, 22 Weekly Dig., 473.

that he will not pay any alimony, and will not give security therefor.

[If the accused is in custody, state it. *N. Y. Code Civ. Pro.*, § 2278.]

[State as to previous application; see p. 2.]

[Jurat.]

[Signature.]

Form No. 1199.

Order for attachment for contempt.¹

[Name of] Court [or if a court order], At a special term [*&c*,
as in Form 493, p. 4].

[Title of cause.]

On reading and filing the affidavits of A. B. and C. D., verified the day of , 18 , and the [injunction] order therein referred to and annexed thereto, showing that [*stating the violation, for instance thus*] the members of the common council of said city of Brooklyn and aldermen of said city, to wit [names], have violated the said injunction-order which was granted herein on the day of last past, and which injunction was duly served on the persons above named; now, on motion of A. T., attorney for plaintiff, it is

ORDERED, I. That an attachment as for a contempt for disobedience of the said injunction-order be issued against said Y. Z. [or, against each and every of the following-named members of the common council of the city of Brooklyn, and aldermen of said city, to wit—names], directed to the sheriff of the county of [or, to the sheriff of any county where the accused may be found²], returnable at a special term of this court to be held [or, before me³] at the court house in the city of , on the day of , 18 , at o'clock in the forenoon of that day [or, forthwith⁴].

II. That the said accused be held to bail on said attachment in the sum of dollars⁵ [each].

[Authentication as in Form 491, p. 3.]

¹ From People *ex rel.* Negus v. Dwyer, 90 *N. Y.*, 402.

² *N. Y. Code Civ. Pro.*, § 2269; applicable to county court, § 347; and superior city courts, § 278.

³ *N. Y. Code Civ. Pro.*, §§ 2269–2272. By § 2271, if the warrant is returnable before the court, it may be issued as prescribed by any judge authorized to grant an order without notice, in an action pending in the court

(see Volume I, pp. 131–133), and it must be made returnable at a term of the court at which a contested motion may be heard.

⁴ *N. Y. Code Civ. Pro.*, § 2269.

⁵ This clause, though usual, is not essential. *N. Y. Code Civ. Pro.*, § 2275, which makes the direction discretionary, contemplates that it be indorsed on the warrant.

Form No. 1200.

Attachment to bring in the accused to answer to a charge of contempt.¹

THE PEOPLE OF THE STATE OF NEW YORK, to the sheriff of the [city and] county of [or, of any county where the accused below named may be found]:

We command you to attach [name], * so that you have his body before our [supreme] court at a [special] term thereof, to be held [or, before me] at the court house in the city of , on the day of , 18 , at o'clock in the noon of that day, then to answer unto us as well, touching the contempt which it is alleged they have committed against us, as also such other matters as shall be then and there laid to their charge, and further to perform and abide such order as our said court [or, the undersigned] shall make in this behalf.

And † have you then there this writ, and make and return a certificate under your hand of the manner in which you shall have executed the same.

WITNESS [&c., as in Form 1190 on p. 586. *If issued by Referee his signature goes in place of signature of clerk.*]

Form No. 1201.

Indorsement of foregoing attachment.²

Issued by special order of the court [or, of the undersigned]. [Hold the accused to bail in the sum of dollars —each.]

[Date.]

[Signature by name and official title of judge or referee.]

[If in court, signature of clerk.]

Form No. 1202.

Order for attachment for contempt in disregarding order to submit to examination before trial.³

[Title of court and action.]

WHEREAS, it satisfactorily appears to me [or, to this court]

¹ As to the sheriff's power to break a door, see *Harvey v. Harvey*, L. R. 26 Ch. Div., 645; 33 Week. Rep., 76.

² From this, even though signed only by the clerk, it will be presumed that an order was entered in the minutes. *Park v. Park*, 80 N. Y., 156.

But the better practice is to insert a clause as to bail in the order, or take the signature of the presiding judge to the direction.

³ See *N. Y. Code Civ. Pro.*, § 853; *Dogge v. State*, 21 Nebr., 272; 31 *Northwestern Rep.*, 929.

that upon the day of , 18 , in an action now pending in the court of , in the county of , wherein one A. B. is plaintiff and one Y. Z. is defendant, an order was duly made by Hon. J. K., one of the justices of the said court, requiring the [defendant] to attend before him [*or*, one of the justices of this court, at a special term [at chambers], to be held at the court house in the city of , on the day of , 18 , at o'clock in the noon, to be examined [as a witness before trial].

And it further so appears that said order was duly and regularly served upon the said defendant, and his fee as a witness duly paid to him; and said order was duly served on his attorney;¹

And whereas the said defendant Y. Z. has not appeared before this court, or one of the justices thereof on the day specified by the said order, to be sworn and examined thereunder [*and, if adjournment was had, recite that an order taking default was made, or that a further order was made, personally served, and disregarded*²].

And whereas, it has been made to appear to me that the defendant is guilty of contempt, and has willfully failed to obey the order aforesaid, and has failed to attend in obedience thereto; now, on motion of A. T., attorney for [plaintiff]:

ORDERED, that a warrant of attachment issue against the said Y. Z. to the sheriff of the [city and county of —*or*, to the sheriff of any county where said Y. Z. may be found], to arrest said Y. Z., and him safely keep and bring him before [me, one of the justices of] this court, at a [special term] at chambers thereof, to be held at the court house, in the city of , on the day of , 18 , at o'clock in the noon of that day [*or*, forthwith] to answer for the alleged offense and disobedience of the orders of this court, and to be further dealt with according to law.

[*Date.*]

[*Signature and title of judge.*]

Form No. 1203.

Affidavit to attach witness (common Form).

[*Title of court and cause.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is [the plaintiff—*or*, the petitioner—*or other-wise show his relation to it*] in the above-entitled cause.

¹ Cowen v. Ferguson, 18 Abb. N. C., 241.

² See McCaulay v. Palmer, 40 Hun., 38.

II. That M. N., the witness named in the annexed subpoena herein and proof of service thereof, is a necessary and material witness for the said [plaintiff] herein, without the benefit of whose testimony, the said [plaintiff] cannot safely proceed with the trial of said cause, as deponent is advised by Q. R., the said [plaintiff's] counsel herein, who resides at No. _____ street, in _____, in the county of _____, N. Y., after fully and fairly stating to him what the deponent expects to prove by said witness, and as deponent verily believes.

III. That said M. N. has failed and neglected to attend the said circuit court [*or, trial term—or, before the referee—or otherwise*] as required in said subpoena, and is not in attendance at or upon said [circuit court].

IV. [*Unless application is made on the call of the witness*] That no previous application has been made for an attachment against said M. N.

[*Jurat.*]

[*Signature.*]

[*Annex subpoena and proof of service.*]

[*Under N. Y. Code Civ. Pro., § 2269, an order to show cause why he should not be punished for contempt may be taken, or an attachment to bring him in to answer, but the latter is usual.*]

Form No. 1204.

Attachment against witness.

[*As in Form 1200, to the *, continuing:*] and forthwith bring him before one of the justices of our _____ court at a circuit [*or, trial term—or otherwise as the case may be*] at the City Hall [*or, County Court House*] in the city [and county] of _____ and county of _____, to answer for his misconduct in not obeying our writ of subpoena to him directed, and on him duly served, commanding him to appear before the said [circuit court], at the place aforesaid, on the _____ day of _____, 18____, and give evidence on the part of the [plaintiff] in a certain action pending between A. B., plaintiff, and Y. Z., defendant; and have you then there this writ.

WITNESS [*conclude as in Form 1190, p. 586*].

Form No. 1205.

Affidavit to attach witness¹ not obeying subpoena to attend before sheriff's jury.

[*Title of cause.*]

[*Venue.*]

A. B., being duly sworn, says :

I. That he is [managing clerk in the office of the attorney for] the in this action [*or otherwise show his relation to the case*].

II. That [*here state briefly the nature of the trial before the sheriff, for instance :*] on the day of , 18 , an execution, then or theretofore duly issued to S. H., the sheriff of the [city and] county of , upon a judgment in this action theretofore duly recovered and docketed in said county, in favor of said , and against said , was levied by said sheriff, on a stock of dry goods in the store No. street, in the city of , then and theretofore in possession of said . That one O. P., having interposed a claim of title to [*or, a claim of the right of possession of*] said goods, the same sheriff proceeded to impanel a jury pursuant to law to try the validity of said claim.

III. That M. N., the witness named in the annexed subpoena herein and proof of service thereof, is a necessary and material witness for the herein, without the benefit of whose testimony said cannot safely proceed to such trial, as deponent is advised by , the 's counsel herein, who resides at No. street, in the city of , after fully and fairly stating to him what the expects to prove by said witness, and as deponent verily believes.²

IV. That said [*witness*] has failed and neglected to attend before the sheriff or the under sheriff as required in said subpoena, and is not, and has not been in attendance at the place therein mentioned; and that the said trial stands adjourned until the day of , 18 .

V. That no previous application for an attachment has been made herein.

[*Jurat.*]

[*Signature.*]

[*Annex subpoena and proof of service.*]

¹ For another Form for ordinary cases, see No. 1203, p. 593. its where the affidavit is not made by the party, see Form No. 981, p. 447.

² For modification of oath to mer- in this Vol.

Form No. 1206.

Order for attachment to bring witness before sheriff's jury.

On reading and filing the affidavit of A. B., dated the day of _____, 18____, and subpoena and proof of service thereto annexed, and it appearing therefrom that M. N. was on the day of _____, 18____, duly subpoenaed to appear and attend before S. H., the sheriff of the county of _____, at _____, to be examined and to testify on the part of _____, on the trial of a claim of [title] before said sheriff, and that the said M. N. has failed and neglected to attend before said sheriff, or the under sheriff, pursuant to such writ of subpoena, and that said M. N. is a necessary and material witness in behalf of said _____ on said trial, without whose testimony the said _____ cannot safely proceed to said trial: Now, on motion of A. T., for the _____,

ORDERED, that a warrant of attachment issue against the said M. N., commanding said sheriff to apprehend said M. N. and bring him before said sheriff, or the under sheriff, forthwith [or, on the day of , 18], at .¹

[Date.] [Signature of judge and initials of title.]

Form No. 1207.

Attachment for witness before sheriff's jury.

[*As in Form 1200 to the *, continuing:*] and forthwith [*or, on the* day of , 18 , and thereafter from day to day till his examination is completed] bring him before yourself as sheriff [*or, before the under sheriff*] of said county, at [*here state place as in the subpoena*], to be examined, testify and

¹ This order may be made by a judge of the court in which the action is brought, or by the county judge, or in the first district a judge of the N. Y. Common Pleas. *N. Y. Code Civ. Pro.*, § 108, subd. 2.

give evidence [*here state object substantially as in subpoena*]; and have you then there this writ.

WITNESS [*conclude as in Form 1190, p. 586*].

[*Indorsement as in Form 1201, but without bail.*]

Form No. 1208.

Undertaking of bail on arrest on attachment to answer for contempt.¹

[*Name of*] Court.

The People on the relation of A. B. against Y. Z.
--

WHEREAS, the above-named Y. Z. has been arrested upon an attachment duly issued out of the Court of , to answer a charge of contempt, wherein A. B. is complainant, and the said Y. Z. is now in the custody of the sheriff of the city [and county] of , thereunder :

Now, therefore, we, the undersigned C. D. [*stating residence and vocation*], and E. F. [*residence and vocation*], hereby jointly and severally undertake, pursuant to the statute, to and with the People of the State of New York, that the said Y. Z. will appear on the day of , 18 , at o'clock in the noon, at a special term of said court to be held [at chambers—or, before Hon. J. K.] at the Court House, in the city of , to answer the matters alleged against him, and then and there abide the direction of said court [*or, judge—or, referee*] thereupon.

[*Date.*]

[*Signature.*]

[*Acknowledgment as in Form 495, p. 6.*²]

¹ *N. Y. Code Civ. Pro.*, § 2277. Formerly a bond was used. See Volume I, p. 61.

In this case there must be two or more sureties (*N. Y. Code Civ. Pro.*, § 2277), unless one is a fidelity or guaranty company. Volume I, p. 468.

It is not essential that the accused also sign. § 811; Volume I, p. 469.

² The sureties may be examined before him if the sheriff requires. *N. Y. Code Civ. Pro.*, § 2277, last sentence.

Form No. 1209.

Order by court, or judge, or referee, that interrogatories be filed.¹

[*Name of*] Court [*or if a court order*], At a special term [*&c.*,
as in Form 493, p. 4].

The People of the State of New
York on the relation of A. B.

against

Y. Z.

On reading and filing the affidavit of _____, verified the _____ day of _____, 18____, the above-named Y. Z. being now here present in court to answer [*or, before the undersigned to answer—*or, in custody of the sheriff under] the attachment herein [*if appearing by attorney, add: and appearing by* Z. T., his attorney], and denying his alleged contempt; and after hearing A. T., of counsel for the relator, and Z. T., of counsel for said accused, and due deliberation thereon being had, now, on motion of _____, of counsel for _____:

ORDERED, 1. That the [relator] within [two²] days file with the clerk of this court and serve upon the said Y. Z. [*or if he has appeared by attorney, upon the attorney for said—accused*] interrogatories to be administered to said Y. Z., touching his alleged contempt.

2. That said Y. Z., within [two²] days thereafter, in like manner file and serve on the relator's attorney answers upon oath to the said interrogatories.

3. It is further ordered that said Y. Z. attend [without further notice³—*or, be remanded to the custody of the sheriff of the—city and—county of _____, to be by him held under said attachment to be produced*] before this court [*or, before me*⁴] at [*&c., as in the warrant*], to abide the judgment and determination of this court in regard to his alleged misconduct.

[*Authentication as in Form 491, p. 3.*]

¹ *N. Y. Code Civ. Pro.*, § 2280. Unnecessary if the offense is admitted. If it is not admitted the accused may waive his right to interrogatories, and the question may be tried on affidavits or other proof, or by a reference.

² Such reasonable time as the court, judge or referee may fix. § 2280.

³ Or require personal notice.

⁴ As to proceeding before another judge, see *N. Y. Code Civ. Pro.*, §§ 26, 279.

Form No. 1210.

Interrogatories as to contempt.¹

[*Title as in last Form but one.*]

Interrogatories exhibited pursuant to an order of this court [or, of Hon. J. K.], made herein the day of , 18 , to be administered to the defendant Y. Z. above named, touching a contempt alleged against him for [violating an injunction granted in an action between A. B. and Y. Z.].

First interrogatory: Were you [or, have you, &c., and so on].

[*Date.*]

[*Signature and office address of*],
Attorney for relator.

Form No. 1211.

Answers to interrogatories as to contempt.

[*Title as in Form 1208.*]

Answers of the above-named Y. Z. to the interrogatories filed herein on the day of , on behalf of the [relator].

To the first interrogatory he says No [*and so on*].

To the interrogatory: The said Y. Z. is advised by his counsel that such interrogatory is not pertinent to the matters in controversy in this proceeding, and he declines to answer the same unless the court shall further instruct him to do so.

[*Date.*]

[*Signature.*]

Form No. 1212.

Verification of answers to interrogatories.

[*Venue.*]

Y. Z. above named being duly sworn, says that the foregoing answers are true.

[*Jurat.*]

[*Signature.*]

¹ The remedy for an objectionable out, or to object to it in the answer. interrogatory is to move to strike it See next Form.

Form No. 1213.

Order of reference as to contempt.

[*As in Form 1195, to the *, inserting in the recital: interrogatories having been filed and answered—or, having been waived—according to the case; and continuing as thus:*]

ORDERED, that it be and hereby is referred to R. F., Esq., of
 , a counsellor at law, to take and report such evidence as may be offered by either party as to the ability of the defendant to give security for the payment of alimony in this case, and that the attachment stand over until the coming in of the referee's report, and that the defendant be remanded [*&c., as in Form 1209*] under his bail bond, until the determination of these proceedings, said bail bond to remain in full force till such time.

[*Or thus: to examine the said defendant, on oath, upon the said interrogatories; and to take such further proofs as either party may produce before him, in relation to the misconduct alleged, and that he report such answers and proofs to this court; and that said defendant attend before the said referee, in the custody of said sheriff; and that the said sheriff detain the said defendant in his custody until the further order of the court.*]

[*Or thus, where interrogatories are waived*] to hear the parties, and to report to the court upon the question of the alleged violation of the said injunction, and the damages resulting therefrom, and that he report the evidence and his opinion thereon [*add direction for presence of accused; see above*].

[*Authentication as in Form 493, p. 3.*]

Form No. 1214.

Order convicting of contempt (after attachment), and directing commitment.¹

[*Title as in Form 1209.*]

[*Recite proceedings as thus:*] A writ of attachment having heretofore duly issued out of this court against the defendant Y. Z., for alleged contempt in disobeying the injunction-order [*or, the mandate of the court, contained in the judgment*]

¹ For another Form see 1 *Duer*, 571, note.

granted _____, 18____, in an action between A. B., plaintiff, and Y. Z., defendant, requiring said Y. Z. [*indicate the act as thus: to give security for the payment of the allowance therein granted to said A. B.*], which writ was directed to the sheriff of the [city and] county of _____, and returnable on the _____ day of _____, 18____, and the said sheriff having returned that he had attached the body of the said Y. Z. and let him to bail in the sum of _____ dollars, as directed by the indorsement of said writ by the court [*or, judge—or, referee*], and the said Y. Z. having appeared personally before the [court] on said _____ day of _____, accompanied by Z. T., appearing as his attorney herein, and interrogatories having been filed specifying the facts and circumstances alleged against said Y. Z., and a copy of the same having been served on him, and he having answered them on oath, and the parties having respectively adduced [*or, had due opportunity to adduce*] such further proofs as they might desire, and said Y. Z. having also made and presented his affidavit for the purpose of purging himself of contempt [*or, and also having been examined thereon, in open court—or, before the undersigned*]; and it having been referred to R. F., Esq., to [*stating scope of reference, if any*], and testimony having been taken before said referee on the part of both parties, and the referee having duly made and filed his report,¹ and the said hearing of the contempt proceedings, under the attachment, having been brought on before this court [*or, the undersigned*] on the following papers [*specify them distinctly so as to preclude difference in case of appeal*], and after hearing A. T., of counsel for the relator, and Z. T., of counsel for said Y. Z., and due deliberation having been had; now, on motion of A. T., attorney for the relator,

It is hereby ORDERED, ADJUDGED [*&c., as in Form 1195 or 1196*].

Form No. 1215.

Warrant of commitment for contempt.

THE PEOPLE OF THE STATE OF NEW YORK, to the sheriff of the [city and] county of _____, greeting:

WHEREAS, on the _____ day of _____, 18____, by an order made by the [undersigned in the] _____ Court of _____, at a term thereof held [at chambers] at the court house [*or, at the office of the undersigned at* _____] in _____, on the _____ day of _____, 18____, in a proceeding in said court in the name of the

¹ Exceptions not necessary, this being a special proceeding and the referee not to hear and determine. Matter of Steinert, 24 Hun, 246.

People on the relation of A. B. against Y. Z., it was adjudged that Y. Z. was guilty of a contempt in [*recite circumstances sufficiently to sustain the warrant as for a contempt "specially and plainly charged in the commitment;" see Forms 1187-1189*], and it was thereupon ordered that the said Y. Z. be committed to the common jail of said county, there to remain charged with the aforesaid contempt [*state requirement of order*]; and that a warrant issue to carry the said order into effect;

NOW, THEREFORE, we command you, that you take the body of the said Y. Z. and him safely and closely keep in your custody, in the common jail of the [city and] county of _____, until [*as above*], and shall pay your fees hereon, or until the said Y. Z. shall be discharged according to law. And you are to return this writ, and to make and return to our said court a certificate, under your hand, of the manner in which you shall have executed the same.

WITNESS [*&c., as in Form 1190*].

IV. PROCEEDINGS SUMMARILY TAKEN AGAINST ATTORNEYS AND OTHER OFFICERS OF THE COURT.

Form No. 1216.

Order to show cause why attorney should not pay over to his client or be punished for contempt.¹

At a special term [*&c., as in Form 493, p. 4*].

In the Matter of the Application
of A. B.

against

A. T., an Attorney.²

¹ Sustained, as between attorney and client, by *Wilmerdings v. Fowler*, 14 *Abb. Pr. N. S.*, 249; *Matter of Mertian*, 29 *Hun.*, 459; *Baldwin v. Foss*, 16 *Nebr.*, 80; 19 *Northwestern Rep.*, 496; *Bowling Green Savgs. Bk. v. Todd*, 52 *N. Y.*, 489; *Matter of Morgan*, 99 *N. Y.*, 145; *Jefferies v. Laurie*, 27 *Fed. Rep.*, 195; s. p., *Matter of Silvernail*, 45 *Hun.*, 575. It is equally proper to give ordinary notice of motion. On the hearing the court may determine the attorney's claim of compensation. *Matter of Knapp*, 85 *N. Y.*, 284.

The court may, after hearing the motion, order that the attorney pay over within a specified time, or that a warrant to commit him for contempt may issue. This is directed to be issued only after notice, usually short notice of two days.

If the decision of the motion be delayed by reference or otherwise, the court can order the attorney to pay the money into court meanwhile.

As to exceptions to report, see p. 601.

² This title is according to the practice, and is proper. *In re Wood*,

On reading and filing the petition¹ [*or, affidavit*] of A. B., verified the day of , 18 , and [*specify other papers, if any*] let A. T., attorney, show cause before this court at a special term [at chambers] at the county court house [*or, the City Hall*] in , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, why he should not pay to the above-named A. B. the sum of dollars [with interest from the day of , 18 , less his legal fees], or, in default of such payment, be punished for contempt; and why such other or further relief should not be granted as may be just.

[And in the meantime and until the order of the court hereon, said A. T. is hereby stayed from further acting as the attorney of said A. B. in the action of A. B. against Y. Z., except that he is directed to give said A. T. or , his attorney in this motion, notice of any proceedings taken in said action that come to his knowledge or of which he is given notice meanwhile.] [*And may enjoin paying over to others.*]

Service of this order and of the papers annexed shall be sufficient if made on said A. T. personally on or before the day of , 18 .

[*Authentication as in Form 491, p. 3.*]

Form No. 1217.

Notice to sheriff or other officer to return a process or mandate.¹

[*Title of court and cause.*]

To M. N., sheriff [*or other officer*] of the county of :

You are hereby required, within ten days after service of this notice, to return [*here briefly describe the process*] heretofore delivered to you for [service] in this cause, or to show cause at a [special] term of this court, to be held [at chambers] at the county court house [*or, City Hall*] in the of , on the day of , 18 , at the opening of the court on that

¹ 6 Dowl. & L. Pr., c. 154. Even if the grievance arises in a pending action, the client may move by another attorney, and is not confined to the places for moving that he would be in a motion in the action.

² See Volume I, p. 331, &c.

³ Under *N. Y. Code Civ. Pro.*, § 2270, this is supported by *N. Y. Gen. Rule*, No. 6, of 1884; s. p., *Heyman v. Cunningham*, 51 *Wisc.*, 506 (where the proceeding was taken against the deputy).

day, or as soon thereafter as counsel can be heard, why you should not be punished for a contempt of the court, with costs of such motion.

[*Date.*]

[*Signature and office address of*],
Attorney for

Form No. 1218.

Affidavit showing duty of sheriff or other officer to make return.¹

[*Title of court and cause.*]

[*Venue.*]

M. N., being sworn, says :

I. That he is the [attorney for the plaintiff] in this action.

II. That judgment was perfected and the roll thereof filed in the clerk's office of county, on the day of , 18 , for dollars and cents, damages and costs, and a transcript thereof was filed, and the judgment docketed in the clerk's office of county, on the day of , as this deponent is informed and believes.

III. That execution, in due form of law, was duly issued thereon to the sheriff of said last-mentioned county, by which said sheriff was commanded to make the said sum of , with interest and his fees, and to return such execution to the office of the clerk of county, within sixty days after the receipt thereof by him, the said sheriff; and that the same was received by said sheriff for execution on the day of , as this deponent is informed and believes [*or, as appears by the affidavit of O. P., hereto annexed*].

IV. That although the time for returning said execution has expired, said execution has not been returned; and that the said judgment has not been paid to the plaintiff, nor has any part thereof, but that the whole remains due and unpaid [*if plaintiff is not the deponent, state means of knowledge*], and that the said sheriff is in default in not returning the said execution, and in not paying over the said moneys.

V. That on the day of , 18 , deponent served on the above-named , sheriff of county, the notice and

¹ See *Crocker on Sher.*, 606.

affidavit, of which copies are annexed, by delivering copies thereof to him personally [*or, if he could not be found, by leaving copies thereof with C. D., a clerk in the office of said sheriff, during the hours in which said office is required by law to be kept open, the said being then absent therefrom*].

VI. That on the day of , 18 , deponent made diligent search in the files of the office of the clerk of the county of , in the place where executions are kept therein, and that the execution in this action, directed and delivered to the sheriff of county, on the day of , 18 , cannot be found on said files on such search [*or, deponent made inquiry at the office of the clerk of county, for the execution issued in this action to the sheriff of county, on the day of , 18 , and returnable to said office, and that this deponent was informed by said clerk —or, by a clerk therein—after search, that such execution had not been returned to said office*]; and this deponent verily believes that such execution has not been returned to said office.

VII. [*If an order to show cause is asked: That no previous application has been made for an order for return herein.*]

[*Jurat.*]

[*Signature.*]

V. COMMITMENT FOR NON-PAYMENT OF MONEY DIRECTED BY ORDER, &c.

Form No. 1219.

Affidavit to obtain summary commitment.

[*Title of court and cause.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is plaintiff in the above-entitled action [*or otherwise state relation to the cause, &c.*].

II. [*Allege the making of the order to pay,¹ referring to a copy annexed.*]

III. [*Allege service; see p. 98, of this Volume, Form 637.*]

¹ See *N. Y. Code Civ. Pro.*, § 2268.

IV. [*Demand by a person duly authorized; see Form 948, p. 414.*]

V. That no previous application [*&c., as on p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1220.

Order for summary commitment thereon.

At a special term [*&c., as in Form 493, p. 4.*]

[*Title of cause.*]

On reading and filing the affidavit of A. B., verified the day of , 18 , making proof which satisfies this court that personal demand has been duly made by A. B. on Y. Z. for payment of the sum of dollars, which was required of said Y. Z. by an order made herein the day of , 18 [being costs personally charged upon him for misconduct as an attorney—*or*, as an officer of this court¹], and that payment thereof has been wrongfully refused [*or*, neglected]: Now, on motion of A. T., attorney for said A. B.,

ORDERED, that a warrant issue herein to the sheriff of the [city and] county of [or, to the sheriff of any county where said Y. Z. may be found], to commit said Y. Z. to close custody in the county jail of county, until said sum of dollars, together with dollars, the costs and expenses of this proceeding, are paid, or until he is discharged according to law.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1221.

Commitment for contempt on failure to pay money.²

THE PEOPLE OF THE STATE OF NEW YORK, to the sheriff of the [city and] county of , greeting:

WHEREAS, on the day of , 18 , by an order made

¹ *N. Y. Code Civ. Pro.*, § 15.

² Sustained by *Ryer v. Ryer*, 33 *Hun*, 116, even without the clause as to recital in the brackets, it being held that §§ 1772, 1773 do not require the

order to recite or adjudge that payment of the alimony could not be enforced by means of security or the sequestration of his property, but that all that has been required is that it

by the Court at a special term thereof, held [at chambers] at the court house in the city and county of , in an action wherein A. B. was plaintiff and Y. Z. was defendant [it satisfactorily appeared to the court that, &c., *as in recital of order*, and thereupon], it was duly ordered that the said Y. Z. be committed to the common jail of said county, there to remain charged with the contempt mentioned in said order, until he should have paid the sum of \$ [alimony] therein, imposed upon him, together with the costs and expenses of the proceedings for such misconduct, amounting in all to the sum of dollars, and a warrant issue to carry said order into effect:

Now, THEREFORE, we command you that you take the body of the said Y. Z. and him safely and closely keep in your custody in the common jail of the county of , until he shall have fully paid the sum imposed as aforesaid, to wit, the sum of \$, and also the costs and expenses aforesaid, amounting to dollars, with your fees hereon, or until the said Y. Z. shall be discharged according to law. And you are to return this writ and to make and return our said court a certificate under your hand of the manner in which you shall execute the same.

WITNESS [*as in Form 1190*].

Form No. 1222.

Order to show cause (before court) why accused should not be punished for contempt in not paying pursuant to order or judgment.¹

[*Name of*] Court [*or if a court order*], At a special term [*&c.*, *as in Form 493, p. 4*].

[*Title of cause.*]

On reading and filing the affidavit of , verified the day of , 18 [*and recite other papers if any; see Form No. 1192*], by which it satisfactorily appears to this court [*or, to me*] that [*name*] has neglected [*or, refused*] to obey the

shall appear presumptively to the satisfaction of the court that payment cannot be enforced by means of the proceedings prescribed by § 1772, or by resorting to any security given therein mentioned. And that it did so appear before the determination was

made for the commitment of defendant, might be presumed from the facts mentioned in his affidavits upon which he applied for his release from imprisonment.

¹ *N. Y. Code Civ. Pro.*, § 2268.

order¹ of this court, entered [*or, made by me*] on the day of , 18 , and duly served on him [*requiring said—name*] to pay [*or otherwise, according to the tenor of the order*], and that a personal demand thereof has been made upon said by M. N.,² and that payment thereof has been refused or neglected by said ; and on motion of C. D., attorney for said A. B. :

ORDERED, that the said show cause, before this court at a special term to be held [at chambers] at the county court house in the of , on the day³ of , 18 , at o'clock in the noon, why he should not be punished⁴ for his alleged offense and contempt, and pay the costs of this motion.

Service of this order, and of the papers on which it is granted, shall be sufficient if made upon said [*name*] personally on or before the day of , 18 .

[*Authentication as in Form 491, p. 3.*]

¹ See *McKelsey v. Lewis*, 3 *Abb. N. C.*, 61.

² Demand must be shown to have been made by one authorized to receive.

³ At least the regular eight days must be allowed unless the affidavit shows reason for fixing shorter time. *Power v. Village of Athens*, 19 *Hun*, 165.

⁴ Using the word "attached" here, instead of "punished," or "committed," is objectionable, because attachment does not necessarily mean anything more than arrested and brought

in to answer. But the objection may be waived. *People ex rel. Tull v. Kenny*, 2 *Hun*, 346.

The English form runs, "stand committed."

A statute merely authorizing the issue of an attachment to enforce payment of money, is not construed to mean commitment, but aailable attachment to bring up the person, and on its return the question of wrongful refusal, including the question of ability to pay, are before the court. *Morrison v. Lester*, 15 *Hun*, 538.

ARTICLE IV.

DISCONTINUANCE.

FORMS.

- (1223.) Consent to discontinuance
(short Form).
(1224.) Order thereon.
(1225.) Notice of motion (or order to

- show cause) for leave to
discontinue.
(1226.) Order thereon (general Form).
(1227–1231.) Statements of discontinuance suitable to be inserted in foregoing Forms.

Form No. 1223.

Consent to discontinuance (short Form).¹

[*Title of court and cause.*]

It is hereby consented that the above-entitled action be discontinued [*if only as against part of the defendants, insert: as against Y. Z.*] without costs to either party as against the other, and that an order to that effect may be entered without notice.² [*For special clauses see Forms 1227–1231.*]

[*Date.*]

[*Signatures.*³]

Form No. 1224.

Order of discontinuance on consent.

At a special term [*dec., as in Form 493, p. 4.*]

[*Title of cause.*]

On reading and filing the annexed consent, and on motion of A. T., attorney for-[plaintiff]:

¹ Consent is generally necessary where defendant has a legal interest in the proceedings—as where he has pleaded a counterclaim. *Merchants' Bank v. Schulenberg*, 54 *Mich.*, 59; 19 *Northwestern Rep.*, 741. *Francis v. Edwards*, 77 *N. C.*, 271. Or where the lapse of time would debar him of a new remedy. *Bowe v. Knickerbocker Life Ins. Co.*, 27 *Hun.*, 312. Or where there has been a decision in defendant's favor. *Chicago & Alton R. R. Co. v. Union Rolling Mill Co.*, 109 *U. S.*, 702. Or where in replevin or ejectment plaintiff has recovered possession and defendant seeks to reclaim. *Wilson v. Wheeler*, 6 *How. Pr.*, 49 (replevin); *Carleton v. Darcy*, 75 *N. Y.*, 375 (ejectment).

Consent of an attorney having a
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lien on the cause of action is also necessary. See cases collected in 18 *Abb. N. C.*, 23–40, *n.*

² If the discontinuance is on a compromise, it is for defendant's protection to add, "said action having been compromised and settled."

To settle an action for statute penalty or forfeiture, leave of court is necessary. *N. Y. Code Civ. Pro.*, § 1894.

³ The attorney's power extends to consenting to a discontinuance. *Gailard v. Smart*, 6 *Cow.*, 384; and Volume I of this work, p. 453. But if the stipulation is relied on as evidence of a settlement to bar a fresh action, ask the client's signature, or evidence of the attorney's authority.

ORDERED, that this action be and the same hereby is discontinued [as to the defendant Y. Z.] without costs to either party as against the other. [*For special clauses see Forms 1227-1231.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1225.

Notice of motion (or order to show cause) for leave to discontinue.¹

[*Title and recitals according to the case; see Forms 488 and 491, omitting matter in brackets following the †, appropriate only to motion before a judge; and substituting for the clause in italics between the † and the ¶ the following:*] directing that this action be discontinued [as against the defendant Y. Z.] without costs [or, upon payment by plaintiff of costs to date—or otherwise; see Forms 1227-1231].

Form No. 1226.

Order discontinuing action on motion (general Form²).

[*Title (court order) and recitals, according to the case. See Form 493, p. 4.*]

ORDERED, that the above-entitled action³ be, and the same is hereby discontinued [as against the defendant Y. Z.] without

¹ A motion for leave to discontinue as against a party who has appeared must be on notice. *Morse v. Stockman*, 65 *Wisc.*, 36; 26 *Northwestern Rep.*, 176, 178, holding this even as to discontinuance as against defendants whose demurrer to the complaint for not stating a cause of action against them had been sustained.

Plaintiff may, before formal appearance of defendant, discontinue without costs, for defendant by not formally appearing has not entitled himself to notice. *Valentine v. Myers Sanitary Depot*, 36 *Hun*, 201. After formal appearance he cannot. *Kenna v. Atlas Steamship Co.*, 19 *Abb. N. C.*, 265. And according to *Cole v. McGarvey*, 6 *Civ. Pro. R. (Browne)*, 305, he cannot do so after defendant has appeared even specially.

² Ordinarily, before defendant has such a fixed interest, a plaintiff has a right to discontinue (without costs if defendant has not appeared, and on paying costs if defendant has appeared), and this right is not to be denied because his object is only to commence a fresh proceeding. *Matter of Butler*, 101 *N. Y.*, 807.

The right and its limitations are discussed in *N. Y. Daily Reg.*, June 6th and 9th, 1887.

For form of order giving defendant leave to answer, and plaintiff leave to discontinue, see 1 *Abb. N. C.*, 426n.

³ A cross-action should be mentioned if included. *Wetmore v. Fiske*, (*R. I.*, 1886) 5 *Atl. Rep.*, 375.

costs to either party as against the other. [*For other special clauses, see below.*]

Enter: [*signature of judge by initials of name and title.*]

STATEMENTS OF DISCONTINUANCE SUITABLE TO BE INSERTED IN FOREGOING FORMS.¹

1227. *Vacating judgment.*²—that the judgment entered in this cause on the _____, 18____, for _____ dollars [*or, awarding the plaintiff the relief demanded in the complaint*], be and the same is hereby vacated and set aside, and that this action be, and the same hereby is discontinued [*continuing as in Form 1224*].

1228. *Providing for attorney's costs.*—discontinued, on payment to A. T. [plaintiff's] attorney, of the sum of _____ dollars, together with his costs, to be taxed by the clerk of the court; and it is further ordered, that unless said sum and costs as taxed be paid within [twenty] days after the service of a copy of this order, that said motion be denied, with ten dollars costs.³

1229. *Withdrawing papers.*—and that the papers may be withdrawn from the files, by the respective parties or attorneys by whom they were filed.⁴

1230. *Stipulating not to sue*—adapt from p. 492 of Volume I.

1231. *Cancelling lis pendens*—as on p. 30 of this Volume.

¹ The court have power to impose conditions. *Matter of Waverley Water Works*, 85 *N. Y.*, 478, rev'g 16 *Hun*, 57; *Carleton v. Darcy*, 75 *N. Y.*, 875. And may require payment of allowance in addition to costs. *Robins v. Gould*, 1 *Abb. N. C.*, 133.

² Discontinuance after judgment is allowable, and it implies *vacatur* of judgment, even without such an express clause. *Loeb v. Willis*, 100 *N.*

Y., 231; s. c., 1 *Centr. Rep.*, 324; 3 *Northeastern Rep.*, 177.

³ Sustained in *Byron v. Durrie*, 6 *Abb. N. C.*, 135. Compare *Wright v. Wright*, 70 *N. Y.*, 96.

⁴ See Volume I, p. 92. Such a clause does not affect the competency of the papers as evidence, but only their possession or accessibility.

They are not evidence as an adjudication, even if not withdrawn. *Loeb v. Willis* (*above*).

ARTICLE V.

DISMISSAL.

FORMS.

(1232.) Affidavit to move for dismissal.

(1233-1236.) Statements of ground of dismissal suitable to insert in foregoing form.

(1237.) Notice of motion (or order to

show cause) to dismiss action.

(1238.) Order dismissing action without trial.

(1239.) Order absolute after conditional dismissal.

(1240.) Judgment dismissing action without trial.

Form No. 1232.

Affidavit to move for dismissal without trial.

[*Title of court and cause.*][*Venue.*]

A. T., being duly sworn, says:

I. That he is the attorney¹ [*or, the managing clerk for the attorney*] for the defendant [*if one of several defendants, name him*] in this action [*or otherwise state relation to the cause*].*

II. [*State neglect to proceed as in following Forms.*]

III. [*If an order to show cause is asked, state reason and as to previous application, see page 2.*]

[*Jurat.*][*Signature.*]

1233-1236. STATEMENTS OF GROUND OF DISMISSAL SUITABLE TO INSERT IN FOREGOING FORM.

1233. *Neglect to obtain leave to sue.*² *Insert in last Form:*—II. That the defendant, Y. Z., is a receiver duly appointed by this court [*or, by the Court of*], by an order [*or, judgment*], of which a copy is hereto annexed; and this action is brought against him as such receiver to recover [an alleged debt due from said, &c.], as appears by the complaint in this action on file; and this action was, as this deponent is informed and believes, commenced

¹ The affidavit for a motion to dismiss founded on neglect to proceed, in the cause, is properly made by the attorney (*Chase v. Edwards*, 2 *Wend.* 283; *Jackson v. Woodworth*, 3 *Cal.*, 136; s. c., *Col. & C. Cas.*, 480) or his managing clerk. It may be made by the defendant if he is shown to be

personally conversant with the facts showing delay. *Ames v. Merriman*, 9 *Wend.*, 498, as qualified by *Bird v. Moore*, 3 *Hill*, 447.

² As to the grounds of requiring leave, see Vol. I, p. 544, and, in reference to receivers, more particularly, p. 137, of this Vol.

without leave, contrary to the rules and practice of this court [and the terms of the order appointing him].

1234. *Neglect to serve complaint.*¹—II. That this action was commenced by [personal] service of the summons, a copy of which is hereto annexed, on the defendant, Y. Z., upon the day of , 18 , as deponent is informed and believes; and on the day of , 18 , deponent [caused to be] served on plaintiff's attorney, a notice of appearance on behalf of said defendant Y. Z., and due demand of a copy of the complaint [as appears from the annexed affidavit of O. P.]; but no copy-complaint has been served, to the knowledge or belief of deponent.

1235. *Neglect to serve other defendants.*²—II. That this action was commenced by [personal] service of the summons, a copy of which is hereto annexed, on the defendant, Y. Z., on the day of , 18 , as deponent is informed and believes; and the defendant W. X. is a necessary party to a complete determination of the matters in controversy, and to the protection of the rights of this defendant, as appears by the complaint [and the answer of this defendant], on file in this action. That although the said W. X. might have been served with the summons in this action by reasonable diligence, the plaintiff has wholly omitted to serve him; and, as deponent is informed and believes, has made no efforts to do so, and said defendant W. X. has not appeared in the action, although days [or, months] have elapsed since the service of this defendant, and [here state briefly the stage to which the cause has arrived; and any other acts, such as filing of his pendens, which show the unreasonableness].

1236. *Neglect to proceed to trial.*³—II. That this action was brought for [indicate cause sufficiently to show whether the cause was triable at circuit or special term, and if in the supreme court, add: and that the place of trial is the county of], and [in the first district if Rule 36 is relied on, add: of fact] was joined [as to all the defendants] on the day of last [but has not been noticed for trial by said defendant.]⁴ That a circuit court [or, a special term of this court], was held at , in and for said county [or, a trial term of this court was held], on the day of last past;

¹ N. Y. Code Civ. Pro., § 480.

² N. Y. Code Civ. Pro., § 821. The moving defendant may ask costs for himself, but not for the defendant not served. *Travis v. Tobias*, 7 *How. Pr.*, 90.

³ The court has inherent power to dismiss for unreasonable neglect to prosecute. *Sebring's Admr. v. Sebring's Admr. (below cited)*; *Bancroft v. Sawin (Mass., 1887)*, 3 *New Eng. Rep.*, 308, and cas. cit. And see 14 *Abb. Pr.*, N. S., 47, note. This power is recognized and regulated by N. Y. Code Civ. Pro., § 822. And the defendant has, subject to the discretion of the court, a right to dismissal, even after long delay to move for it. *Sebring's Admr. v. Sebring's Admr. (N. J., 1887)*, 10 *Abb. Rep.*, 193. The former practice is stated in *Winchell v. Martin*, 14 *Abb. Pr.*, 47. If defendant has been served he should show that he has answered. One of several

may move for a dismissal as to himself. *Salters v. Pruyn*, 15 *Abb. Pr.*, 224, if a separate judgment could be had against him. N. Y. Code Civ. Pro., § 822. If a separate judgment could not be had, he should bring on the cause for trial, and, if plaintiff does not appear, take a dismissal there.

⁴ The clause in brackets though usual, is not, perhaps, essential. He is not bound to notice the cause, and his doing so should not prejudice him. *Bowles v. Van Horne*, 11 *Abb. Pr.*, 84; s. c., 19 *How. Pr.*, 346; *Corbett v. Claffin*, 17 *Abb. Pr.*, 418. To the contrary, where he failed to ask a dismissal at the circuit under his notice: *Miller v. Ring*, 18 *id.*, 244. Delay to prosecute a reference, is equally cause for dismissal. *Ellsworth v. Brown*, 16 *Hun.*, 1; 56 *How.*, 235; *Mancello v. Bellrude (Cal., June 16, 1886)*, 11 *Pacific Rep.*, 502.

and that the said plaintiff did not notice the action for trial [*or, that said plaintiff having noticed the action for trial, did not proceed and try the same*] then, according to the practice of this court;¹ and that issues of a later date were tried at the said circuit [*or, term*], in the regular order of the calendar.

Form No. 1237.

Notice of motion (or order to show cause) to dismiss action.

[*Move the court as in Form 488, p. 1, or take order returnable before the court; see p. 491, stating order desired, thus:*] directing that this action be dismissed [as against said Y. Z.] for want of authority on the part of A. T. to bring this action,² and charging said A. T. personally with the costs thereof, and of this motion; and for such other relief as may be just.

[*Or, for plaintiff's unreasonable neglect to proceed therein against said defendant, and for such other relief as may be just, with costs of this motion.*]

[*Or, for unreasonable neglect to serve a copy of the complaint duly demanded and for such other—&c., as above.*]

[*Or, for unreasonable neglect to serve the summons upon a necessary co-defendant and for such other—&c., as above.*]

[*Or, because brought without leave and for such other—&c., as above.*]

Form No. 1238.

Order dismissing action without trial.

[*Title (court order) and recitals as in Form 493, p. 4, of this Volume.*]

ORDERED, that the plaintiff's complaint herein be and the

¹ The affidavit should state where the venue is laid; that the cause was noticed for trial, and was not tried; or that it was not noticed, and that a circuit was held at which it might have been tried. *Johnston v. Davis*, 1 *How. Pr.*, 239; *Brooks v. Hunt*, 3 *Cal.*, 128; s. c., *Col. & C. Cas.*, 444; *Walsh v. Hill*, 3 *Johns.*, 446; *Anonymous*, 6 *Cow.*, 388; *Roy v. Thompson*, 1 *Duer*, 636; s. c., 8 *How. Pr.*, 253. Stating that issue was joined, without saying issue of fact—is enough (*Saratoga Mutual Ins. Co. v. Duram*, 3 *Hill*, 451), except in the first district, where Rule 36 is relied

on. What the cause of action is, is not essential to be stated (*Griffing v. Thurman*, 2 *How. Pr.*, 275), unless the motion is on the part of one of several defendants, in which case the affidavit should show the cause of action to be one on which a separate judgment might be asked.

² It is not enough to show that plaintiff does not desire to prosecute the action. *Boston Tunnel Co. v. McKenzie*, 67 *Cal.*, 485; 8 *Pacif. Rep.*, 22. As to motion by the party misrepresented, see *Brigham v. McDowell*, 19 *Neb.*, 407; 27 *Northwestern Rep.*, 384.

same hereby is dismissed [*state ground, as thus*: for want of prosecution] with dollars costs¹ of this motion [and without prejudice²], and that defendant have judgment accordingly [*leave to proceed may be added, as thus*] unless the plaintiffs shall, within twenty days after the service of this order on them or their attorney, serve the complaint on said Y. Z. [*or, the summons on said W. X.*] [*or, give notice of a motion that leave to bring the action be granted nunc pro tunc.*³ And if notice of such motion is given, then all proceedings of both parties are hereby stayed until the hearing and decision thereof].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1239.

Order absolute after conditional dismissal.⁴

At a special term [*&c., as in Form 493, p. 4.*]

[*Title of cause.*]

On reading and filing the annexed affidavit of Y. Z., verified the day of , 18 [and proof of due notice of this motion to A. B.], and after hearing Z. T., of counsel for defendant, and A. T., of counsel for plaintiff [*or, no one appearing*], in opposition; now, on motion of Z. T., attorney for defendant:

ORDERED [*as in last Form, without the condition or leave reserved*].

Form No. 1240.

Judgment dismissing action without trial.

[*Title of court and cause.*]

[*Briefly recite circumstances as thus:*]

This action having been commenced by the service of the

¹ As to the power to give judgment for costs, on dismissing for want of prosecution, see *Thiem v. Madden*, 27 *Hun.* 371, and cases cited.

² The equity practice is to express that a dismissal not on the merits, is without prejudice. *Bennett on Lis Pendens*, 122, and cases cited. But by *N. Y. Code Civ. Pro.*, § 1209, a judgment of dismissal does not prevent a new action unless the judgment-roll shows that it was rendered upon the merits.

³ Leave to sue may be granted in opposition to a motion to set aside the proceedings. *Thayer v. Lewis*, 4 *Den.* 269; *Walley v. Leonard*, 2 *How. Pr.* 282; *Higgins v. Allen*, 6 *id.* 30. Though this practice has been disapproved. *Finch v. Carpenter*, 5 *Abb. Pr.* 225. But compare Volume I of this work, p. 559.

⁴ See Volume I, p. 258, as to conditional orders.

summons, without a copy of the complaint, on the defendant, and the said defendant having, on the day of , 18 , served on the plaintiff's attorney a notice of appearance, and demanded a copy of the complaint, and due proof having been given to the court of such notice and demand, and that no copy of the complaint has been served [and the court having made an order that unless plaintiff, within twenty days from service of such order, serve a copy of said complaint; and due proof being produced by the affidavit of M. N. that said order was served on the plaintiff's attorney on the day of , and that no copy-complaint, has been served, although more than twenty days have elapsed], now; on motion of Z. T., for the defendant:

[*Or thus:* This action having been at issue and pending in this court, and the plaintiff having failed to bring the same to trial according to the course and practice of this court and younger issues having been tried in their regular order, and the defendant having moved at a special term of this court for a dismissal of the complaint, with costs, and the said motion having been granted and the costs adjusted at \$; now, therefore, on motion of Z. T., attorney for the defendant:]

IT IS ADJUDGED that the complaint of the plaintiff be and hereby is dismissed with costs [without prejudice] and that the defendant recover of the plaintiff the sum of dollars, his costs as adjusted, and that he have execution therefor.

[*Date.*]

[*Signature of clerk.*]

Form No. 1240a.

Another Form; for failure to furnish particulars.¹

[*Title and recital of service of summons and complaint as in other cases; and proceed:*] and an order having been made, dated on the day of , that the said plaintiff's attorney should deliver to the said defendant's attorney an account in writing of the particulars of the plaintiff's demand for which this action was brought [or show cause on the day of], and that in the meantime all further proceedings in this cause should be stayed; at which day, the plaintiff not having delivered the particulars, it was ordered [*recite order as thus; for other forms of proceeding, see Nos. 1029 to 1046:*] that the said plaintiff's attorney should, within days, deliver to the said defendant's attorney an account in writing of the particulars of the said plaintiff's demand for which the said action was brought, and that in default thereof the defendant should be at liberty to enter judgment of dismissing the plaintiff's complaint. And although notice of the said last mentioned order was, on the day of , given to the attorney of the plaintiff, and although the said days have elapsed, yet the said attorney of the said plaintiff, having not delivered to the said defendant's attorney, or the said defendant, any account in writing of the particulars of the said plaintiff's demand for which this action was brought; and the court having thereupon ordered judgment as herein awarded, and defendant's costs having been duly adjusted at \$; now, therefore, on motion of T. Z., attorney for defendant:

IT IS ADJUDGED [*&c., as above.*]

¹ See *Fleuret v. Durand*, 14 *Johns.*, 329; *Chitt. Forms*, 832.

ARTICLE VI.

ELECTION BETWEEN ACTIONS.

Form No. 1241.

Order that plaintiff elect between several actions.¹

[*Title (court order) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, 1, that the plaintiff do within days after service of a copy of this order on his attorney, make his election in which action he will proceed, and notify the same in writing to defendant's attorney; and if he shall elect to proceed in this action [*or, in the action first above entitled*] he shall stipulate to proceed no further in the action brought by him in the court [*or, second above entitled*] till the further order of this court.

2. If he shall fail seasonably to elect and stipulate as aforesaid to proceed in this action only, then this action [*or, with the action first above entitled, then said action*] is from thenceforth to stand absolutely dismissed out of this court with costs.²

Enter: [*signature of judge by initials of name and title.*]

ARTICLE VII.

ISSUES FOR TRIAL BY JURY.

[The power to award an issue for the trial of an interlocutory or incidental question or any question of fact not in issue upon the pleadings, will be better understood in connection with its power to refer such question, see References and TRIAL.]

¹ This motion will be upon affidavit, to which the pleadings should be annexed except such as may be already on file in the action in which the motion was made. If both ac-

tions are in the same court and place, entitle in both. If otherwise, move in one; see Volume I, p. 117.

² As to allowance, &c., see Form 1238, p. 615, note 1.

ARTICLE VIII.

OFFER OF JUDGMENT.

1. Object—speedy judgment.
2. — to avoid costs.

FORMS.

- (1242.) Offer by defendant to allow judgment.
- (1243.) Offer by plaintiff to allow judgment on counter-claim.
- (1244.) Affidavit to authenticate offer or acceptance.

- (1245.) Notice of acceptance of offer of judgment.
- (1246.) Affidavit to enter judgment on accepted offer.
- (1247.) Affidavit to move for payment of sum admitted by offer.
- (1248.) Notice (or order to show cause) thereon.

1. *Object—speedy judgment.*—Confessions of judgment and consents to immediate judgment have been already treated. Considered as the means of obtaining judgment, the power of the court to act upon consent rests upon common law principles, although regulated in some of its details by statute.¹

2. — *to avoid costs.*—For the purpose of enabling defendants to avoid unnecessary litigation and costs, there is a statutory remedy allowing an authenticated offer to submit to judgment for such relief as defendant admits the plaintiff is entitled to, so that plaintiff, if he refuses to accept the offer, shall proceed at his own peril as to costs; but if the offer is accepted, judgment entered thereon extinguishes the entire claim.²

OFFER OF JUDGMENT.

Form No. 1242.

Offer by defendant to allow judgment.³

[*Title of court and action.*⁴]

The defendant [*if all of several do not join, name each of*

¹ Vol. 1, p. 591, p. 634.

² *Davies v. Mayor, &c.*, of N. Y., 93 N. Y., 250.

³ Sustained in *Carpenter v. Kent*, 11 *Ohio St.*, 584; *Ossenkop v. Akeson*, 15 *Nebr.*, 622; 19 *Northw. Rep.*, 709, and *N. Y. Code Civ. Pro.*, § 738.

Also in *Harris v. Equitable Life Assur. Soc.*, 64 N. Y., 196; where it was held, under the circumstances, equivalent to an offer to restore within the rule as to rescinding for fraud.

⁴ The statute held not applicable to proceedings for compensation in

those joining],¹ offers to allow judgment to be taken against him [or, the defendants offer to allow judgment to be taken against them] herein by the plaintiff for [here specify the sum, property or specific relief intended,² and, if interest is intended specify it, with the dates necessary for exact computation]³, with costs.⁴

[Signature of each defendant joining, with acknowledgment;
[Date.] edgment; or signature and office address of],
Attorney for defendant.

[Address] To
Attorney for plaintiff.

[Serve at least ten days before the cause is to be reached.⁵
The original is served and a copy retained.]⁶

eminent domain. *Johnson v. Sutliff*, 17 *Nebr.*, 423; 23 *Northwestern Rep.*, 9.

It is applicable in all classes of actions. *Bridenbecker v. Mason*, 16 *How. Pr.*, 203.

So held in foreclosure, *Bathgate v. Haskin*, 63 *N. Y.*, 261; *Penfield v. James*, 56 *N. Y.*, 659; in foreclosure of mechanics' lien, *Lumbard v. Syracuse, &c., R. R. Co.*, 62 *N. Y.*, 290; in ejectment, *Keese v. Wyman*, 8 *How. Pr.*, 88 (but as to ejectment for non-payment of rent, see *Code Civ. Pro.*, §§ 1504-1507 and 15 *Alb. L. J.*, 70.) As to damages for detention, *Code Civ. Pro.*, § 1531.

¹ In an action against defendants severally, or jointly and severally liable, as to whom the action might be severed and separate judgments taken, either one or more of such severable defendants can make an offer on behalf of themselves alone. *Bannerman v. Quackenbush*, 17 *Abb. N. C.*, 103.

In an action against several on a liability wholly joint, all must unite, or, as to those who do not unite, there must be default before judgment can be entered. *Id.*, and cases cited; *Eversen v. Gehrman*, 1 *Abb. Pr.*, 167.

² To authorize the clerk to enter judgment, the offer must be absolute, not conditional. *Pinckney v. Childs*, 7 *Bosw.*, 660. Compare *Hanna v. Dexter*, 15 *Abb. Pr.*, 136 n.

It is not essential, however, to specify the relief in the offer; it may be made sufficiently certain by a reference to the complaint. *Burnett v. Westfall*, 15 *How. Pr.*, 420.

An offer to pay is not equivalent to an offer to allow judgment. *Quinton v. Van Tuyl*, 30 *Iowa*, 554.

³ Compare *Johnston v. Catlin*, 57 *N. Y.*, 652, and *Smith v. Bowers*, 15 *Weekly Dig.*, 485.

It is essential to offer costs. *Raney v. Russell*, 3 *Duer*, 689.

It is not safe to say "costs to date," for this proposes to preclude plaintiff from costs of entering judgment, &c. *Leslie v. Walrath*, 45 *Hun*, 18.

⁴ Signature is essential. *Ossenkop v. Akeson*, 15 *Nebr.*, 622.

If the signature is not by the attorney of record it better be by the defendant himself. In that case have it acknowledged; see Vol. I, p. 1. If by the attorney, the verification given in the next form, is essential, *Riggs v. Waydell*, 78 *N. Y.*, 586. If omitted, the better practice is to return the offer with notice of refusal to accept; but it is not necessary to do so (*McFarren v. St. John*, 14 *Hun*, 387); nor on doing so, to assign that as the reason. The defect is not amendable. *Werbolowsky v. Greenwich Ins. Co.*, 14 *Abb. N. C.*, 96.

If the defendants are a firm, signature by one of them is not enough without affidavit to authority from the others.

⁵ *Hermann v. Lyons*, 2 *Abb. N. C.*, 90; s. c., 10 *Hun*, 111; *Mansfield v. Fleck*, 23 *Minn.*, 61.

⁶ But admission of "due service of a copy" waives the objection that the original was not served. *Noonan v. Smith*, 12 *Abb. N. C.*, 337.

*of several—or if plaintiff's offer—*of plaintiff], to allow judgment to be taken against him in this action [for the sum of dollars], with costs.

[Date.] [Signature of party with acknowledgment; or signature and office address of—

Attorney for

Adding affidavit as in Form 1244.]

[Address] To

Attorney for defendant.

Form No. 1246.

Affidavit to enter judgment on accepted offer.

[Title of court and action.]

[Venue.]

A. T., being duly sworn, says:

I. That he is [the managing clerk in the office of] the attorney for the plaintiff in this action.

II. That on the day of , 18 , the defendant Y. Z. [by Z. T., his attorney], served upon said attorney for the plaintiff the annexed written offer, subscribed by said defendant [or, subscribed by said attorney for the defendant, and duly authenticated by his affidavit thereto annexed], to allow judgment to be taken against said Y. Z. in this action, for [the sum of dollars], with costs [or state special relief].

III. That on the day of , 18 , and within ten days after the service of said offer as aforesaid, the plaintiff accepted the same, and served upon said defendant[']s attorney] a written notice of acceptance, subscribed by defendant, of which a copy is [or, subscribed by defendant's attorney, and duly authenticated by his affidavit, of which notice of acceptance and affidavit copies are] hereto annexed.

IV. That the items of expense and disbursements embraced in the annexed bill of costs have been, or will be, necessarily incurred by the plaintiff in this action, according to deponent's knowledge or belief.

[Jurat.]

[Signature.]

Form No. 1246a.

Judgment on accepted offer.

[*Title of court and action.*]

The summons in this action having been duly [personally] served on the defendant, and the defendant having appeared and offered in writing to allow judgment to be taken against him for the sum of dollars, with costs; and the plaintiff having within ten days thereafter accepted said offer; Now, on motion of A. T., plaintiff's attorney,

IT IS ADJUDGED, that the plaintiff A. B. recover of the defendant Y. Z. the sum of dollars, with dollars costs, amounting together to dollars.

Form No. 1247.

Affidavit to move for payment of sum admitted by answer.¹[*Title of court and cause.*][*Venue.*]

J. L. L., the plaintiff's attorney herein, being duly sworn, says, that the answer served herein admits \$ to be due plaintiff, and that the annexed notice of offer to allow judgment was served on deponent, by defendant's attorney herein, on the day of , 18 , and that the plaintiff has not accepted said offer, and the time to accept the same has expired.

[*Jurat.*][*Signature.*]

Form No. 1248.

Notico (or order to show cause) thereon.

[*Title, &c. (moving on pleadings and offer and affidavit to facts) as in Form 488 or 491, substituting for the italic clause between the ‡ and ¶: that the defendant pay to the plaintiff the part of the plaintiff's claim admitted to be just, to wit, the sum of dollars, with interest thereon from the day of , 18 , with costs of the action to the time of the service of said offer to allow judgment, without prejudice to the continuance of the action for the balance claimed to be due, and with costs of this motion, and for such other [&c.].*

¹ Sustained by *Wireman v. Remington, &c., Co.*, 39 *Super. Ct. (J. & S.)*, 315.

ARTICLE IX.

OFFER TO LIQUIDATE DAMAGES.

FORMS.

(1249.) Offer to liquidate damages.

(1250.) Notice of acceptance thereof.

Form No. 1249.

Offer to liquidate damages.¹

[Title of court and action.]

The defendant [*if one of several not jointly liable, name him*] hereby offers that if he fail in his defense in this action, plaintiff's damages may be assessed at the sum of dollars.

[Date.] [*Signature of defendant, with acknowledgment, or signature and office address of*]

Attorney for defendant.

[Address] To
Attorney for plaintiff.

[*If subscribed by attorney or by one of the several partners, &c., add affidavit; see Form 1244.*]

Form No. 1250.

Notice of acceptance thereof.²

[Title of court and action.]

Please take notice, that plaintiff hereby accepts the offer of the defendant [*if one of several, name him*], that if he fail in his defense herein, the plaintiff's damages be assessed at the sum of dollars.

[Date.]

[Signature of]

Attorney for plaintiff.

[Address] To
Attorney for defendant.

[*If subscribed by attorney or by one of several partners, &c., add affidavit; see Form 1244.*]

¹ This offer, which is allowed by *N. Y. Code Civ. Pro.*, § 736, in actions on contract, must be served with the answer. If not accepted, it has the effect of entitling defendant to recover

his expenses of preparing for trial, unless plaintiff's damages are assessed at a larger sum.

² To be served with or before notice of trial.

ARTICLE X.

PAYMENT INTO COURT.

[For voluntary payment, to obtain interpleader, see p. 529. For compulsory payment of sum admitted to be due, see p. 248. For payment of proceeds of sale under judgment, see a later chapter.]

FORMS.

- | | |
|--|--|
| (1251.) Order allowing money to be paid into court. | (1255.) Affidavit to obtain order for payment out of money in court. |
| (1252.) Notice of payment into court. | (1256.) Notice of motion (or order to show cause) thereon. |
| (1253.) Certificate that money has been paid into court. | (1257.) Order for payment of money out of fund in court. |
| (1254.) Notice of acceptance of payment. | |

Form No. 1251.

Order allowing money to be paid into court.¹

[*Name of*] Court [*or if a court order*], At a special term [*&c.*,
as in Form 493, p. 4].

On reading and filing the annexed [complaint and answer

¹ The power of the court to allow voluntary payment into court, by way of narrowing or superseding the issue raised, is inherent. *Dakin v. Dunning*, 7 *Hill*, 30; *Wilson v. Doran*, 39 *Hun*, 88. But the practice has been extended and regulated in some detail by statute. *N. Y. Code Civ. Pro.*, §§ 731-734, 744.

Payment into court in ejectment for non-payment of rent, see *N. Y. Code Civ. Pro.*, §§ 1506, 1508. On foreclosure commenced for non-payment of an instalment, *Id.*, §§ 1634, 1635.

The order, which was a common order under the former practice, and is usually made *ex parte* now, may be applied for on affidavit, or on the pleadings, or even the complaint alone. And doubtless may be made by a judge. Volume I, p. 122.

It is the better practice always to take an order giving leave. *Wilson v. Doran*, 39 *Hun*, 88. Payment to the clerk without such leave has been held ineffectual. *Davidson v. Lamprey*, 16 *Minn.*, 445.

The clerk ought not to receive

money offered as paid into court, without an order authorizing it. *Baker v. Hunt*, 1 *Wend.*, 103 (holding that therefore he might return it and was not thereafter liable to plaintiff as if he had kept it).

Compulsory payment of a sum admitted has already been treated—p. 248.

The court has inherent power to require its officer, having possession of a fund in litigation (*Matter of Swerarton*, 20 *Weekly Dig.*, 378, attorney); or one who obtained possession of the fund by judicial appointment which he has since resigned (*People ex rel. Dennis v. Kent Circuit Judges*, (*Mich.*, 1886) 3 *Northwestern Rep.*, 644, special administrator); or any one who has wrongfully withdrawn a fund from the court (*Osborn v. United States*, 91 *U. S.*, 474), to refund it. Compare, as to other remedies also, *Keiley v. Dusenbury*, 42 *Super. Ct. (J. & S.)*, 238 (aff'd in 77 *N. Y.*, 597, without opinion); *De Bussierre v. Holladay*, 4 *Abb. N. C.*, 111, 112, note.

the sum of dollars, pursuant to the order of which a copy is annexed [*or otherwise, as thus: as having been paid to him by Y. Z., the defendant, in lieu of an undertaking of bail in this action*].¹

[*Date.*]

[*Signature of*],
Clerk of

county.

Form No. 1254.²

Notice of acceptance of payment.

[*Title of court and cause.*]

Please take notice, that the plaintiff accepts the sum of dollars, paid by you into court, in satisfaction of the claim in respect of which it is paid in.

[*Date.*]

[*Signature and office address of*],

[*Address*] To

Attorney for plaintiff.

Attorney for defendant.

Form No. 1255.

Affidavit to obtain order for payment out of money in court.³

[*Title of court and action.*]

[*Venue.*]

Y. Z. being duly sworn, says :

I. That he is the defendant above named [*or otherwise state relation to the cause.*]

II. [*State circumstances of payment into court and show applicant's right.*⁴]

¹ As to title to such deposits, see note in 18 *Abb. N. C.*, 323.

² *N. Y. Code Civ. Pro.*, §§ 742, 743; *Johnson v. Covert*, 3 *Month. L. Bul.*, 91; *Mela v. Geis*, 3 *Civ. Pro. R. (Browne)*, 152.

³ See *Tunstall v. Winton*, 31 *Hun*, 231.

The court may act upon motion on affidavits; but the Court of Chancery was accustomed, except in clear cases (*Heathcote v. Edwards, Jac.*, 504; *Oliver v. Burt*, 1 *Beav.*, 583), to require a petition. Under the present practice

a petition is more appropriate if persons not parties to the action apply or are to be notified and heard, and it is also commonly resorted to where a contest is expected and the formal trial of an issue desired. See Volume I, p. 381, &c.

⁴ As to the right in case of a tardy application after partial distribution, see *In re Howard*, 9 *Wall.*, 175; *Kerr v. Blodgett*, 48 *N. Y.*, 62; and 16 *Abb. Pr.*, 137; and see pp. 221, 222, and notes, in this Volume.

III. [If order to show cause is asked, state as on p. 2.]

[Jurat.]

[Signature.]

[Append certificate of depository showing amount of fund; and any consent of a party relied on, acknowledged.¹]

Form No. 1256.

Notice of motion (or order to show cause) thereon.²

[Title and recitals as in Form 488 or 491, stating relief, as thus:] requiring M. N., county treasurer [or, county clerk—or, chamberlain of the city and county of New York], to pay to the defendant Y. Z. or his attorney dollars, the amount of defendant's costs in this action, out of the sum of dollars deposited by the plaintiff with said in lieu of the usual undertaking required by law on the granting of an order of arrest.

Form No. 1257.

Order for payment of money out of fund in court.³

[Title of action.]

At a special term [&c., as in Form 493, p. 4].

[Title (court order) and recitals according to the case; see Form 493, p. 4, stating relief as thus:]⁴

ORDERED, that said motion be and the same is hereby granted, and the [clerk of the city and] county of is hereby directed to pay, out of the funds remaining on deposit in his hands to the credit of this action, to the defendant, [or to T. Z., his attorney,⁵] the sum of dollars [being costs awarded] defendant by the order and remittitur of the Court of Appeals,

¹ Consents to payment must be acknowledged. See *N. Y. Gen. Rules*, No. 12, of 1888, and Volume I, p. 2.

² Serve on attorneys of all who have appeared. *N. Y. Gen. Rules*, No. 70, of 1888.

³ For the inherent power of the court to direct that a deposit taken by it as a security be passed over, see *Russell v. Farley*, 105 *U. S.*, 433-442.

⁴ That an *ex parte* order may protect the treasurer, see *People ex rel. Morris v. Randall*, 73 *N. Y.*, 416. But see *N. Y. Gen. Rules*, No. 70, of 1888.

⁵ As to the power of the attorney of record to receive payment, *Hiller v. Prewatt*, 37 *Miss.*, 431; *Spencer's Appeal*, (*Penn.*, 1887) 8 *Central Rep.*, 207.

filed herein on , 18 , together with interest on said sum to this date, amounting in the aggregate to the sum of \$], and that the said clerk pay the balance thereof, to wit, the sum of \$ to the plaintiff [or to A. T. his attorney].

Enter: [*signature of judge by initials of name and title.*]

[*Deliver certified copy or copies according to N. Y. Gen. Rules, No. 70, of 1888.*]

ARTICLE XI.

PREFERENCES ON THE CALENDAR.

FORMS.

(1258.) Affidavit to obtain preference on the calendar, on facts not appearing in the papers.

(1259.) Notice of motion to put cause on preferred calendar.

(1260.) Order thereon.

Form No. 1258.

Affidavit to obtain preference on the calendar, on facts not appearing in the papers.¹

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says :

I. [*Here state the ground of preference, for instance, if under subd. 6 :*] That she is the plaintiff in the above-entitled action, which is brought to recover her dower in lands belonging to her late husband, as appears by the complaint.

II. That she has no sufficient means of support aside from the estate in controversy; that her income is wholly derived from [*here state source, if any*]; and said income amounts to less than dollars per week, and she subsists in part only by the charity and assistance of her relatives [*naming them*] who reside at [*or otherwise set forth facts substantiating the allegation*].

III. That the action was at issue on the day of , and [*state earliest time at which it may be tried; and circumstances, if any, as to delay, which may affect the application*].

IV. [*If order to show cause is asked, or if application is ex parte :*] That no previous application [*&c.; see p. 2*].

[*Jurat.*]

[*Signature.*]

[*Serve copy of the order giving preference, with or before notice of argument.*]²

¹ Sustained by *Yates v. Stiles*, 15 *Weekly Dig.*, 113.

Affidavit is necessary when the grounds of preference do not appear on the pleadings. The official or representative capacity in which a party sues, and the infancy of one ap-

pearing by guardian *ad litem*, are facts appearing on the pleadings, within this rule.

² In this particular case of dower, the order may be *ex parte*, but in other cases notice should be given (§ 793), and in this case, as well as in

Form No. 1259.

Notice of motion for preference in appellate court.

[*Title of court and cause.*]

Please take notice, that upon the pleadings [and proceedings—*if practicable, specify what*] in this case, and upon the affidavit of A. B., a copy of which is hereto annexed, the undersigned will move this court at a special term thereof, to be held [at chambers] at the court house [or, at the City Hall], in the city of _____, in and for the county of _____ [or, will move the Hon. J. K., a justice of this court at—*specifying place*],¹ on the _____ day of _____, 18 ____ [*if motion is in court, add: at the opening of the court on that day, or as soon thereafter as counsel can be heard*], for an order giving this cause a preference on the calendar of the _____ court [or, term], on the ground [*stating ground, as thus:*] that the property of the defendant is held under an attachment issued in this case,² and for such other and further relief as may be just.

[*Date.*] _____ [*Signature and office address of*],
 [Address] To _____, Attorney for [defendant].
 Attorney for [plaintiff].

Form No. 1260.

Order giving preference on the calendar.³

[*Title and recitals according to the case; see Forms 492 and 493, p. 4.*]

ORDERED, that this cause is entitled to a preference as [*indicating ground*], and that it be placed upon the calendar with such preference [without prejudice to a motion by the plaintiff—or, defendant—to move to postpone the trial when the cause is reached, if in the opinion of the justice then presiding cause for postponement be shown].

[*Authentication as in Form 491, p. 3.*]

others, the order must be served before notice of argument. *Bartlett v. Musliner*, 92 N. Y., 646.

¹ *Bank of Attica v. Metrop. Natl. Bk.*, 91 N. Y., 239; *N. Y. Code Civ. Pro.*, § 793, as amd. in 1888.

² *N. Y. Gen. Rules*, No. 36, of 1884 and 1888, which provides also for a defendant held under arrest. The court also have an inherent power to

give preference to avoid hardship. *Smith v. Keepers*, 5 *Civ. Pro. R.* (Browne), 66; s. c., 66 *How. Pr.*, 474.

For other cases see the statutory enumeration. *N. Y. Code Civ. Pro.*, § 791, &c.

³ This order must be made by the court or a judge thereof.

ARTICLE XII.

REFERENCES (OTHER THAN FOR TRIAL OF ISSUES ON THE PLEADINGS).

- | | |
|---|---|
| 1. Power of the court. | partition and admeasure
dower. |
| 2. The practice. | |
| 3. Effect of reference of motion. | (1284.) Summons by referee to appear
personally. |
| FORMS. | (1285.) Order that books and papers
be deposited with referee
before accounting. |
| (1261.) Order referring a question not
arising on the pleadings, to
hear and determine. | (1286.) Report of referee on ques-
tion arising on motion (con-
tempt). |
| (1262.) Order referring a motion or a
question arising thereon. | (1287.) Exceptions to referee's report,
on special question (assess-
ing damages on injunction
undertaking). |
| (1263-1280.) Statements of special di-
rections suitable to be in-
serted in foregoing Forms. | (1288.) Notice of motion to confirm
referee's report. |
| (1281.) Notice of bringing on motion
after reference. | (1289.) Order on motion to confirm
report. |
| (1282.) Notice of hearing before ref-
eree. | (1290.) Order sustaining exceptions to
referee's report. |
| (1282a.) Subpoena to attend before
referee. | |
| (1283.) Oath of referee on special re-
ference other than to make | |

1. *Power of the court.*]—The inherent power of the court to order a reference, does not extend to delegating thus the judicial power to hear and determine an issue arising upon the pleadings. It does enable the court to call to its aid a referee to take testimony, or to ascertain facts, in an interlocutory proceeding, or to take and report testimony, and in either case, with or without the opinion of the referee; or to state an account, ascertain the competency of sureties or receivers, superintend the execution of a deed, or perform other administrative functions, in aid of the court; and under the New York statute,¹ on a reference for such purposes as these, or on any question not arising on the pleadings, the referee may be directed to determine the question.²

2. *The practice.*]—As a general rule, the power to order a reference is a power of the court, not a power of the judge.³

Orders referring issues arising on the pleadings are com-

¹ *N. Y. Code Civ. Pro.*, § 1015.

² See note in 18 *Abb. N. C.*, 418, on reference of partly-tried issues, where this distinction is illustrated.

³ See as to the distinction, Volume I, pp. 121, 123, &c. So also, by § 2266,

monly made on an express application for the purpose, which is treated under the chapter on Trials. Orders for other references such as form the subject of this Article, are more commonly made incidentally, in disposing of a motion or of an application on which the court would otherwise determine the question itself.

The duty of the referee should be clearly indicated in the order, to avoid the embarrassment, which results from uncertainty under an ambiguous order, as to whether he is only to take and report testimony, or is to find the facts, and whether he is to give his opinion.¹

3. *Effect of reference of motion.*—If a reference of motion is had, and full proofs taken, and the order thereon is such as might be reviewed by appeal, the order may be regarded as *res adjudicata* and binding on the parties in a sense in which an order made on affidavits is not.²

Form No. 1261.

Order referring a question not arising on the pleadings, to hear and determine.³

At a special term [*&c.*, as in
Form No. 493, p. 4].

[*Title of cause.*]

Upon reading and filing the annexed [stipulation dated

the power of referees to punish for contempt for the indemnity of the party aggrieved, is conferred only on referees appointed by the court.

¹ A reference to ascertain and report a fact implies the power to take testimony if the subject is only to be ascertained by evidence. (*Story v. Livingston*, 13 *Pet.*, 359. The contrary held of a reference "to state the facts," based on voluminous testimony already taken on a previous reference. *Burton v. Peterson*, 4 *W. N. C.*, 526.)

But under such reference, without directions to report the evidence, a statement of the conclusion, without the testimony, is sufficient. (*Dorr v. Noxon*, 5 *How. Pr.*, 29; *Byington v. Hampton*, 13 *Iowa*, 23; *Simmons v. Jacobs*, 52 *Me.*, 143, 153; s. p., *Bailey v. Myrick*, *id.*, 132.) Otherwise in actions, by *N. Y. Gen. Rule No. 30, of 1888*.

A direction to take and report proofs or evidence does not justify taking *ex parte* affidavits. (*Cumming v. Waggoner*, 7 *Paige*, 603.) The finding on a reference to ascertain facts contested on a motion, does not conclude the court (*Marshall v. Meech*, 51 *N. Y.*, 140. *Contra*, *Brown v. Marrisgold*, 50 *How. Pr.*, 248); much less when the reference is to take proof and report opinion. (*Muhlenbrinck v. Pooler*, 40 *Hun*, 526.)

² *Dwight v. St. John*, 25 *N. Y.*, 203. But even then a rehearing or renewal may be had. *Riggs v. Pursell*, 74 *N. Y.*, 370, 380. See Vol. I, pp. 112, 333.

³ This is unusual. It would be the the stipulation and order provide for better practice in such a case to make entering an order upon the decision,

the day of , 18 , and] affidavit of M. N., verified the day of , 18 , and on motion of A. T. :

ORDERED, that the question [*stating it as thus*, as to what would be a reasonable counsel fee and compensation for M. L. & B., attorneys, for services performed by them for the defendant and the estate of which he is executor], be and the same hereby is referred to L. W. L., Esq., counsellor at law, to hear and determine the same, and that he proceed and report with all convenient speed.

[*May add clauses as in Reference for Trial of issues on the pleadings.*] Enter: [*&c., as in next form.*]

Form No. 1262.

Order referring a motion, or a question arising thereon.

At a special term [*&c., as in Form 493, p. 4.*]

[*Title of cause.*]

The motion of the plaintiffs [for an injunction against the defendants W. X. and Y. Z., and that a receiver of the property of the corporation be appointed] and for other or further relief, coming on to be heard [*if referred by consent, to determine, add:* and both parties having agreed, in open court, that it be referred pursuant to section 1015 of the Code of Civil Procedure, to a referee to determine and report upon all the questions of fact arising upon this motion, upon *—mentioning papers—*and the parties having failed to agree upon a referee]:

ORDERED, that R. F., Esq., of , counsellor at law, be and he hereby is appointed referee [pursuant *as aforesaid*] to [determine and report] with all convenient speed, upon the questions [of fact] arising upon said motion. [*Add special directions, if desired, according to the case. See below, and see Forms under TRIAL. For order referring motion as to contempt see pp. 590, 600.*]

Enter: [*signature of judge by initials of name and title.*]

STATEMENTS OF SPECIAL DIRECTIONS SUITABLE TO BE INSERTED IN FOREGOING FORMS.

1263. *Recital where reference is ordered by the court of its own motion.*¹—Now, at the instance of the court before whom such motion was heard: ORDERED, that it be and it hereby is referred to [*&c.*].

or that the report should be brought before the court for confirmation by notice, or should be filed and stand confirmed if exceptions were not duly taken. See Matter of Bedford, 30 Hun, 551.
¹ Burnett v. Snyder, 41 Super. Ct. (J. & S.), 342.

[*Or*, and it appearing that a proper decision of said motion cannot be made until an examination of said be had: ORDERED—&c.]

1264. *To take testimony on specific question.*—To take such evidence as may be produced by the respective parties herein [*or*, to take the testimony of M. N., the witness therein named] upon the question whether [&c.].

1265. *To take evidence as to truth of allegations.*—To take evidence as to the truth of the allegations in said petition [*may add*: and of any defense thereto—*or*, in said affidavit—*or*, in said affidavits on both sides], and report the same, with his opinion.

1266. *Of specific question of fact arising on motion for injunction.*—To take proofs on said question of fact and to report such proofs to the court. And the decision of plaintiffs' motion for a preliminary injunction, &c., is hereby reserved until the coming in of said report. The injunction granted by the order not show cause herein continues until entry and service of an order on the decision of the motion.¹

1267. *Motion as to moneys in hands of attorney.*—To take the said examination of the parties, and of said J. W. P., who is required to appear and submit to an examination before said referee, and such other proofs as shall be produced in regard to the right, title and claims of said J. W. P. to the fund or any part of the fund or judgment in controversy, the defenses thereto, and the liens upon, claims to, and set off of said H. against said fund, and that he make a report to this court of the evidence so taken and of the facts deemed by him to be established thereby, and that said moneys be retained as they now are until the determination of this proceeding and subject to the further order of the court to be made herein concerning their disposition and payment.

1268. *To take oral testimony on matter in affidavits.*—To examine on oath the parties or their agents [and such further *or* other witnesses as either party may produce before him] upon the matters stated in the affidavit above mentioned, and to report the evidence and his opinion thereon.²

1269. *Cross-examination of affiants, and further proof on specific questions.*—To take the cross-examination of the said affiants on both sides, and to take such further proof on the question of the residence of the defendant E. W. P., as either party may desire to produce, and to report the same, with his opinion as to whether said P. was or was not a non-resident of this State at the time of issuing of the attachment herein.

1269a. *Direction for resuming motion.*—Said motion to be brought up again before this court, at special term [at chambers], upon days notice, for hearing and decision upon such report and opinion of said referee and the testimony taken before him, as well as on the affidavits, filed as aforesaid.

1270. *Direction that party or witness appear personally.*—That the [defendant] do appear [*or*, produce said witness] personally before said referee and submit to examination touching [&c.].³

¹ This is now a convenient practice, especially in cases of great importance. Compare Vol. I, p. 440, and *Stubbs v. Ripley*, 39 *Hun*, 620, 626.

² *Stafford v. Ambs*, 8 *Abb. N. C.*, 337; *Scott v. Williams*, 14 *Abb. Pr.*, 70; s. c., 23 *How. Pr.*, 393.

When a referee appointed to take oral proofs, is restricted thereto, documents, especially when authenticated under statute, may be put in evidence at the hearing. *Baker v. Woodward*, 12 *Oreg.*, 3; 6 *Pacific Rep.*, 173.

³ See also fuller Form on p. 638. On reference of an ordinary motion, neither the court nor a referee can compel a party to attend and be examined orally as a witness, *King v. Leighton*, 58 *N. Y.*, 383 (*contra Meyer v. Lent*, 16 *Barb.*, 539); unless it may be by granting the reference conditionally in a case where granting the primary motion is discretionary. See Vol. I, p. 258.

Other witnesses may be compelled. *Stubbs v. Ripley*, 39 *Hun*, 620.

1271. *To examine prisoner in jail.*—To examine M. N., as to [stating subject], at the jail in the city of _____, where the said M. N. is confined [may add], said examination to be had or commenced on the _____ day of _____, 18____, at _____ o'clock, _____ M.

1272. *Direction to produce books.*—That the books of the said _____, which may contain entries or evidence relevant to said question [or, issues] be produced before said referee.¹

1272a. *Or thus:*—That either party be at liberty to introduce before said referee the books of the said corporation, to wit [designating them], and any other evidence pertinent or relevant to the questions of fact arising upon said motion; and that the defendants are hereby directed to produce said books or such of them as the plaintiff shall call for, before the referee for that purpose, and leave the same with the referee if by him required.

1273. *To examine account of special guardian after objections or exceptions.*—To examine and audit said account, and take such evidence as may be adduced before him by either party, and report the same, with his opinion, to the court.

1274. *To take evidence of various claimants on specific questions.*—To take evidence by the respective parties, and judgment-creditors referred to in the petition herein, upon the following questions, viz.:

1. Did the sheriff sell on all the executions, referred to in the petition herein, at once?

2. Did he sell on each separately? [and so on.]

That any of the parties, or of said judgment-creditors, may take evidence before said referee on two days notice in writing, served on the attorneys for the other parties, or judgment-creditors.

That this motion may be brought on before Mr. Justice B., at _____, in the city of _____, on the report of said referee, and the testimony taken by him, by any party, or judgment-creditor, on two days notice in writing, to be served on the attorneys of the other parties, and said judgment-creditors.

1275. *Direction to give third persons notice.*—That said referee give _____ days notice, of [&c.], to all to be served personally if practicable, and otherwise such notice to be served by mail.²

1276. *To enable the referee to give his opinion, add:* and report the same, with his opinion [may specify particular questions if desired].³

1276a. *To speed reference.*—That said referee proceed on [two] days notice from either party, and from day to day thereafter, unless otherwise expressly ordered by him for cause shown.⁴

1277. *Leave to object to evidence after report.*—That either party be at liberty on the coming in of said referee's report to object to the relevancy or admissibility of all or any portion of the proof.

1278. *Leave to apply for further direction.*—That in case question shall arise concerning any documents, and as to whether the [petitioners] herein, or their counsel, are entitled thereto, either party may, upon notice, move for

¹ Not ordered in common law cause. *North v. Platt*, 7 Robt., 207. Compare 4 Abb. Ct. App. Dec., 326.

Under this it will be the referee's duty to receive evidence of inability offered in excuse. *McCartan v. Van Syckel*, 10 Bosw., 694.

² See *Matter of Youngs*, 5 Abb. N. C., 346, and note.

³ If a reference other than of the

issues depends upon consent, and the order does not contain such authority, the referee's opinion cannot be reported. If the order does not depend upon consent, the court may add such a direction by subsequent order, or refer the matter back to have the referee add his opinion.

⁴ *Stubbs v. Ripley*, 39 Hun, 620.

day¹ of _____, 18 ____ —or say: that the examination, &c., *concisely indicating the subject*] will be brought on before R. F., Esq., the referee appointed, at his office, No. _____ street, in the city² of _____, on the _____ day of _____, next, at _____ o'clock in the _____ noon.

[Date.] [Signature and office address of],
[Address] To _____, Attorney for _____.
Attorney for _____.

Form No. 1282a.

Subpœna to attend before referee.³

[Same as on the trial of the issues, except that if the cause is a special proceeding, not an action, the subpœna must be issued under the hand of the referee.⁴ If there is doubt, take the usual form of court subpœna and get the referee to sign it with his official addition beneath the teste,]

Form No. 1283.

Oath of referee on special reference⁵ other than to make partition and admeasure dower.⁶

[Title of court and cause.]

[Venue.]

R. F., the referee appointed herein by order bearing date _____

¹ A referee, whether official or special, and whether he has to try a matter or report thereon, has power, subject to the control of the court, to peremptorily appoint a day for the hearing of the same. *Wenlock v. River Dee Co.*, 53 *L. J. Rep.*, Q. B. Div., 208; 49 *L. T. Rep.*, N. S., 617; 32 *Week. Rep.*, 220.

It is the practice for the parties to agree on a time; or, the one prosecuting the reference may get the referee to fix the time (writing is not essential to fix it—*Sage v. Mosher*, 17 *How. Pr.*, 367) and notify the adverse party in writing. If the length of notice is not prescribed by statute or the court, the party is entitled to reasonable notice. *Bernie v. Vandever*, 16 *Ark.*, 616.

² If the place proposed is without

the jurisdiction of the county fixed as a place of trial (or, in the case of a motion, the county where the motion may by law be heard), consent should be sought. *Bonner v. McPhail*, 31 *Barb.*, 106; *Blake & Johnson v. Lyon & Fellows Manuf. Co.*, 77 *N. Y.*, 626; *Newland v. West*, 2 *Johns.*, 188.

³ *Hoffm. on Ref.*, p. 35.

⁴ *People ex rel, Jacobs v. Ball*, 37 *Hun.*, 245; *N. Y. Code Civ. Pro.*, §§ 854, 859.

⁵ *N. Y. Code Civ. Pro.*, § 1016, and see notes to Form in chapter on TRIALS.

⁶ For these purposes the Form is different. See *N. Y. Code Civ. Pro.*, § 1550 (partition), § 1608 (dower). And in special proceedings a special oath is often required.

the day of , 18 , being duly sworn, says: That he will faithfully and fairly hear and determine the questions referred to him,¹ and make a just and true report according to the best of his understanding.

[*Jurat.*]

[*Signature.*]

Form No. 1284.

Summons by referee to appear personally,

[*Title of court and cause.*]

Pursuant to an order of reference herein entered the day of , 18 , I, the undersigned referee therein appointed, summon you to appear before me, at my office, No. street, in the city of , on the day of next, at o'clock in the noon, to attend a hearing before me of the matters so referred. And I direct that this summons be served at least days previous to the return day thereof.²

[*Date.*]

[*Signature of*]

[*Address*] To .

Referee.

UNDERWRITING: [*state object concisely, for instance, in foreclosure, to compute amount due.*]

To ascertain and compute the amount due on the bond mentioned in the complaint.

[*Or, on reference as to surplus moneys, thus:*]

To ascertain the validity of the claim of the defendant W. X. to the surplus moneys arising on the sale of the mortgaged premises mentioned in the complaint in this cause, and the amount which is due to any other person which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon.

[*Signature of*³],

Referee.

¹ If the reference is not for the hearing and determination of any question, or imposes other duties, add or substitute a concise indication of it.

² Instead of a referee's summons, notice of the hearing may be given,

as in Form 1282; and this is now usual except in equity causes, and where personal attendance is required.

³ *Whipple v. Stewart, Walk. (Mich.) Ch., 357.*

Form No. 1285.

Order that books and papers be deposited with referee before accounting.

At a special term [*&c.*, as in Form 493, p. 4].

[*Title of cause.*]

On reading and filing the affidavit of A. B., the plaintiff [*or*, on the petition of C. D.—*or*, on the certificate of the referee] herein, dated the day of , 18 , and after hearing A. T., of counsel for the plaintiff, and Z. T. [*or*, no one appearing], for the defendant [and on proof of due service of notice of this motion]. Now, on motion of A. T., attorney for plaintiff:

ORDERED, that the defendant Y. Z., within [four] days after personal service hereof, on said defendant, or on his attorney, produce before the said referee, under oath, all [*here specify the writings*] in his custody or power, relating to the matters in question, under penalty of punishment for contempt.¹

Enter: [*signature of judge by initials of name and title.*]

Form No. 1286.

Report of referee of testimony and opinion on question arising on motion (contempt).

[*Title of court and cause.*]

To the Court of .

The undersigned R. F., the referee named in an order of this court, a copy of which is hereto attached [*or*, entered the day of , 18], respectfully reports:

I. That in pursuance of said order the parties by their attorneys and counsel, appeared before me and gave the evidence hereto attached, marked "A," and which is all the evidence adduced before me,² and is hereby reported to the court.

II. That it is my opinion, based on said evidence, that the

¹ Where the referee is appointed by the court, and himself makes the order, he has now power in some cases to proceed for contempt without application to the court. *N. Y. Code Civ. Pro.*, § 2272. Otherwise formerly. *Edw. on Ref.*, 40.

² *Story v. Livingston*, 13 *Pet.*, 359.

injunction issued in this action was violated by the defendants in continuing to remove the earth from the plaintiff's premises after the service of the said injunction upon the defendants.

III. That in my opinion, based on said evidence, the plaintiff suffered damages to the amount of dollars on account of the removal of said earth after the service of the said injunction.

All of which is respectfully submitted.

[Date.]

Fees, \$, paid.

[Signature of],

Referee.

[Annex the testimony.]

[File, with testimony, if any,¹ and serve copy of report, with notice that the report (with testimony, if any¹) has been filed, on all who have appeared.]

Form No. 1287.

Exceptions to referee's report on special question² (assessing damages on injunction undertaking).

[Title of court and cause.]

The plaintiff herein [or other party to the undertaking who excepts to the report] hereby excepts to the report of R. F., Esq., referee, filed the day of , 18 , as follows:

1. To the conclusion of [law] of said referee, wherein he finds [stating it].

2. To the refusal of said referee to find, as a matter of [fact], that [stating it].

3. That said report [or specify part] was founded upon illegal evidence, to wit [indicating it], which said referee received against [plaintiff's] objection.³

[Date.]

[Signature and office address of],

Attorney for

[File, and serve copy on attorney for party filing the report.]

¹ Pope v. Perault, 22 Hun, 468; Natl. State Bank v. Hibbard, 45 How. Pr., 280; Bowne v. Leveridge, 2 Month. L. Bul., 87.

This is not necessary on the trial of the issues in an action, or on computing the amount due in foreclosure. N. Y. Gen. Rules, No. 30, of 1888.

² Under N. Y. Gen. Rules, No. 30, of 1888, the report (in references other than for the trial of issues or to compute amount in foreclosure) stands confirmed unless exceptions are filed

and served within eight days after service of notice of the filing. Whether they are necessary here see p. 636, n. 1.

³ To review the admission of testimony taken by a referee (on a reference other than of an issue arising on the pleadings), the party should specify as a part of his exceptions to the report that it was founded upon illegal testimony, and the referee had improperly overruled his objection. Brown v. Mayor, &c., of N. Y., 9 Hun, 587, 595.

Form No. 1288.

Notice of motion to confirm referee's report.¹[*Title of court and action.*]

Please take notice, that upon the report of R. F., Esq., referee herein under the order of this court entered the day of , 18 , which report was filed on the day of , 18 , and on [*mentioning any other papers*], the undersigned will move this court at a special term,² to be held [at chambers³] at the county court house [*or, the city hall*], in the city of , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard for an order confirming said report [*and here may add any other relief desired*], with costs of this motion.

[*Date.*] [Signature and office address of],
[Address] To , Attorney for
Attorney for .

Form No. 1289.

Order on motion to confirm report.⁴

At a special term [*&c., as in Form 493, p. 4*].

[*Title of the cause.*]

The motion of the plaintiff to confirm the report of the referee herein filed on the day of , 18 [*or, the exceptions filed on the part of the defendants to the report—&c., as above*], having come on for argument, on the motion of the

¹ Notice of motion to confirm the report and for final relief thereon is not to be given until after exceptions have been filed or the eight days allowed for filing has elapsed. *Riley v. Brown*, 14 *Abb. Pr.*, N. S., 290, note; s. c., 44 *How. Pr.*, 429.

² Motion to confirm a report is to be made at special term, even though the reference was ordered by the general term to correct an error for which they modified a judgment brought before them on appeal. *Gautier v. Douglas Mfg. Co.*, 39 *Hun*, 642. But the general term have power to confirm it. *Tracy v. Talmadge*, 1 *Abb. Pr.*, 460.

³ In the first district of New York, the motion to confirm may be entertained at chambers, even though the reference be of part of the trial of the cause, under interlocutory judgment. *Boegler v. Eppley*, 40 *Hun*, 523; s. r., Volume I, p. 123, note 4. But it is better practice, in such case, to move at the special term held for enumerated motions. *Empire, &c., Assoc. v. Stevens*, 8 *Hun*, 515.

⁴ For another Form confirming report of referee under original petition, see Volume I, p. 363.

plaintiff to confirm said report [*or*, of the defendant to set aside said report], and after reading said report [and the evidence taken by said referee, *may add*, and his opinion therewith filed, and], after hearing A. T., of counsel for the plaintiff, and T. Z., of counsel for defendant in opposition, now, on motion of A. T., attorney for plaintiff:

ORDERED, that the exceptions of the defendants to the report of the referee herein be and the same hereby are * overruled, and that the said report be, and the same is hereby in all things confirmed, and that [*state principal relief according to the case*].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1290.

Order sustaining exceptions to referee's report.

[*As above, substituting for the words following the *:*] sustained, and the motion to confirm said report is denied with \$10 costs to the _____, and that said report and order of reference are hereby vacated and set aside.

ARTICLE XIII.

SET-OFF ON MOTION.

FORMS.

(1291.) Order to show cause why costs should not be set-off against each other. (1292.) Order setting-off costs against each other.

Form No. 1291.

Order to show cause why costs should not be set-off against each other.¹

[*Title of court and cause.*]

On the annexed affidavit of A. B., and on the order made herein upon the day of , 18 , and upon the judgment roll filed herein upon the day of , 18 , let the plaintiff or her attorney show cause at a special term of this court, to be held [at chambers] at the in the city of , on the day of , 18 , or as soon thereafter as counsel can be heard, why the costs awarded to the plaintiff by said order made on . 18 , should not be set-off against the costs awarded to the defendants by the order made on the day of , 18 , or against an equal amount of the costs remaining unpaid on the judgment entered herein on the day of , 18 , and why the defendants should not have such other and further relief as may be just [and why the precepts issued to the sheriff of the city and county of New York, to enforce the collection of the costs awarded by said order, made , 18 , should not be vacated].

All proceedings upon the part of said sheriff under said precepts, and all proceedings on the part of the plaintiff and her attorney for the enforcement of any costs whatever under any orders in this action, are hereby stayed until the entry and service of an order on the decision of this motion. Service hereof this day shall be deemed sufficient.

[*Date.*] [*Signature of judge and initials of title.*]

Form No. 1292.

Order setting-off costs against each other.

[*Title (court order) and recitals, according to the case; see Form 493, p. 4.*]

ORDERED, that said motion be and the same is hereby

¹ See *Roediger v. Simmons*, 2 *Abb.* aff'd in 96 *N. Y.*, 660; *Smith v. Chen-N. C.*, 279; *Dingee v. Shears*, 29 *Hun.*, 210; *Tunstall v. Winton*, 31 *id.*, 219; 20. oweth, 18 *Abb. N. C.*, 349, rev'g *id.*,

granted, and the sum of dollars costs [*indicating what, as thus*] taxed by the clerk of this court as awarded to defendant against plaintiff by the Court of Appeals herein, be and the same are hereby set-off against an equal amount of the general costs of this action awarded to plaintiff against defendant upon the trial thereof, as taxed by the clerk of this court on the day of , 18 , and to that extent the said costs be deemed paid and satisfied. [*If judgment has been docketed, may add: and it is further ordered that the clerk of this court make the proper correction on the docket of this court by reducing said judgment to the sum of dollars.*]

Ordered, further, that defendant pay to plaintiff \$10 costs of this motion.

Enter: [*signature of judge by initials of name and title.*]

ARTICLE XIV.

STAY OF PROCEEDINGS IN USELESS OR VEXATIOUS ACTIONS.

[For rules applicable to stays generally, see Volume I, p. 434. For proceedings for stay in order to apply for removal of cause, see Volume I, pp. 730-740.]

FORMS.

(1293.) Affidavit to stay proceedings in the cause until after determination of another cause.

(1294.) Order thereon.

(1295.) Order staying proceedings until costs of former cause are paid.

Form No. 1293.

Affidavit to stay proceedings in the cause until after determination of another cause.¹

[*Title of court and cause.*]

[*Venue.*]

Z. T., being duly sworn, says :

I. I am the defendant's attorney.

II. This action was commenced [*here concisely state the history and condition of the cause, indicating all the parties, it usually being necessary to refer to the pleadings on file, or to annex copies, and show also where and how soon the action can be tried, and the attorneys' names and addresses*].

¹ This application should be made in the cause which it is sought to stay. If both actions are in the same court, however, there is power in the court to order a stay of one action upon an application made in the other, if the former be an equitable action involving injunction against the other litigation as a part of the relief; and, in the Supreme Court, such relief may be granted in one county or district staying an action pending in another; but the better practice is in the absence of unusual circumstances to confine the party to a motion in the cause which he desires to stay, except where the nature of the relief sought requires

the bringing of a fresh action for injunction. See Volume I, p. 813.

As to the necessary identity of the causes, see *Sorley v. Brewer*, 18 *How. Pr.*, 509.

The general test is whether the subject is the same in such sense that when decided there will be a judicial estoppel of the parties in the other suit. It is not essential that the one should be such as to be pleadable in abatement in the other. *Hurd v. Moiles*, 28 *Fed. Rep.*, 897 (holding that pendency of bill to redeem is ground for stay of subsequent suit to foreclose); *s. p.*, *Matthews v. Shaffer*, 19 *Weekly Dig.*, 456.

III. On the day of , 18 , the defendant above named commenced an action against this plaintiff in the Court [*here state concisely the history and condition of, and parties to, the other cause in the same way*].

IV. The issues in the last-mentioned action involve the same questions as those involved in the issues in this action [*state issues sufficiently to show how, and add any other circumstances favoring the application, as thus*: That the issues in said other action give the defendant in this action, being the plaintiff in that action, the benefit of a jury trial in that action, and he claims that he is entitled to such trial.]

V. No previous application for such an order as this has been made in this action; [but on or about the day of , 18 , this defendant applied to the said Court in said other action for an order staying the trial of this action, and the motion was denied on the ground that the stay could only be granted in the action sought to be stayed.]

[*Jurat.*]

[*Signature.*]

Form No. 1294.

Order staying proceedings in the cause until determination of another cause.

[*Title (court order) and recitals, according to the case; see Form 493, p. 4.*]

ORDERED, that said motion be, and the same hereby is in all respects granted, and that this action and all proceedings herein, on the part of the plaintiff and his attorneys, be and the same hereby are stayed until [the trial and final entry of judgment¹] in the action now pending in Court of , in which the defendant above named is plaintiff, and the plaintiff above named and are defendants.

[*Signature and title of presiding judge.*]

Enter: [*signature of judge by initials of name and title.*]

¹ It is the usual practice to express the stay thus, though there is some ambiguity in the term "final judgment," it being in some cases understood to extend to judgment on appeal to the court of last resort if such appeal be taken (see Volume I, p. 458); but as the stay is subject to further order of the court to be made on an application founded on intervening facts, unanticipated delay, or other new matter, it is usually deemed sufficient that the order for the stay should indicate that a trial on the merits and final judgment

is contemplated, leaving it to the court on a future application if necessary to qualify the direction.

For other Forms, see CONSOLIDATION, pp. 581, 582.

In *Hodges v. Pingree*, 108 Mass., 585, where the order for stay in an action at law, was merely "to abide decision in" a suit in equity, held that on verdict, and order thereon for an account, in the equity suit, the action at law could proceed without awaiting final decree in the equity suit.

Form No. 1295.

Order staying proceedings until costs of former cause are paid.¹

[*Title (court order) and recitals, according to the case; see Form 493, p. 4.*]

ORDERED, that said motion be and the same is hereby granted [with ten dollars costs, to be paid to by personally, by reason of his misconduct and bad faith in bringing this action], and that all proceedings on the part of the plaintiff and his attorneys in this action be and they hereby are stayed until the costs of the action brought by said against the defendant herein in the Court, in the annexed affidavit more fully described [*or otherwise identify the action*], and the costs of this motion shall have been paid.

Enter: [*signature of judge by initials of name and title.*]

ARTICLE XV.

TENDER.

[See Payment into Court, p. 624, &c.]

¹ Special order is not now requisite in most cases in New York. See Volume I, p. 444, and cases there cited.

For notice of the statutory stay, required in case of appeal, see Form 208, Vol. I, p. 448.

CHAPTER XIII.

MEANS OF EVIDENCE.¹

ART. I.—STIPULATIONS, AND ADMISSIONS.

II.—DEMAND OF ADMISSION AND NOTICE TO PRODUCE.

III.—SURVEY.

IV.—DISCOVERY AND INSPECTION OF DOCUMENTS.

V.—EXAMINATION OF PARTIES BEFORE TRIAL.

VI.—DEPOSITIONS TAKEN WITHOUT THE STATE.

VII.—EXAMINATION WITHIN THE STATE, BY CONSENT.

VIII.—EXAMINATION OF WITNESSES CONDITIONALLY (DE BENE ESSE).

IX.—COMPELLING ATTENDANCE OF WITNESSES AT TRIAL.

X.—AUTHENTICATION OF RECORDS.

ARTICLE I.

STIPULATIONS, AND ADMISSIONS.

Forms.

(1296.) Stipulation as to facts or evidence for trial (general Form).

(1297–1303.) Statements suitable to be inserted in the foregoing Form.

(1304.) Stipulation to produce witness, and documents.

(1305.) Stipulation admitting how witness, if present, would testify.

(1306.) Agreed statement of facts, or of evidence, for trial.

¹ As to the use against a party of his testimony procured by other means, see the following authorities:

Examination in supplementary proceedings. *Keiley v. Dusenbury*, 2 *Abb. N. C.*, 360; *Code Civ. Pro.*, § 2460, as am'd by *L.* 1881, c. 122.

— under general assignment act. *Matter of Holbrook*, 99 *N. Y.*, 539; *Matter of Rindskopf*, 16 *Abb. N. C.*, 316, *n.*; *Matter of Wilkinson*, 36 *Hun.*, 134.

In legislative investigation. *People ex rel. McDonald v. Keeler*, 32 *Hun.*, 563; rev'd in 99 *N. Y.*, 463; *Kilbourn v. Thompson*, 103 *U. S.*, 168; *People v. Sharp*, 14 *Northeast. Rep.*, 310; rev'g 45 *Hun.*, 460, 491; *In re Pacific Ry. Com.* (*Cal.*, 1887), 32 *Fed. Rep.*, 241.

Investigation by municipal council. *Briggs v. Mackellar*, 2 *Abb. Pr.*, 30; *Briggs v. Matsell*, *id.*, 156; *Whitcomb's Case*, 120 *Mass.*, 118; *s. c.*, 21 *Am. Rep.*, 507. [In a note to this case, the case of *People v. Learned*, 5 *Hun.*, 626, was cited as a special case, wherein the legislature conferred powers enabling the commission to commit for contempt.]

— by supervisors. *Faulkner v. Morey*, 22 *Hun.*, 379 (*L.* 1858, c. 190); *Matter of Pilsbury*, 56 *How. Pr.*, 290 (1 *R. S.*, 6th ed., 879, §§ 44–48).

— by coroner's jury. *People v. Fitzgerald*, 105 *N. Y.*, 146; rev'g 43 *Hun.*, 35; *Code of Crim. Pro.*, §§ 773, 774, 777, &c.

— by search warrant. *Code Crim. Pro.*, §§ 791, 792; *People v. Noelke*, 29 *Hun.*, 461.

Form No. 1296.

Stipulation as to facts or evidence for trial¹ (general Form).

[Title of court and cause.]

The parties hereto² hereby stipulate by their respective attorneys that for the purposes of the trial of this action only [if desired to restrict it to one trial, say: the trial about to be had in this action only] * the following facts [and the due execution of the following documents] are admitted [or if desired to make the admission several, say: the following admissions are made]:

I. This plaintiff admits [&c.].

II. The defendant admits [&c.].

[For other Forms see below, 1297 to 1303.]

[Date.]

[Signatures of attorneys].

STATEMENTS SUITABLE TO BE INSERTED IN THE FOREGOING FORM.

1297. *Admission of details stated in schedule.*—Substituted for what follows the * above:—that Schedule A hereto annexed contains a correct statement of all [the descendants of M. N. and their various degrees of relationship—or, all the creditors of M. and the amounts respectively due to them].

1298. *Waiver of authentication.*:—that _____ waives the proof of the handwriting of any letter of M. N., of _____, to _____.

1299. *Admission of copy.*:—that the annexed is a copy of the attachment mentioned in the agreement referred to in the complaint, and may be read in evidence in lieu thereof, and without preliminary proof, and that said attachment was delivered to the sheriff of _____ county, on the _____ day of _____, 18____, at _____ A. M., and that on the same day, but not till after 12 M., said sheriff levied on the property in said agreement mentioned under said attachment.

1300. *Leave to read copy.*:—that the within extracts from the statutes of New Jersey may be read by either party as evidence.

1301. — or thus:—that either party may read in evidence from the volume entitled "Ferry leases and railroad grants," compiled by David T. Valentine, by orders of the common council, in the year 1866, extracts from, or the whole of any laws, agreements, resolutions or ordinances, under which any of

¹ As to the power of the attorney to stipulate, and the construction of such papers, see Volume I, p. 450.

² If the stipulation affects the substance of the issues, it is the better practice to express it as that of the

parties, though signed by the attorneys; but a stipulation expressed as by the attorneys, is doubtless equally valid for the purpose of the cause in which it is made.

the aforesaid railroads were originally constructed or authorized to be built, with like effect as if the originals of any such laws or ordinances, resolutions or agreements were produced.

1302. *Leave to read minutes or case:*—that either party may read from the stenographer's minutes [*or, from the printed case*] in this cause [*or, in the case of M. N. v. O. P.—or if indorsed:* from the within] the testimony of all or any witnesses called on the former trial herein [*or, on the trial of said cause—and all or any documentary evidence admitted on that trial*], subject, however, to all such objections or exceptions as either party may seasonably take, and reserving to each party the right to call any of said witnesses or others, and to put in any other or further documentary evidence.

1303. *Saving clauses:*—But each party [*or, the*] reserves all objections and exceptions to the admissibility, relevancy or materiality of any such fact.

If the cause is not tried at the term, 18 , this entire stipulation is to be absolutely void.

Form No. 1304.

Stipulation to produce a witness and documents.¹

[*Title of court and action.*]

The [defendant] hereby stipulates by his attorney, as a condition of the granting of his application to postpone, that he will produce the witness M. N. on the day of , 18 , [*or, whenever thereafter the trial shall proceed*], and the books of the Bank; and on failure to produce the said witness or books, the [plaintiff] may then forthwith take judgment.

[*Date.*]

[*Signature of*],
Attorney for .

Form No. 1305.

Stipulation admitting how witness, if present, would testify.¹

[*Title of court and cause.*]

The [plaintiff] hereby stipulates to admit on the trial of this cause [*or, for the purposes of this trial only*] that M. N., of , if sworn as a witness for defendant on such trial, would testify that [*stating fact*].

¹ In *White v. Harlow*, 5 *Gray* (Mass.), 463, a stipulation conditioned on the production of a note was held satisfied by its production without putting it in evidence.

² *Abb. Brief for Civil Jury Trials*, 76.

And this stipulation may be read on such trial with the same force and effect as if the said M. N. then testified as a witness as aforesaid.

[Date.]

[Signature of],
Attorney for plaintiff.

Form No. 1306.

Agreed statement of facts, or of evidence, for trial.

[As in Form 1296 to the *, continuing] the following are the facts [if desired to preclude other evidence, say: are all the facts] in this action.

[If desired to present what is agreed on, merely as evidence, from which it will remain to draw conclusions of fact, say] the following statements are to be deemed evidence [and are all the evidence] in this action:

- I. On the part of the plaintiff [stating it].
- II. On the part of the defendant [stating it].

ARTICLE II.

DEMAND OF ADMISSION AND NOTICE TO PRODUCE.

FORMS.

(1307.) Notice requesting admission
of documentary evidence.(1308.) Admission thereunder.
(1309.) Notice to produce.

Form No. 1307.

Notice requesting admission of documentary evidence.¹[*Title of court and cause.*]

Please take notice, that the undersigned proposes to adduce in evidence upon the trial of this cause the document [*or, the several documents*] hereto annexed and exhibited to you, and you are now requested to give an admission in writing of the genuineness of the same [*respectively*].

[*Date.*] [*Signature and office address of*],
[*Address*] To Attorney for
 Attorney for

Form No. 1308.

Admission thereunder.²[*Title of court and cause.*]

I hereby make the admission above requested [*and where only a part of several documents are admitted, add: so far as relates to the—bond—annexed, and refuse to make any other admission*].

[*Date.*] [*Signature and office address of*],³
 Attorney for

Form No. 1309.

Notice to produce.⁴[*Title of the court and action.*]

Take notice, that you are hereby required to produce, on the

¹ By *N. Y. Code Civ. Pro.*, § 735.² To have the effect of exonerating from costs of proving the document, must be served within four days after the request. *N. Y. Code Civ. Pro.*, § 735.³ If the admission is signed by a party not an attorney, it should be proved or acknowledged. See Volume I, p. 1.⁴ It will often be found useful to give such notice as the above, calling

trial of this cause¹ [a certain—*here describe the document sought, or, if there are several, say*], the following-described documents:

I. A deed bearing date on or about the day of
18 , and executed, or purporting to be executed, between M.
N. and O. P., and to convey a farm in the town of S.

II. All books of accounts kept by M. N. in his business at S., from the day of , 18 , to the day of , 18 , and containing entries relating to dealings between M. N. and O. P.

Also all other documents, letters, books, papers and writings whatsoever, in your control, containing any entry, memorandum or other matter in any wise relating to the matters in question in this cause.²

[Date.] [Signature and office address of],
[Address] To , Attorney for
Attorney for .

for every document that *may* be wanted.

For authorities on the practice in general, see *Abb. Tr. Br. Civil Jury Cas.*, 80, 81, 89, *De Baril v. Campoy v. Pardo (Pa., 1887)*, 7 *Centr. Rep.*, 642, and cases cited; and for exceptions to the rule requiring previous notice, *Howell v. Huyck*, 2 *Abb. Ct. App. Dec.*, 423; *Boynton v. Boynton*, 16 *Abb. Pr.*, 87; s. c., 25 *How. Pr.*, 490.

¹ One notice given in this form is sufficient, without repetition at subsequent circuits. *Gilmore v. Wale*, *Anth. N. P.*, 87; *Jackson v. Shearman*, 6 *Johns.*, 19.

² This clause should be made more specific, if possible. Thus, as to letters, the notice should specify the per-

sions between whom the correspondence sought for took place; and if not the dates of each letter, at least the period within which the correspondence took place.

As to what will be sufficiently specific, compare *Walden v. Davison*, 11 *Wend.*, 65; *Jones v. Edwards*, *McCl.* & *Y.*, 139; *France v. Lucy*, *R. & M.*, 341; *Jacob v. Lees*, 2 *M. & R.*, 33; *Morris v. Hannen*, 1 *Car. & M.*, 29; 2 *M. & R.*, 392; *Rogers v. Custance*, *id.*, 179.

For the remedy against suppression of evidence by seeking stay of proceedings in the action, compare *Premo v. Smith*, 10 *Abb. Pr.*, *N. S.*, 90; *s. c.*, 2 *Sweeney*, 467; and *Wood v. Kroll*, 43 *Hun*, 328, 333.

ARTICLE III.

SURVEY.¹

FORMS.

(1310.) Affidavit for motion for survey.

(1311.) Notice of motion for survey.
(1312.) Order for survey.

Form No. 1310.

Affidavit for motion for survey.²[*Title of court and action.*][*Venue.*]

A. B., being duly sworn, says:

I. He is the above-named plaintiff [*or, defendant*] in this action [*or otherwise state relation to the cause*].II. That this action is brought to [*state object, partition, ejectment, dower, foreclosure, or other action affecting real property, as thus: foreclose a mortgage upon the property of the defendant Y. Z. recorded in the office of the register—clerk—of the county of* , in Liber of Mortgages, page].III. That [*state condition of action and how far it has progressed*].IV. That said [mortgaged] premises are situated in the town of in this county [*or, on* street in the village —*or, city of*], and contain acres or thereabout; but that it is uncertain what area or extent of land is in fact [covered by said mortgage], and what are the boundary lines of said premises [*or, what the north boundary line of said premises is*]. [*State reasons why there is uncertainty, or nature of controversy.*]

¹ As to view, see *Abb. Jury Trial Brief*, 72, &c.; in waste, *N. Y. Code Civ. Pro.*, § 1659; respecting the condition of structures and performance of building contracts, *Stones v. Menham*, 2 *Exch.*, 382; *Maxted v. Seymour*, 56 *Mich.*, 129; 22 *Northw. Rep.*, 219; in eminent domain, *Galena, &c., R. R. Co. v. Harlam*, 73 *Ill.*, 494; *Matter of N. Y. Lack, &c., R. R. Co.*, 63 *How. Pr.*, 265; injury to real property, *Boardman v. Westchester Fire Ins. Co.*, 54 *Wisc.*, 364; *Pick v. Rubicon Hydraulic Co.*, 27 *Wisc.*, 433; *Bare v. Hoffman*, 79 *Pa. St.*, 71; negligence, *Smith v. St. Paul City Ry. Co.*, 32 *Minn.*, 1; 18 *Northw. Rep.*, 827; ejectment, *Brown v. O'Brien*, 3 *Pa. Law J. (Clark)*, 115; trover, *Nutter v. Ricketts*, 6 *Iowa*, 92.

As to view of life-tenant when ejectment depends on his death, see *N. Y. Code Civ. Pro.*, § 2311.

² *N. Y. Code Civ. Pro.*, § 1682; *Abb. Jury Tr. Brief*, ch. 12.

V. That said premises [and the adjoining premises affected by said boundary] belong, as deponent is informed and believes, to Y. Z., the above-named defendant, and that the same, including the portion as to which there is uncertainty or controversy, are in the exclusive possession of said Y. Z. [*or, of M. N., of* —*add particulars, if possible, if possession is qualified as in case of tenancies, &c.*], under a claim that he is the owner [*or otherwise*].

VI. That this motion is made in good faith and without delay, and not for the purpose of delay on the part of this deponent.

[*Jurat.*]

[*Signature.*]

Form No. 1311.

Notice of motion for survey.¹

[*As in Form 488, p. 1, of this Volume, omitting the matter in brackets following the ‡, and substituting for the italic matter between the ‡ and ¶ the following:*] granting leave to [*the applicant*] his necessary servants and agents to enter upon the property of Y. Z. below mentioned for the purpose of making a survey thereof [*or, of a boundary line between the property of A. B. and the property of Y. Z., which said property is more particularly described [or, which said property is—briefly describe it—and is adjacent to that more particularly described]* in the annexed affidavit of A. B.

Form No. 1312.

Order for survey.

At a special term [*&c., as in Form 493, p. 4.*]

[*Title of court and action.*]

On reading and filing the annexed affidavit of A. B., verified the day of , 18 , and the affidavit thereto attached of C. D., verified the day of , 18 , showing that due notice of this motion was duly served upon [*the party in possession*], and after hearing A. T., Esq., in support of this motion, and T. Z., Esq. [*or, no one appearing*], in opposi-

¹ N. Y. Code Civ. Pro., § 1682.

tion thereto. Now, on motion of A. T., attorney for *[the applicant]*:

ORDERED, 1. That leave is hereby granted to *[the applicant]*, his necessary surveyors, servants and agents to enter upon the real property herein below described for the purpose of making a survey thereon to ascertain the boundary lines *[or, the north boundary lines]* of the premises described in the complaint herein.

2. That a copy of this order be served upon Y. Z., the owner *[or, occupant]* of the abov-mentioned premises *[two]* days before the entry herein allowed is made upon the said property. The following is a description as definite as may be of the property *[or, boundary line]* to be surveyed *[and of the real property upon which it is necessary to enter for the purpose of making such survey]* *[insert description]*.

Enter: *[signature of judge by initials of name and title.]*

ARTICLE IV.

DISCOVERY AND INSPECTION OF DOCUMENTS.¹

[See tables on next page; also explanations on page 419.]

The power of the court was inherent in chancery (Volume I, p. 536), and extended to common law actions by the New York Constitution merging the jurisdiction in law and equity, as well as by the Revised Statutes previously (2 *N. Y. R. S.*, 199, § 21). The power is now expressly recognized by statute (*N. Y. Code Civ. Pro.*, § 803), and extended to all courts of record other than justices' courts in cities, with a direction that the general rules of practice must prescribe the cases in which the power may be exercised, and the proceedings where the same are not prescribed in the Code. The fact that the rules of court made pursuant to this direction (*N. Y. Gen. Rules*, No. 14, of 1888) only contemplate discovery to enable the applicant to plead, does not limit the power of the court to allow it to enable him to prepare for trial. *Stichter v. Tillinghast*, 43 *Hun*, 95, and cases cited. On the contrary, it has been held both under the former Code of Procedure and the Code of Civil Procedure (*Seligman v. Real Estate Trust Co.*, 20 *Abb. N. C.*, 210, and note), and I think well held, though there are other cases sounding to the contrary,² that the new provision in the Codes authorizing the court, in case of disobedience, to direct that the document be excluded from being given in evidence, extends the power of the court, beyond the chancery rule which forbade discovery to ascertain the adversary's evidence, and allows it now to be exercised to inspect a document which the adversary relies on, if justice entitles the applicant to examine it in order to meet it on the trial, as for instance, where the adversary expressly sets it forth in his pleading,³ or where it consists of a record kept by the adversary admittedly as agent of the applicant⁴ or where the applicant alleges forgery⁵ or falsification.⁶

¹ "Documents," in the law of evidence, includes books, papers and written or printed matter generally. Discovery is not yet extended in American courts to other objects such as merchandise (*Ansen v. Tuska*, 19 *Abb. Pr.*, 391), machinery (*Cook v. Lalance Grojean Mfg. Co.*, 29 *Hun*, 641), and the like. But see *Williams v. Peabody*, 8 *Hun*, 271, allowing it as to personalty held by life-tenant.

² See *Andrews v. Townshend*, 48 *Super. Ct. (J. & S.)*, 162; *Mott v. Consumers' Ice Co.*, 2 *Abb. N. C.*, 143; *Sanger v. Seymour*, 42 *Hun*, 641.

³ *Seligman v. Real Estate Trust Co.*, 20 *Abb. N. C.*, 210, and cases cited.

⁴ See *Manley v. Bonnel*, 11 *Abb. N. C.*, 123; *Duff v. Hutchinson*, 19 *Weekly Dig.*, 20, and *White v. Ahrens*, 32 *Weekly Rep.*, 649. See also *Martine v. Albro*, 26 *Hun*, 559; *Newman v. Newman*, 20 *Weekly Dig.*, 283 (partnership books). As to executors, &c., see *Livingston v. Curtis*, 12 *Hun*, 121.

⁵ *Cornell v. Woolsey*, 7 *Weekly Dig.*, 555; *Holmes v. Cornell*, 7 *id.*, 375; *Hepburn v. Archer*, 20 *Hun*, 535.

Forgery was a recognized exception to the restricted rule in chancery. *Bischoffsheim v. Brown* (*N. Y.*, Dec. 23, 1886), 29 *Fed. Rep.*, 341 (*dictum* as to forgery).

⁶ *Inyo Mining, &c. Co. v. Pheby*, 49 *Super. Ct. (J. & S.)*, 392 (plaintiff's allegation of falsification of plaintiff's account kept by defendant when in plaintiff's service). Compare *Walmsley v. Nelson*, 3 *Abb. N. C.*, 127.

METHODS OF DISCOVERY IN

I.	II.
Discovery in equity actions.	Discovery and inspection of documents (in all classes of actions).
Gets examination of party and inspection of documents so far as necessary and founded on allegations and demand for relief in applicant's pleading.	Gets inspection and right to copy documents, but not right to examine party.
Power inherent in court of equity. Formerly exercised by Written Interrogatories annexed to bill, and sworn Written Answers; and by Examination and Production of documents on oath, before a Master.	Power inherent in court of equity. Formerly exercised as in I; and by bill of discovery, in aid of a party to a cause at common law.
— <i>statutory</i> now so far as made so by saving clause as to creditors' actions (<i>N. Y. Code Civ. Pro.</i> , §§ 1871, 1878), and general saving clause as to equity jurisdiction except as restricted by the Code (§ 217).	— <i>statutory</i> in common law actions in Supreme Court since 1830. 2 <i>N. Y. R. S.</i> , 199, § 21. Extended to all courts of record except justices' courts in cities. <i>N. Y. Code Pro.</i> , § 388; <i>Code Civ. Pro.</i> , § 803.
Applicable only to a party (including an officer, director or member of a corporation-party).	Applicable only to a party (including corporations).
Exercised at such stage of the action as it becomes necessary in order to the substantial relief granted, as thus: 1. On motion for receiver, to ascertain assets and superintend transfer: 2. At the trial, before interlocutory judgment (by subpoena and oral examination, or subpoena <i>duces tecum</i> , or order to produce), so far only as necessary to reach interlocutory judgment: 3. —and after interlocutory judgment establishing the right, then, by reference, with direction for examination and production, and by summons or subpoena thereon, before referee. 4. After judgment, by supplementary proceedings or creditors' action.	Exercised at any stage of the action, as thus: 1. To enable to prepare complaint, or join yet unknown defendants: 2. To enable to prepare answer or other responsive pleading: 3. To prepare for trial. [At the trial, inspection of documents belonging to the party, in other than equity actions, is allowed only on common law principles, as on the examination of a witness, and is had by subpoena <i>duces tecum</i> or order to produce, or by notice to produce.]
Application (except in supplementary proceedings) must be to the court, or to a referee to hear and determine the issues, or a referee specially authorized.	Application must be to court; and on petition verified by affidavit; and an order to show cause made by court or judge.

ACTIONS UNDER THE CODE.

III.

Examination before trial (in all classes of actions).

Gets examination of party, and production of documents to be examined on ; but no right to take copy, and no other right to inspect than counsel has on examining a witness at the trial under subpoena *duces tecum*.

Power inherent in court of equity. Formerly exercised as in I and II.

—*statutory* in common law actions in courts of record (except certain inferior local courts. *Code Pro.*, § 389; *Code Civ. Pro.*, § 870).

Applicable only to a party (including an officer or director of a corporation-party).

Exercised at any stage of the action, as thus:

1. To enable to prepare complaint, or join yet unknown defendants.

2. To enable to prepare answer or other responsive pleading.

3. To prepare for trial.

[At the trial, examination of the party is had by the same means as any other witness, on common law principles.]

Application must be to a judge, on affidavit, and *ex parte*.

IV.

Examination or discovery incidental to some interlocutory proceedings.

Power wholly statutory, except as below indicated.

The principal cases are:

Compelling person not a party to make affidavit for purposes of a motion. Vol. I, pp. 139, 202.

Examination by sheriff or by attaching creditor, of books, etc., levied on, with stock-in-trade, etc., of debtor, under attachment as a provisional remedy; or of third person holding assets.

Demand or order for copy account or bill of particulars. [Power inherent in court.]

Compelling receiver, attorney, or other officer of the court, having documents in his possession as such, to allow inspection when matter of right to a party. [Power inherent in court, and exercised in such mode as the court may direct.]

Same power to compel such person to submit to examination.

Exactng consent to examination or discovery as the condition of granting a discretionary order, for the purposes of which disclosure may be justly required. [Power inherent in court and in judge, within limits not very clearly defined. Rarely exercised.]

See also note on p. 660.

FORMS.

(1313.) Petition for discovery and inspection, or that cause be shown.

(1314.) Order thereon.

(1315.) Affidavit to oppose petition for discovery, &c.

(1316.) Order absolute for discovery and inspection.

(1317-1320.) Statements suitable to insert in foregoing form.

Form No. 1313.

Petition for discovery and inspection, or that cause be shown.¹

[*Title of court and action.*]

To the Court of [or, To Hon. J. K.,² justice—
or, judge—of the Court of].

NOTE.—As to discovering books and papers of debtor by attaching his property and books, see *Brooke v. Foster*, 20 *Abb. N. C.*, 200; *Bleier v. Davidson*, *id.*, 207, n., and cases cited, and p. 429 of this Volume, Form 959.

Getting copy of document by demand of account or order for bill of particulars, see p. 469 of this Volume.

For getting evidence by mandamus, see the following cases:

Inspection of books of a foreign corporation. *Huyilar v. Cragin Cattle Co.*, (*N. J.*, 1887); s. c., 5 *Centr. Rep.*, 645 (but denying the petition as to papers and memoranda); *Swift v. Richardson*, (*Del.* 1886) 6 *Centr. Rep.*, 843; *People ex rel. Delmar v. St. Louis, &c.*, *R. R. Co.*, 44 *Hun*, 552; s. c., 19 *Abb. N. C.*, 1 (reference to take proof of facts alleged and denied in the affidavits may be made).

Inspection of books of benevolent corporation. *People ex rel. Aaronson v. Scheel*, 8 *Abb. N. C.*, 342. Books of domestic corporation. *People ex rel. McDonald v. U. S. Mercantile Rep. Co.*, 20 *Abb. N. C.*, 192; *Commonwealth v. Phoenix Iron Co.*, 105 *Pa. St.*, 111; *Phoenix Iron Co. v. Commonwealth*, 113 *id.*, 563; 5 *Centr. Rep.*, 688; *Matter of Sage v. Lake Shore, &c.*, *R. R. Co.*, 70 *N. Y.*, 220. Books of defunct corporation in the custody of new company. *In re Glamorganshire Banking Co.*, 33 *Weekly Rep.*, 209. Documents in the possession of liquidator of dissolved corporation. *London & Yorkshire Bk. v. Cooper*, 15 *Q. B. D.*, 7; 33 *Weekly Rep.*, 751; *aff'd*, 54 *L. J. Q. B.*, 495. Mandamus to compel custodian of public records to permit inspection. *People ex rel. Title Guarantee, &c., Co. v. Reilly*, 38 *Hun*, 429; *Colnon v. Orr*, 71 *Cal.* 43; 11 *Pac. Rep.*, 814. To compel public officials to give certificates. *Matter of Roberts v. Hatch*, 40 *Hun*, 53; *People ex rel. Haase v. German Hospital*, 8 *Abb. N. C.*, 332.

See *Boyd v. United States*, 116 *U. S.*, 616 (holding that a statute compelling the production of private papers by the defendant in an action for a forfeiture is unconstitutional in that it compels him to be a witness against himself).

As to privilege of professional communications, see *Mott v. Consumers' Ice Co.*, 2 *Abb. N. C.*, 143.

As to investigations, see note on p. 648.

¹ Under *N. Y. Code Civ. Pro.*, § 805, and *N. Y. Gen. Rules*, No. 14, &c., of 1888, petition is held essential. *John S. Way Manuf. Co. v. Corn*, 66 *How. Pr.*, 152 (holding notice of motion ir-

regular, and therefore denying application). For general rules as to petitions, see Volume I, pp. 331-337.

² May apply to any judge authorized to make an order in the action.

The petition of A. B. [*if a corporation, add: by A. B., its president—or, agent*] shows to the court:

I. That he is the plaintiff [*or, defendant*] above named [*or otherwise state relation to the cause, and that this action is brought [here briefly state its nature; and if the application is to enable to plead, see Forms on p. 419, &c.].*]

II. [*Here state condition of the cause, for instance, thus:*]² That issue has been joined¹ by the service, on the day of last, of defendant's answer [*or, plaintiff's reply*]; and that the cause has been placed on the calendar, but not noticed for trial; and the time appointed for holding the next trial term [*or, next circuit—or, special term—in the county of , where this action is triable*] is the day of next.

III. [*Describe the books, papers, &c., of which discovery is sought, so as to identify them,¹ as thus:*]² That during the negotiation for, and in making the agreement sued on, deponent wrote to the [*adverse party*] several letters relating thereto, and in particular [*two*], bearing date about the day of , &c., respectively, which, or some of them, as deponent is informed and believes [*stating sources of information and belief*], constitute said agreement.³

IV. That, among other things, said letters contain [*here specify matters constituting the evidence sought, in sufficient detail to show that they are material⁴ to the applicant's case; or that he has a right to see them within the principles indicated on page 658, and notes*], and said letters are, as deponent is advised and believes, material and necessary⁵ to his case [*or, defense*] upon the trial of this cause; and that he cannot safely proceed to trial without them [*or sworn copies of them*].

See Volume I, p. 134, 161. The better opinion is, that the alternative in the usual order made on this petition, allowing the adverse party to show cause instead of complying, is not "an order to show cause" within the meaning of N. Y. Gen. Rules of 1888, No. 37, which forbids orders to show cause being made returnable, as notices of motion may be, in a county without the district. See Vol. I, p. 162, note. But it is safer to make the order returnable if practicable, within the district.

¹ People v. Trinity Church, 6 Abb. Pr., 177.

² Thompson v. Erie R. Co., 9 Abb. Pr., N. S., 230.

³ See Brownell v. Bank of Gloversville, 20 Hun, 517.

⁴ Brooklyn Life Ins. Co. v. Pierce, 7 Hun, 236; N. Y. Gen. Rules of 1888, No. 15; Walker v. Granite Bank, 44 Barb., 39; s. c., 19 Abb. Pr., 111.

⁵ The evidence need not be alleged to be indispensably necessary (Whitworth v. Erie R. Co., 37 Super. Ct. (J. & S.), 437; Harbison v. Von Volkensburgh, 5 Hun, 454), though discovery is not allowed merely as a precautionary measure. Walmsley v. Nelson, 3 Abb. N. C., 127.

V. That none of said [letters] are in the possession or under the control of deponent, nor has he kept any copies of, or extracts from them, and he is ignorant of their precise contents.¹

VI. That said letters are, as deponent verily believes, in the possession or control² of the [*adverse party—stating sources of information and grounds of belief*], and deponent knows of no way to obtain a knowledge thereof except by ordering him to make discovery thereof.

VII. That on the day of , 18 , and since the commencement of this action, this petitioner applied to the plaintiff [*or, defendant*] for permission [*here state what request was made*], but he, although informed that they were required for and involved in this action, refused said request.³

VIII. [*If plaintiff petitions, and his complaint was not verified, add*] That your petitioner has fully and fairly stated the case in this action to his counsel. A. T., who resides at No. street, in the city of , and that he has a good and meritorious cause of action herein, and that the discovery and inspection he seeks is necessary to enable him to prepare for trial, as he is advised by his said counsel after such statement, and verily believes.

[*Or, if defendant petitions, oath to merits, as in Form 981, p. 447, of this Volume.*]

IX. That this application is made in good faith for the very purpose stated, and none other; and no previous application has been made [*except—&c.; see p. 2*].

X. [*If a stay is desired, state facts showing its necessity.*]

WHEREFORE, your petitioner asks that an order be made giving him a discovery and an inspection, and permission to take copies, of the hereinbefore described; and that said inspection and discovery be made * by requiring the plaintiff [*or, defendant*] to deliver sworn copies of said to the

¹ Where several join, ignorance, &c., of each must be alleged, but oath to the facts, at least in case of partners, may be made by one. *Seligman v. Real Estate Trust Co.*, 20 *Abb. N. C.*, 210.

² It is not enough to show the documents to be in the hands of defendant's attorney, placed there by third persons. *Douglas v. Delano*, 20 *Week. Dig.*, 85.

³ This allegation has sometimes been thought necessary, but it seems not now absolutely essential to sustain an order, since the proceeding is by order to make discovery or show cause. But if the fact be shown, and discovery be finally ordered, it may be with costs of motion. *Seligman v. Real Estate Trust Co.*, 20 *Abb. N. C.*, 210.

Form No. 1315.

Affidavit to oppose petition for discovery.¹[*Title of court and action.*]

Y. Z., defendant above named, being duly sworn, says:

I. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

II. I object to produce the said documents set forth in the second part of the first schedule hereto.

III. [*Here state upon what grounds the objection is made, and verify the facts as far as may be; see p. 660, end of note.*]

IV. I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit set forth in the second schedule hereto.²

V. The last-mentioned documents were last in my possession or power on [*state when*].

VI. [*Here state what has become of the last-mentioned documents, and in whose possession they now are.*]³

VII. According to the best of my knowledge, information and belief, I have not now, and never had in my possession,⁴ custody or power; or in the possession, custody or power of any attorney, solicitor, counsel or agent of mine; or in the possession, custody or power of any other person or persons on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

[*Jurat.*][*Signature.*]

¹ *N. Y. Code Civ. Pro.*, § 806. This Form is adapted from the Form prescribed under the English Judicature Act, 1875, app. B., Form 9. See *Minet v. Morgan*, *L. R.*, 8 *Ch.*, 361; 11 *Eq.*, 284; *Corporation of Hastings v. Ival*, *L. R.*, 8 *Ch.*, 1017.

² A denial by several should be: We have not in our power or possession, and neither of us has in his power or possession, &c. *Fendall v.*

O'Connell, 33 *W. R.*, 619; s. c., 52 *L. T. R.*, *N. S.*, 553.

A denial must be explicit. *Hepburn v. Archer*, 20 *Hun*, 535.

³ The denial of possession, if credited, puts an end to proceedings. *Hoyt v. American Exchange Bank*, 1 *Duer*, 652; *Ahoyke v. Wolcott*, 4 *Abb. Pr.*, 41. But a denial of materiality does not. *Clyde v. Rogers*, 24 *Hun*, 145.

⁴ See note 2, and p. 662, n. 1.

Form No. 1316.

Order absolute for discovery and inspection (short Form).¹

At a special term [*&c.*, as in Form 493, p. 4].

[*Title of action.*]

An order having been heretofore on the day of , 18 , entered in this action directing the [defendant] herein to allow the [plaintiff] herein on or before the day of , 18 , to inspect [*designating the document as thus*: a certain paper or certificate dated the day of , 18], referred to in the petition on which said order was granted, and to take a copy of said [paper or certificate], or in default thereof to show cause before this court why such inspection with copy should not be allowed; and the said defendant having appeared and failed to show sufficient cause why such inspection with copy should not be allowed: Now, on reading and filing copies of said order to show cause and of the petition on which it was granted [and on the pleadings, and *designate other papers, if any*], and after hearing A. T., of counsel for said plaintiff, in support of the motion, and Z. T., of counsel for said defendant in opposition, and on motion of A. T., attorney for said plaintiff:

ORDERED, that the said [defendant] produce at the office of the said [plaintiff's] said attorney at No. street, in , on the day of , 18 , at o'clock in the noon, the aforesaid [paper or certificate], and there allow plaintiffs or their said attorney to inspect the same, and to take a copy thereof. [*For other Forms see 1313, 1317-1320 (below).*]

And it is further ordered, that the said defendant pay to the said plaintiff \$10 costs of this motion.

Enter: [*signature of judge by initials of name and title.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1317. *Direction to deposit books with clerk.*²—ORDERED, that said defendant * within days after service of a certified copy of this order upon his attorney [or, upon said defendant personally], file with the clerk of this court, at his office in the county court house in the city of , the books, letters and

¹ Sustained by *Seligman v. Real Estate Trust Co.*, 20 *Abb. N. C.*, 210. perintend the discovery and inspection. See Form No. 1318, p. 666.

² *Rossner v. N. Y. Museum Asso.*,

A referee may be appointed to su- 20 *Hun*, 182.

telegrams above referred to, and give the plaintiff's attorneys written notice of such filing; the books, letters and telegrams to remain on file with the clerk for days after the service of such notice, during which time the plaintiff shall have leave to inspect and copy the accounts, letters and telegrams above mentioned.

1318. *Exception as to books beyond the jurisdiction.*¹—It is further ordered that said company is hereby required to produce [before the referee], for the purpose of the inspection directed in this order, such only of said books as are within the control of said company or its officers in this State, and shall not be required to produce such books as are at its office in ; that in respect to the books not produced, the said defendant shall produce and deliver to [said referee for the use of] the plaintiff sworn copies of their contents which relate to the subject-matter mentioned in said order; [that such sworn copies shall be so produced and delivered within forty days after it appears to the satisfaction of the referee that the original books cannot be produced before him; that the said referee may pass upon the sufficiency of said copies, and in his discretion direct other or further copies to be produced and delivered].

1319. *Direction to serve sworn copy, but with leave to deposit instead.*²—ORDERED, that the defendant, within days after service of a certified copy of this order upon defendant's attorney [or, upon defendant personally], deliver to the plaintiff's attorneys sworn copies of all the entries contained in the several books of account kept by defendant, including the original entries under the heading , relating to all the transactions had by him for the plaintiff as his broker, and of all other entries in the said books of account relating to transactions had by defendant for plaintiff or his account, or in respect to which he had an interest; also of all the letters and telegrams in defendant's possession or control, received by him from the plaintiff, between the day of , 18 , and the day of , 18 .

It is further ordered, that instead of serving sworn copies the defendant may [continue as in 1317 from the *].

1320. *Preclusion from proving document not produced.*³—It is further ordered that the defendant be, and hereby is precluded from giving evidence upon the trial herein of any agreement or agreements between said N. Y. C. S. C. C. and said N. Y. C. & H. R. R. Co., or any agreements in any way affecting or governing the rights and duties of said N. Y. C. S. C. C. and said N. Y. C. & H. R. R. Co., as between each other and the employees respectively, except such agreements as they may produce as aforesaid.

¹ From a general term order on appeal, modifying the order below by inserting this clause. *Ervin v. Oregon, &c., R. & Nav. Co.*, 22 *Hun*, 566. See also *Phillips v. Germania Mills*, 20 *Abb. N. C.*

² The court, on evidence that all the entries relevant are commingled with entries relative to other persons, may direct that the books be deposited with the clerk with a sworn copy of the relevant entries, and the certificate of the clerk to his actual examination and comparison thereof. *Pynchon v. Day*, 118 *Ill.*, 9; s. c., 7 *Northeastern Rep.*, 65.

This may afford a convenient means for sanctioning without injustice discoveries of entries in firm books where the co-partner is not a party to the action, which has frequently been denied because of the want of the co-partner's consent. See *Hadley v. McDougall*, *L. R.*, 7 *Ch. App.*, 312.

³ From an order settled at special term in a contested case. See also *Whitworth v. Erie R. R. Co.*, 37 *Super. Ct. (J. & S.)*, 437. The safer practice is to apply after disobedience for an order precluding the evidence. See pp. 478-480, and 55 *N. Y.*, 518.

ARTICLE V.

EXAMINATION OF PARTY BEFORE TRIAL.¹

[See explanations on pp. 419, 420 and 657-659, of this Vol. The chancery discovery in creditors' actions is also expressly preserved (*N. Y. Code Civ. Pro.*, § 1871), but by oral examination (§ 1871).]

FORMS.

(1321.) Affidavit to obtain examination of adverse party before trial.

(1322-1329.) Statements of cause of action and defense, materiality and necessity, suitable to be inserted in foregoing Form.

(1330.) Order that party, or officer of corporation-party, submit to examination before trial.

(1331-1333.) Statements suitable to be inserted in foregoing Form.

(1334.) Subpoena to non-resident or-

dered to appear for examination before trial.

(1335.) Subpoena *duces tecum*, where non-resident is required to produce documents.

(1336.) Order that a party under examination show cause why he should not produce books referred to by him.

(1337.) Order absolute thereon.

(1338.) Deposition on examination before trial.

(1339-1344.) Statements suitable to be inserted in foregoing Form.

Form No. 1321.

Affidavit to obtain examination of adverse party before trial.

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is [the attorney² for] the plaintiff³ [*or, defendant*] above named [*if otherwise, state relation to the cause*].

II. That this action was commenced by the service of summons and complaint on _____, on the _____ day of _____,

¹ This proceeding applies in surrogate's courts. *N. Y. Code Civ. Pro.*, § 2538, except where § 2539 precludes.

For proceedings to examine before suit brought, see Volume I, p. 536. To ascertain unknown or additional defendants, Volume I, p. 684. To enable applicant to plead, p. 419 of this Volume. For examination in creditor's action, pp. 153-155, and 670. For other examinations, see p. 649, note.

² The attorney may make the affidavit. *Corbett v. De Comeau*, 4 *Abb. N. C.*, 252, rev'd on another point in 5 *id.*, 169; *Hale v. Rogers*, 22 *Hun*, 19.

³ Or one of the plaintiffs. An affidavit by one of several united in interest and pleading together, is sufficient.

18 , and that issue¹ was joined therein on the day of , 18 , by the service of the defendant's answer [*or otherwise show issue in a condition to be tried*].

III. [*As in paragraph II, Form 958, p. 428.*]

IV. That this action is brought [*here state the nature of the action and the substance of the judgment demanded therein. See Forms 1322-1329 (below)*].

V. That the defense in this action is [*stating its nature. See Forms 1323-1329 (below)*].

VI. That the testimony of the above-named party [*or, if an officer or director of a corporation:—that—(naming him)—is an officer,*² to wit—(*designating office*)—of the corporation above named, and his testimony] is material and necessary³ [*specifying in what respects it is material, as in Forms 1322-1329 (below)*].

VII. That the said [*name*], whose examination is desired, is now residing [*or, sojourning—or, regularly transacting business*] at [*stating place; and if a town or city, the street and number; and if a resident of the State, but not of the county where the examination is sought, add*], and there has an office for the regular transaction of business in person. [*If a non resident, and leave is desired to serve the order in any other county than that where it is to require him to attend for examination, add reason. N. Y. Code Civ. Pro., § 886.*]

[*If the examinee is a convict, in jail, state it. N. Y. Code Civ. Pro., § 877, and see Volume I, p. 539.*]

[VIII,—and to the end, as in Form 958, p. 429.]

STATEMENTS OF CAUSE OF ACTION AND DEFENSE, MATERIALITY AND NECESSITY SUITABLE TO BE INSERTED IN THE FOREGOING FORMS.

1322. *Action against broker for an accounting.*⁴—That this action is brought to recover damages [in the sum of dollars] sustained by the plaintiff, by reason of the misconduct and breach of duty of the defendant,

¹ An application for the purpose of preparing for trial is not allowed before issue.

² Officers and directors of a corporation may be thus examined, but not servants, agents or employees. *Reichman v. Manhattan Co.*, 26 *Hun*, 433.

³ *N. Y. Gen. Rules, No. 83, of 1888.* The affidavit must show the ma-

teriality of the witness either to the knowledge of deponent, or it must show, if made on information, the sources of information upon which deponent bases the allegation of the materiality. *Hale v. Rogers*, 22 *Hun*, 19 (holding so in case of an affidavit made by attorney).

⁴ From *Smith v. McDonald*, 1 *Abb. N. C.*, 350.

while acting as factor for plaintiff, in the sale or disposition at _____, in the year _____, of linen and cotton embroidered handkerchiefs and laces, which were of the value of over _____ dollars, consigned by plaintiff to defendant, as factor, for sale.

Plaintiff charges that the defendant did not sell the said goods in a proper manner and according to the usage of merchants, and with a proper exercise of care, discretion and diligence, and in good faith, but that he acted in bad faith, contrary to usage, and sacrificed said goods.

That an examination of the defendant Y. Z., and his books and papers, is material and necessary to enable the plaintiff to prove that the defendant has acted and conducted the said business in the manner aforesaid, and to learn the names of persons concerned in the sale of the plaintiff's goods, and the method employed in the disposition of said goods, and the character of the sales, all of which are at present unknown to the deponent. [*State all the details fully.*]

1323. *In action against stockbroker by customer.—Defense and necessity.*¹—The testimony of the plaintiff, T. A. H., is material and necessary for the defendants and for the defense of this action, and the prosecution of the defendants' counterclaim, for the following reasons: The complaint in this action alleges in the _____ and _____ paragraphs thereof, "that defendants never demanded of plaintiff that he should deposit any collateral security or margin, nor was there at any time any suggestion made or notice given to plaintiff by said defendants that said collateral security was desired or required by defendants before the alleged sale of stocks as hereinafter mentioned;" and also that on and between the _____ and _____ days of _____, 18____, the defendants, without notifying plaintiff of the time and place of sale, sold, or pretended to sell, the said stocks secretly. The answer denies that the said stocks were sold without notifying the plaintiff, or that they were sold secretly, and alleges, in paragraph _____ thereof, that between the _____ and _____ days of _____, 18____, the defendants made repeated demands in writing of the plaintiff for margin, and that on or about the _____ day of _____, 18____, the defendants sent to the plaintiff written notice that if such margin was not sooner furnished they would sell his stocks at a place and time in said notice mentioned. During part of the time between the _____ and _____ days of _____, 18____, the plaintiff was not in _____, but was, as I am informed and believe, at _____. The notices above referred to were mainly sent by telegraph, and I desire and expect to prove by the plaintiff that he did receive some or all of the notices so sent to him, and when and where he received such notices.

The answer further alleges that on the _____ day of _____, 18____, notice of the said sales of stock or some part thereof in writing was delivered to the plaintiff, but that he did not on that or the succeeding day, or until late in the afternoon of the _____ day of _____, make any claim whatever that the sale of the said stocks had been wrongful, nor did he disavow or repudiate the said sales, but acquiesced in and ratified the same. The defendants desire and expect to prove by the plaintiff the fact of the receipt of the said notice and the time at which it was received, and other facts relative thereto, which will also relate to and be material upon the amount of damages to be recovered by the plaintiff.

The answer further alleges that the said sales of stock were in accordance with the custom of brokers and dealers in stocks in the city of _____, which customs were well known to the plaintiff, and were assented to by him. I desire to prove by the plaintiff's testimony his knowledge of and assent to such customs.

The agreement between the parties is differently set forth in the complaint and in the answer. The said agreement was verbal, and I desire to prove by the plaintiff's testimony the facts relative to the said agreement.

¹ Sustained in *Hardy v. Peters*, 30 *Hun*, 79.

1324. *In action for negligence:—necessity and materiality.*¹—Plaintiff alleges in her complaint that the defendant was, at the time she received said injuries, the proprietor of the Mill in , and defendant in his answer denies the allegation, and deponent wishes to examine defendant to prove what interest defendant has in said Mill, and to ascertain whether said Mill is a corporation or a copartnership, and deems it necessary so to do in advance of trial of this action, for the purpose of obtaining admissions of said facts in issue, and to dispense with the necessity of procuring witnesses to establish facts which may be admitted by the plaintiff on such examination. That all the facts above alleged are within the personal knowledge of defendant.

1325. *Action for physical injuries,—necessity and materiality.*²—That in order to properly prepare for the trial of this action, and to conduct the defense thereof, it is necessary and material for the defendant to have the examination of the plaintiff A. B., because it is impossible to prove in any other way what injuries have in fact been sustained by him, or what his physical condition is at this time, and as this defendant is informed and believes the alleged injuries sustained by the plaintiff are much less severe than as set forth in the complaint, and that the immediate and remote effects thereof are exaggerated therein.

1326. *In action for libel.*—That this action is brought to recover alleged damages sustained by the plaintiff as a proprietor, owner, manufacturer and vender of an alleged remedy and medicine for certain diseases, and arises out of the publication of certain matter by the defendants, as proprietors of a newspaper called the , published in , and which said matter is alleged on the part of said plaintiff to have been libelous and defamatory.

That the defense is, in part, a justification of the facts which the said defendants published of and concerning the plaintiff, and which facts are charged as libelous; and in part, by way of mitigation, certain other facts to be established on the trial of the aforesaid cause, if any such trial should be had, material and necessary to the defendants as public journalists. [*Stating defense fully.*] That in order to protect the rights of himself and his co-defendants, it is necessary to examine the plaintiff and take his deposition upon the several matters set forth in the plaintiff's complaint; and that, without so doing, defendant cannot, nor can his co-defendants, safely proceed to trial. That the medicines which the plaintiff vends are so much under the control of the plaintiff that the defendant cannot proceed to trial without the benefit of said plaintiff's testimony.

1327. *Creditors' action for conspiracy to prefer.*³—That this action is a judgment-creditors' suit, to set aside a general assignment by M. M. to L. L. as fraudulent and void; that the complaint herein sets forth: "That on

¹ Sustained in *Sweeney v. Sturgis*, 24 Hun, 162. It is safer to state something more than intent to prove "admissions."

² Sustained in *Harrold v. N. Y. El. R. R. Co.*, 21 Hun, 268 (where an order was modified by thus allowing the presence of the attending and other physicians at the time of the examination, whose judgment should control the referee as to the extent of the examination, in order to prevent the strength of the examinee from being overtaxed).

That the court has no power to compel a party to submit to an examination of his person by physicians, see *Neuman v. Third Av. R. R. Co.*, 50 Super. Ct. (J. & S.), 412; s. p., *Williams v. Phillips*, 1 Month. L. Bul., 62. To the contrary, see *Shaw v. Van Rensselaer*, *Daily Reg.*, Dec. 20, 1880; *Reeve v. Prospect P. & C.*, R. R. Co., 1 Month. L. Bul., 91. See cases collected in *Abb. Jury Tr. Brief*, p. 71.

³ Sustained in *Tenney v. Mautner*, 1 Civ. Pro. R. (McCarty), 64.

, 18 , plaintiffs recovered a judgment in the supreme court of this State against the defendant M. M. for dollars.

That on , 18 , said M. executed a general assignment of all his property to defendant L.

The defendants [*naming which*] were made preferred creditors of defendant M. M., to the amount of dollars, whereas they were not creditors of said M. M. at all, but conspired with him and defendant L. to pretend that they were.

That said general assignment of M. M. was made with the intent to hinder, delay and defraud the plaintiffs and prevent them from collecting their just debt; that plaintiffs had issued execution, which has been returned unsatisfied.

Plaintiffs demand judgment that said assignments be adjudged fraudulent and void as against the plaintiffs; that said L. be decreed to pay them the amount of their judgment, with interest and costs, out of the assets in his hands; or that a receiver be appointed by the court to take possession of said assets, and out of them pay plaintiffs the amount of their judgment, with interest and costs, with other relief, and in the meantime, the defendant L. may be enjoined from distributing or disposing of the assets in his hands as assignee.

That each of said defendants [*naming which*], has served a separate answer upon plaintiffs' attorneys, denying that said general assignment of defendant M. M. was made with intent to hinder, delay and defraud said M. M.'s creditors, or that the defendants [*naming them*], were not creditors of defendant M. M.

That defendant M. M., as maker of said assignment, and the other defendants [*naming which*], as pretended creditors of said M. M. and the parties who by such assignment are made preferred creditors, have peculiar knowledge of the facts involved in the above issues, and that the testimony concerning these facts of the parties to be examined, is material and necessary to plaintiffs in the prosecution of this action; and deponent further says that defendants [*naming which*], claim that they were and are creditors of defendant M. M., and that they held his notes; that no entries indicating any indebtedness to them on the part of defendant M. M. appear upon any of his books, and that there are other suspicious circumstances connected with the assignment [*state them fully—or*, which will appear more fully from the affidavit of J. P. R., hereto annexed].

1938. *Fraudulent conspiracy by trustees of the plaintiff corporation in inducing transfer of assets without consideration.*¹—[*After stating substance of the issues, and alleging deponent's inquiry into the circumstances and for means of evidence of plaintiff's knowledge of the facts; continuing as follows:*—From such examination and inquiry I am convinced and have advised the plaintiff that it will be material and necessary to the plaintiff to prove, and it can and will prove, on said trial, that the defendant S. received the instruments purporting to convey said patents, or some right, title, or interest in, to, or under the same, without any consideration whatever, and that the defendant S. received said instruments with knowledge or notice of the prior claim and right of the plaintiff to said patents then existing, and of the concoction, progress and consummation of the fraud and conspiracy against the plaintiff by the defendants H., D. and A., set forth in said complaint.

From such examination and inquiry I have learned, and have advised the plaintiff, that the transactions leading to and comprising the receipt by the defendant S. of said instruments purporting to convey to him the said pat-

¹ From Mechanical Orguinette Co. v. Haynes, 19 *Weekly Dig.*, 535, where it was held the order was proper in such a case, subject to the right of the

party to refuse to answer any question which must of necessity tend to establish criminality.

ents, (which said transactions will, if disclosed, prove the absence of consideration for such conveyance and the knowledge in or notice to the defendant S. of the plaintiff's claim and right aforesaid) were carried on and continued throughout as the personal, private and secret transactions of the defendants S. and A.; that they are the only witnesses cognizant of said transactions, and of the matters aforesaid to be proven by said transactions; that no other witnesses nor other means of evidence, except the defendants A. and S., are available to, or known to the plaintiff, or its officers or agents, to prove said transactions, and that the testimony of the defendants S. and A. is therefore material and necessary for the plaintiff, and for its prosecution of this action.

1329. *Action for malicious prosecution.*¹—That the nature of this action is as follows, viz.: Damages to the plaintiff by reason of the defendants maliciously causing an action to be brought against the plaintiff in this action and others, and falsely and maliciously charging therein that certain statements made by the plaintiff in this action and his former partners concerning their financial condition upon obtaining a composition with their creditors, were false and known to be false. That said action was brought by an assignee of the pretended cause of action therein to recover balance of debt after paying composition to defendants, as creditors of plaintiff's late firm of B., B. & C., and plaintiff herein claims that the same was done maliciously, and that defendants caused false and defamatory words to be inserted in the complaint as follows [*quotation*].

That the answer herein denies each and every allegation of the complaint of the acts set forth in the complaint being done in bad faith, or with intent to injure the plaintiff, or that it was brought in the name of said A. to avoid liability for costs, or that they controlled said action, or that the plaintiff was damaged.

That the plaintiff demands a money judgment to the amount of \$.

That plaintiff desires to examine the defendant S. J. C. before trial, and that his testimony is material and necessary for the prosecution of this action by the plaintiff to prove that the action started by A. was really started by the defendants in his name, and without any reason to believe that the plaintiff and his said late firm had been guilty of any fraud in their composition proceedings, and without any intent to injure the plaintiff. That it is the intention of the plaintiff to use the testimony so taken on the trial of this action.

Form No. 1330.

Order that party, or officer of corporation-party, submit to examination before trial.²

[*Title of court and cause.*³]

On reading the annexed affidavit of A. B. [plaintiff herein],

¹ Sustained at general term in an unreported case.

² *N. Y. Code Civ. Pro.*, § 873. The statute is not imperative, although its language is "must;" but the practice is to grant the order on a proper affidavit, and exercise the discretion on a motion to vacate.

³ This is not a court order. Vol.

I, p. 121, note 3. It may be made by any judge of the court, in any part of the State. *Bank of Silver Creek v. Browning*, 16 *Abb. Pr.*, 272, unless the restriction as to the place of return prevents. Within the same restriction it may be made by a county judge. *N. Y. Code Civ. Pro.*, § 873; (s. F., *Whereatt v. Ellis*, 28 *Northwest-*

verified the day of , 18 , [and on the pleadings herein], and on motion of A. T., counsel for A. B. [plaintiff] above named :

ORDERED, that Y. Z. above named [*or*, Y. Z., the president of the Company above named], be examined [as an adverse party herein] and his deposition be taken, pursuant to section 873 of the Code of Civil Procedure, and that for that purpose he appear before me, at chambers, at the city hall [*or*, at the county court house], in the city of ¹ [*or*, before J. K., a referee hereby appointed to take said deposition, at his office—*designating it*], on the day of , at o'clock in the noon,² and submit to examination concerning the matters relevant to the issues in this action [*or*, concerning the matters stated in said affidavit. *For other directions, see Forms 1331 to 1333 (below)*].

Let a copy of this order be served on said , within the State, on or before the day of [*not more than twenty, nor less than five, days before return*].

[*Or*, And it appearing to me by the special circumstances shown in said affidavit, that it is necessary to allow more than twenty days—*or*, less than five days—service of this order; let a copy hereof, and of said affidavit, be served on said M. N. and Y. Z., within the State, at any time on or before the day of , 18 .]

[*In either case, if the party is a non-resident, may add, if reasons are stated in the affidavit: Service of this order in the county of shall be sufficient.*³]

[*Stay, if granted, may be as in next Article.*]

[*Date.*] [*Signature of judge with initials of title.*]

[*Serve on the examinee, personally, with subpoena, and pay witness fees;⁴ also serve the order on the attorneys for each party other than the applicant.*]

[*File original within ten days after deposition taken and certified. N. Y. Code Civ. Pro., § 880.*⁵]

ern Rep., 630). Or a special county judge. *Kinney v. Roberts*, 17 *Weekly Dig.*, 75.

This is not so broad as the general rule as to *ex parte* applications on other motions. Vol. I, pp. 181, 183.

¹ In the county in which he resides, or where he has an office for the regular transaction of business in person; and, if a non-resident, where it is expected to serve him. *N. Y. Code Civ. Pro.*, § 886.

² If it is to be left to the referee to fix the time, say, at such time as the said referee may appoint, and get the referee to fix it in writing, and in the subpoena designate the time so fixed.

³ *N. Y. Code Civ. Pro.*, § 886.

⁴ At the rate prescribed in an action in the Supreme Court.

⁵ Or later by leave, *nunc pro tunc*. *Bank of Silver Creek v. Browning*, 16 *Abb. Pr.*, 272.

1331-1333. STATEMENTS SUITABLE TO BE INSERTED IN FOREGOING FORM.

1331. *Direction to produce books and papers.*¹—It is further ordered that the said J. F., as ² president, and the said T. K., as treasurer and secretary of the B. & S. A. R. R. Co., are severally directed and required to produce for inspection, at the time and place aforesaid, the cash books, ledgers, and minute books of the said railroad company.³

1332. *Limiting subject of examination.*—Said examination to be limited, until the further order of the court, to the following subjects [*stating them as thus* :]

1. The persons composing the original firm mentioned in said affidavit.
2. Their respective interests in said firm.
3. The names of the persons who may from time to time have succeeded to any of said interests respectively.

1333. *Presence of medical experts at examination of invalid.*—It is further ordered that J. D., M. D., the attending physician of said plaintiff, may be present at said examination; J. S. F., M. D., the physician heretofore employed by the defendant, and who has heretofore examined the plaintiff, may also be present at such examination; and D. A., M. D., of _____, may be also present, with said J. D.; and that such examination by said referee shall not proceed at any one time further than his physical and mental strength shall in their judgment warrant.⁴

1333a. *Direction as to prisoner.* See Vol. I, p. 543.]

1333b. *Direction on reference;* p. 666 of this vol.]

Form No. 1334.

Subpœna to non-resident ordered to appear for examination before trial.⁵

THE PEOPLE OF THE STATE OF NEW YORK, To [*name of examinee*], greeting :

We command you, that all and singular business and excuses

¹ Sustained in *Frothingham v. B. S. Ave. R. R. Co.*, 9 *Civ. Pro. R.* (*Browne*), 304. But the word "inspection" does not entitle the applicant to examine the documents as if he had an order for discovery. As to the extent to which counsel may go, see *Hutchinson v. Lawrence*, 29 *Hun*, 450; *aff'd* 3 *Civ. Pro. R.*, 98.

² Characterising him as such in the order is not essential.

³ Production of books of a foreign corporation, which are at the home office, should not be inconsiderately ordered. *Erwin v. O. R. & Co.*, 22 *Hun*, 566. Such an application may be denied, as to the books,—or wholly if only made for examination on the books,—upon the corporation stipulat-

ing to allow examination at its home office. An order to produce does not usually give discovery. *Dick v. Phillips*, 41 *Hun*, 603. Compare *Morrison v. McDonald*; 8 *Abb. N. C.*, 57 n.

An order to produce "the books and papers, if any such there are, mentioned in such affidavit, if the same are in your possession or under your control," is too uncertain. *Olney v. Hatcliffe*, 37 *Hun*, 286.

⁴ Sustained in *Harrold v. N. Y. El. R. R. Co.*, 21 *Hun*, 268.

⁵ Serve with a copy of the order. Perhaps not essential, but served for greater caution under *N. Y. Code Civ. Pro.*, § 886, last clause. Compare § 874.

being laid aside, you [and each of you] appear and attend before Hon. J. K., one of the justices of the court, at his chambers at the city hall [or, county court house, in the city] of , and county of [or, before R. F., Esq., of , a referee duly appointed by the order, a copy of which is herewith served upon you], on the day of , 18 , at o'clock in the noon, to be examined and give your deposition at the instance of the , in a certain action now pending in the court, between [yourself] as plaintiff [or, yourself and as plaintiffs], and Y. Z. as defendant [or, and Y. Z.—and others—as defendants], pursuant to the order, whereof a copy is herewith served on you,* and for a failure to attend† you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto, besides the punishment of having your pleading stricken out.¹

WITNESS [as in Form 1190, p. 586].

Form No. 1335.

Subpœna duces tecum, where non-resident is required to produce documents.

[Insert in last Form, at the *, a designation of the document, as in the order. Where, from the relation of the parties, the applicant has a right to all records of transactions between them, the documents may be described generally, as thus:]

And that you bring with you, and produce at the time and place aforesaid, your ledgers, cash books, sale books, and blotters, containing entries of goods sent or consigned to you by the plaintiff, or relating in any way to the same; also the auctioneer's returns of sales of any and all goods of the plaintiff so sold; also all letters of the plaintiff to you since the day of , 18 , and all other books, papers, memoranda, and writings relating to the business heretofore done between yourself and the plaintiff, or containing any entries relating to the same, now in your custody, and all other deeds, evidences, and writings which you have in your custody or power, concerning the premises.² And for a failure to comply herewith, [conclude as in last Form from the †].

¹ But take a separate order, on notice after disobedience. See 55 N. Y., 518.

² Adapted from form sustained in Smith v. Macdonald, 1 Abb. N. C., 350.

Form No. 1336.

Order that a party under examination show cause why he should not produce books referred to by him.¹

[*Title of the cause.*]

Upon the annexed affidavit of M. N., and upon all the papers and proceedings in this case, including the examination of the two defendants now in progress, let the defendant, W. X., show cause before me, one of the justices of this court, [at chambers thereof,] in the court house, in the city of _____, on the _____ day of _____ inst., at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why an order should not be made in this case, directing said defendant W. X. to make a discovery of his books of accounts containing the account mentioned in the affidavit hereto annexed, by producing the same in open court, and allowing the plaintiff's attorney and counsel to examine such parts thereof as may be necessary to enable them to obtain the information asked for in the questions put to the said W. X., on his examination aforesaid, and leave the said books in the custody of the clerk of this court for three days, or until, within that time, such inspection may be made, and to allow the plaintiff's attorneys to make a copy therefrom, of such portions thereof as are mentioned in the annexed affidavit.

Service of this order on or before the _____ day of _____ inst., 18____, shall be sufficient.

[*Date.*] [*Signature of judge and initials of title.*]

Form No. 1337.

Order absolute thereon.

At a special term [*&c., as in Form 493, p. 4*].

[*Title of cause.*]

Upon the affidavit of M. N., and upon the examination of the defendants herein, and upon all the papers and proceedings in this case, and on the order to show cause, heretofore granted, why the defendant W. X. should not produce, upon his examination before trial in this action, his books of account contain-

¹ This and the next Form are from 57, note, where the affidavit on which *Morrison v. McDonald*, 8 *Abb. N. C.*, this order was granted is given.

ing all record of the transactions between the plaintiff and W. X. and Y. Z., or between W. X. and Y. Z., and after hearing M. N. in favor of the motion, and O. P. in opposition thereto, it is

ORDERED, that the motion is granted unless the defendant, after examination of his books, furnishes the information called for in the questions already put to him upon his examination in this cause, and to the end that he may have an opportunity so to do, he is required, at the adjourned day of such examination, to fully answer all such questions as may be put to him concerning the contents of his books, and what is contained therein, and if he fail to do so, then the defendant W. X. is hereby ordered to deposit with the clerk of this court, on or before _____, at _____ o'clock, on that day, all his books of account containing any record whatever of the transactions between the said W. X. and Y. Z., relating to the purchase or sale or payment of the proceeds of the mining claim, and to leave the same so deposited until _____, the _____, and that in the meantime the attorneys and counsel of the plaintiff may have access to such books in the hands of such clerk, and may take transcripts thereof of such portions thereof as relate to the transactions aforesaid, and it is further ordered, that the defendant W. X. pay to the plaintiff _____ costs of this motion.

[Date.] [Signature of judge and initials of title.]

Form No. 1338.

Deposition on examination before trial.¹

Before Hon. J. K., Judge.²

[Title of court and cause.]

Deposition of A. B. [the plaintiff above named], taken under the annexed order, dated the _____ day of _____, 18____, at the instance of the [defendant] above named, pursuant to section 873 of the Code of Civil Procedure.

The said A. B., being duly sworn, and being examined by A. T., Esq., counsel for defendant, says:*

[Stating substance, or setting forth question and answer; noting also all proceedings, for various instances, see Forms 1339 to 1344 (below).]

[Signature of deponent.]

¹ Adapted from *Richards v. Judd*, 15 Abb. Pr., N. S., 184.

² If taken before referee, adapt accordingly. See Vol. I, p. 209.

Subscribed and sworn to before me this day of ,
18 .

[*Signature of judge and initials of title.*]

I HEREBY CERTIFY that, pursuant to the annexed order, granted by me herein, I took the annexed deposition of A. B. this day of [*or, on the days therein stated*], he having been by me first duly sworn, and the plaintiff appearing by A. T. and the defendant by T. Z.; and when completed said deposition was carefully read over to said A. B., and subscribed by him in my presence.

[*Date.*] [*Signature of judge and initials of title.*]

[*File order and affidavit on which it was granted, and proof of service (or the stipulation), with deposition, duly certified, within ten days.*¹]

[*Order striking out pleading for refusal to answer, see Form 1046, p. 480.*²]

1339-1344. STATEMENTS SUITABLE TO BE INSERTED IN FOREGOING FORM.

1339. *Adjournment.*]—Further examination adjourned to ,
18 , at , A. M.
On day , the plaintiff and his attorney appear and examination proceeds. [The last question asked on previous examination waived.]

1340. *Question and objection.*]—Q. Of what is Balsam No. 2, which you advertise as one of your Golden Remedies, composed?

Plaintiff, as advised by his counsel, refuses to answer the question, and counsel object to the question on the following grounds:

First. It is irrelevant, as it is immaterial as to what it is composed of.

Second. It is immaterial.

Third. It is a secret in our trade; it is our property, and the courts will recognize it as such.

Both parties went before Judge J. K. to argue the question on the above objections.

Judge J. K. directed the plaintiff to answer the question. Plaintiff's counsel excepted.

1341. *Identification of exhibit.*]—Q. Is this one of the circulars you send out with what you advertise as Dr. Richau's Golden Remedies?

A. Yes.

The defendant's attorney asks to have this circular marked and attached to the deposition of the witness.

Marked defendant's Exhibit "A" of this day.

Objected to on the ground of its being a privileged communication.

Judge J. K. admitted the circular, and directed it to be marked. Exceptions by plaintiff's attorney.

¹ See note 5 to Form 1330.

² See also Vol. I, p. 168, n. 7.

1342. *Objection taken and reserved.*—Q. Do you advertise Dr. Richau's Golden Elixir d'Amour, or Elixir of Love?

A. Yes, sir.

Q. Of what is it composed?

Objected to by plaintiff's counsel, as it comes under the same question and rulings as Balsam No. 2, and subject to the same objection then and there given.

Question not waived, but to be submitted to the judge.

1343. *Argument of objection.*—Attorneys for plaintiff and defendants appeared before Justice J. K. to argue question as to the propriety of the above question and motion. Adjourned by him to inst., at , A. M.

The motion herein was argued on this day of , 18 , and Mr. Justice ruled: "The plaintiff must answer the question which has been propounded."

1344. *Objection to sufficiency of answer.*—Q. Of what is Dr. Richau's Golden Elixir d'Amour, or Elixir of Love, composed?

A. It is a secret compound, and composed of various ingredients which possess great medicinal properties.

The defendants object to the answer, on the ground that it is evasive, and does not disclose the component parts of the Elixir d'Amour.

Q. Do you decline to give a further answer to this question, Doctor?

A. Witness refuses to answer.

Justice J. K.¹ rules that the [question is relevant; that the plaintiff is bound to answer it; that his] answer is evasive, and that the plaintiff must answer the question as to the several constituent parts. Exception taken to ruling by plaintiff's counsel. Plaintiff refuses to answer, under instructions of his counsel. [Justice J. K. orders the plaintiff's complaint herein stricken out, and dismissed, with costs.]

¹ If the refusal is before a referee he should certify it to the judge. *N. Y. Code Civ. Pro.*, § 880. And if application is to be made to the court or judge to fine or imprison for contempt of the referee's direction, take the referee's

affidavit, or other adequate affidavits, to the truth of his report or certificate.

Order for attachment for contempt in disregarding order to appear for examination before trial,—see Form 1202, on p. 592.

METHODS OF TAKING EVIDENCE

I.	II.	III.
Commission with written Interrogatories.	Letters rogatory.	Commission for oral examination.
Allowable in any court of record before issue, after issue of fact, or after default, or pending appeal, or motion for new trial.	Allowable in same cases as I, but only in principal courts, and if there is reason to believe that justice will be better promoted. Written interrogatories required.	Allowable only in principal courts and after issue of fact.
May go to any part of the world.	May go to any court of recognized jurisdiction in any part of the world.	May go to any part of the world.
Witness must be designated.	Witness usually designated.	Witness must be designated.
Commissioner must be named.	Foreign court will act or direct.	Commissioner must be named.
Time and place of examination fixed by commissioner.	Time and place of examination fixed by foreign court.	Time and place of examination fixed by notice by examining party.
Compulsion of witness depends on whether law of place of examination provides for commissioners acting under foreign commissions.	Compulsion of witness depends on the power of the foreign court.	Compulsion of witness depends on whether the law of the place of examination provides for commissioner acting under foreign commissions.

WITHOUT THE STATE (UNDER THE NEW YORK STATUTE).

IV.	V.	VI.
Open Commission.	Order to take Depositions.	Stipulation, etc.
Allowable only in principal courts and after issue of fact, and where no party is an infant or adjudicated incapable.	Allowable only in principal courts and after issue of fact, and where no party is an infant or adjudicated incapable.	A stipulation will serve to take the place of <i>affidavit and notice of motion</i>, in every case but application for letters rogatory; in that case not, for the court will not call on a foreign court to act, without proof, by affidavit, of a proper occasion.
May go only within U. S. and Canada.	May go only within U. S. and Canada.	
Witness need not be named. Such as are produced will be examined, except party cannot be, on his own behalf, without consent.	Witness same as in IV.	A stipulation will not dispense with an <i>order for a commission</i>, or a <i>judicial allowance of a commission</i>, except, perhaps, where the commission itself is agreed on and actually issued in terms by the stipulation. An executory stipulation, followed by a commission not otherwise authenticated, is not enough.
Commissioner must be named.	Commissioner need not be named, but may be agreed on, or fixed by notice by examining party, designating one of a class of magistrates mentioned in the statute.	
Time and place of examination fixed by notice by examining party, unless directed by the order.	Time and place of examination fixed by notice by examining party.	
Period for terminating examination may be limited by commission or order.	Period for terminating examination must be limited in the order.	
Compulsion of witness as in III.	Compulsion of witness as in III.	

ARTICLE VI.

DEPOSITIONS TAKEN WITHOUT THE STATE.

[For explanations see Table on pp. 680, 681.]

FORMS.

I. BY COMMISSION WITH WRITTEN INTERROGATORIES, OR FOR ORAL EXAMINATION.

(1345.) Affidavit to move for commission to take deposition of specified witness without the State (short Form).

(1346.) The same (full Form).

(1347-1351.) Statements of condition of cause suitable to be inserted in the foregoing Form.

(1352.) Notice of motion or order to show cause thereon.

(1353.) Order for a commission.

(1354-1360.) Statements of condition or terms suitable to be inserted in foregoing Form.

(1361.) Order to show cause why the witness should not be cross-examined orally.

(1362.) Order absolute thereon.

(1363.) Stipulation for issue of commission to take testimony without the State.

(1364.) Order for commission thereon.

(1365.) Interrogatories on commission; settled by consent.

(1366.) Notice of settlement of interrogatories or cross-interrogatories.

(1367.) Interrogatories on commission; settled by order.

(1368-1377.) Interrogatories suitable to be inserted in foregoing Form.

(1378.) Cross-interrogatories on commission.

(1379-1382.) Cross-interrogatories suitable to be inserted in foregoing Form.

(1382a.) Allowance of interrogatories.

(1383.) Commission to take testimony on interrogatories or oral examination.

(1384.) Direction to return commission.

(1385.) Notice of examination by oral questions.

(1386.) Oath of witness.

(1387.) Oath of interpreter.

(1388.) Deposition taken upon commission by interrogatories or oral examination.

(1389.) Certificate of execution of commission (short Form).

(1390.) The same (a fuller Form.)

(1391.) Indorsement by commissioner on exhibit.

(1392.) Certificate of execution to be indorsed where there is not room to indorse the return in full.

(1393.) Certificate of mailing; indorsed on the envelope.

(1394.) Affidavit of agent bringing deposition.

(1395.) Indorsement by clerk or judge of receipt of deposition.

(1396.) Notice of motion to suppress deposition.

(1397-1406.) Statements suitable to be inserted in foregoing Form.

(1407.) Order suppressing deposition.

II. OPEN COMMISSION (WITNESSES NOT NAMED).

(1408.) Affidavit to move for open commission or an order to take depositions of witnesses produced by either party.

(1409.) Notice of motion or order to show cause for open commission or order to take deposition.

(1410.) Order for open commission.

(1410a.) Open commission.

III. ORDER TO TAKE DEPOSITIONS.

(1411.) Order to take deposition of witness to be produced without the State, before a person agreed on, or a judge, &c.

(1412.) Notice of taking deposition.

I. BY COMMISSION WITH WRITTEN INTERROGATORIES, OR
FOR ORAL EXAMINATION.

Form No. 1345.

Affidavit to move for commission to take deposition of specified witness without the State (short Form, where contest, except perhaps on the interrogatories, will not be made).¹

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says :

I. That he is the [plaintiff] in this action [*or otherwise state relation to the cause*].

II. [*If in supreme court:*] That the place of trial named in the summons and complaint herein, is the county of .

III. That issue of fact was joined herein [on the day of , 18], and has not been tried.

IV. That M. N., who resides at No. street, in , in the State of , is a witness whose testimony is material for the [plaintiff].

V. [*As V, in next Form.*]

[*If stay or order to show cause is asked, allege as in VIII, IX or X, in next Form.*]

[*Jurat.*]

[*Signature.*]

Form No. 1346.

Affidavit to move for commission to take depositions of specified witness without the State² (full Form).

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says :

I. That he is the [plaintiff]³ in this action [*or otherwise state relation to the cause*].

¹ For notes and explanation, see next Form.

² *N. Y. Code Civ. Pro.*, § 888, &c.
The application should be made as early as practicable. *Rathbun v. Ingersoll*, 34 *Super. Ct. (J. & S.)*, 211.

³ This affidavit may be made by any person acquainted with the facts, if no stay of proceedings is desired (*Demar v. Van Zandt*, 2 *Johns. Cas.*, 69), but if otherwise, it will be better that the affidavit should be made by

II. That this action is brought to recover [*state gist of cause of action; see Form 877, p. 359, of this Volume, and Volume I, p. 594.*]

III. [*Here state condition of cause, justifying order for commission; see Forms 1347-1351 (below).*]

IV. That M. N.,¹ who resides at No. _____ street, in _____, in the State [*or, Republic*] of _____, is a material witness for deponent [*or, for the* _____] upon such inquest [*or, reference—or, new trial—or, trial*] upon said question of _____.
 [*If desired to state facts proving necessity, see Forms in Examination before Trial, p. 608, &c., and Discovery, p. 659, for mode.*]
 [*If the commission is to issue from one of the principal courts, to a foreign country, and the witness does not understand the English language, may say:*² That the said M. N. does not understand the English language, as this deponent is informed and believes—*giving source of information—but he does understand and speak the* _____ language.]

V. That this deponent has fully and fairly stated to his said counsel the facts which he expects to prove by said witness;³ that said witness is a material⁴ and necessary

the party, or an excuse given for its not being so made. *Eaton v. North*, 7 Barb., 631 (holding non-residence of party within the county where the judge resided is an excuse for its being made by attorney).

Or, if by an agent having conduct of the subject-matter of the suit, and direction of the suit itself, it may be made without stating an excuse why the party did not make it. *Murray v. Kirkpatrick*, 1 Cow., 210.

In the absence of the party it may be made by counsel, and on information and belief. *Deshay v. Persse*, 9 Abb. Pr., 289, note.

¹ The deposition of a party may be taken. *N. Y. Code Civ. Pro.*, § 887.

But where it appeared that plaintiff was a fugitive from justice, his application to take his testimony on commission was refused. *McMonagle v. Conkey*, 14 Hun, 326.

The deposition of an insane witness may be taken. *Hand v. Burrows*, 23 Hun, 330.

² Authorized by *N. Y. Code Civ. Pro.*, § 912.

³ This allegation is necessary. *Seymour v. Strong*, 19 Wend., 98.

⁴ The materiality of the witness (see *Eaton v. North*, 7 Barb., 631), and the advice of counsel as to the same (*Lansing v. Mickles*, 1 How. Pr., 248), must be sworn to, unless the affidavit is made by the counsel for the applicant, in which case the averment of advice may be omitted. *Beall v. Dey*, 7 Wend., 513. See *Eaton v. North*, 7 Barb., 631.

Under the New York statute (*Code Civ. Pro.*, § 888, &c.), to authorize the court to grant a commission, it must appear by affidavit that the testimony is material. It is not essential for the moving papers to set forth evidence substantiating the allegations of materiality, for the present statute is mandatory, in form, at least, saying that the judge must grant the order upon satisfactory proof of the facts authorizing it, in cases other than applications in anticipation of new trial; but this is the safer course in all cases where there is no consent. *Cadmus v. Oakley*, 2 Dem., 298; *Eaton v. North*, 7 Barb., 631; *Walker v. Spencer*, 1 Month. L. Bul., 45; *In re Voorhis*, 5 Civ. Pro. R. (Browne), 444.

witness for the deponent for his [defense] on the trial of said action, as he is advised by his said counsel after such statement, and verily believes [and that, without his testimony,¹ the deponent cannot safely proceed to the trial of the cause, as he is also advised by his said counsel, after such statement, and verily believes].

VI. That, as deponent is informed and believes, said M. N. [witness] is not within the State,² but is now at , in the State of [or in *N. Y. city court*: is now at , in the county of , in this State]; and that the source of deponent's information and the grounds of this belief are [stating them, for instance:] a letter which he received from said M. N. on last, dated at , and saying [*&c.*].

[Where application is before issue, add.³] and there is reason to apprehend that before issue is joined, and an application for a commission can thereafter be made, said M. N. will die [or, become unable to give his testimony—or, will remove, so that his testimony cannot be taken—adding particulars substantiating this allegation, as in Form No. 1416].

VII. That [the adverse party] resides at , and his attorney in this action is A. T., Esq., who resides at in the of , in this State, and whose office address is .

[Oath to diligence by either party, asking stay:] VIII. That the time appointed for holding the next circuit in the county of , in which this action is triable, is the day of , 18 ; and that due diligence has been used by deponent and his said counsel and attorney in preparing this motion for the earliest practicable day after issue joined as aforesaid, and that this motion could not be earlier made by reason of [stating excuse for delay, if any].

[Oath to merits where defendant asks stay:⁴] IX. That this deponent has fully and fairly stated the case to T. Z., his coun-

In *Henry v. Henry*, 4 *Dem.*, 253, it was held that the moving party is bound to disclose what facts he intends to prove when the opposing party makes it appear that the proposed witness could not probably give any material testimony.

¹ This allegation is not essential. *Brackett v. Dudley*, 1 *Cov.*, 209.

² It is not necessary to allege that the proposed witness is a non-resident; absence from the State is sufficient

ground for the order. *N. Y. Code Civ. Pro.*, § 887.

³ *Id.*, § 888, subd. 4.

⁴ An affidavit of merits is necessary only when the party asks for a stay of proceedings until the return of the commission. *Warner v. Harvey*, 9 *Wend.*, 444; *s. p.*, *Franklin v. U. S. Ins. Co.*, 2 *Johns. Cas.*, 285; *Meech v. Calkins*, 4 *Hill*, 534; *Brisban v. Hoyt*, 1 *Wend.*, 27.

sel, who resides at No. _____ street, in the city of _____, and that he has a good and substantial defense on the merits to the action [or, proceeding], as he is advised by his said counsel after said statement, and verily believes to be true.

X. [*If an order to show cause is asked, state as to previous application and the reason for not giving the usual notice, as in Form 489, p. 2.*]

[*Jurat.*]

[*Signature.*]

STATEMENTS OF CONDITION OF CAUSE SUITABLE TO BE INSERTED IN FOREGOING FORM.

1347. *To assess damages after default.*¹—III. That the summons [and complaint] herein were duly served on the defendant personally within the State [or, by publication—or, personally without the State—pursuant to an order herein, dated, &c.], as appears by the annexed affidavit of C. D.; and the defendant's time to plead expired on the _____ day of _____, 18____; that he has made default in pleading; that he has [not] appeared herein, and has [not] demanded notice of the execution of any reference or writ of inquiry herein;² all of which more fully appears by the annexed affidavit of C. D.; and that [*here state briefly the proceedings for the inquest, &c.*].

1348. *After final judgment, to carry it into effect.*³—III. That on the day of _____, 18____, final judgment herein was entered, and the judgment-roll filed in the office of the clerk of this court [or, of the clerk of the county of _____], by which judgment it was, among other things [*here state briefly the proceedings requiring the testimony*].⁴

1349. *In anticipation of desired new trial.*⁵—III. That on the _____ day of _____, 18____ [after a trial of this action before a referee, and upon his report—or otherwise, as the case may be], final judgment was rendered herein in favor of the _____ against the _____, for _____, and thereafter said _____ appealed therefrom to _____ [or, moved at _____, for a new trial upon—&c., *briefly indicating grounds*]; and that said appeal [or, motion] is now pending and undetermined; and that, if a new trial should be awarded, the question whether [*stating it*] will be among the issues which deponent will desire to maintain.

1350. *Before issue, witness being a transient person, or sick, &c.*⁶—III. That on the _____ day of _____, 18____, the summons and complaint herein were duly

¹ Authorized by *N. Y. Code Civ. Pro.*, § 888, subd. 1.

² *Id.*, § 1219, subd. 2.

³ *Id.*, § 888, subd. 2. Not allowed on motion by one not a party—as a purchaser seeking to be relieved. *Crane v. Evans*, 18 *Abb. N. C.*, 444.

⁴ A commission will not issue to take the deposition of witnesses for use in supplementary proceedings. *Graham v. Colburn*, 6 *Duer*, 678; 14 *How. Pr.*, 52; *Morrell v. Hey*, 15 *Abb. Pr.*, 430; 24 *How. Pr.*, 48; s. p., *Matter of an Attorney*, 83 *N. Y.*, 164.

⁵ Authorized by *N. Y. Code Civ. Pro.*, § 888, subd. 3.

⁶ *Id.*, subd. 4. When issue is joined as to one of several defendants, a commission may be issued to take testimony out of the State, although issue is not joined as to all the defendants. *Treadwell v. Pomeroy*, 2 *Supm. Ct. (T. & C.)*, 470.

If the action is interpleader, or the issues are between co defendants, indicate that the testimony is material to issues between the parties between whom it is used. *Kemp v. Dickinson*, 22 *Hun*, 593 (interpleader).

served on the defendant personally, within the State [or, by publication—or, personally, without the State—pursuant to an order herein, dated, &c.], as appears by the annexed affidavit of C. D.; and that issue has not been joined, and defendant's time to plead will not expire until the day of , 18 . [That defendant has not appeared herein.]

1351. *After issue joined.*¹—III. That on the day of last, issue herein was joined by the service [on plaintiff, of defendant's answer to plaintiff's complaint]; and that among the issues are payment and the Statute of Limitations [or otherwise; see Forms Nos. 1313 and 1323, &c.].

Form No. 1352.

Notice of motion on order to show cause for commission thereon.²

[As in Form 488, p. 1, of this Volume (or if order to show cause, as in Form 491, p. 3), substituting for the italic matter between the ‡ and ¶ the following:] that a commission be granted in this action, directed to C. C.,³ Esq., of , counsellor at law [or, one or more other competent persons therein named], * for the examination on oath of M. N., of , as a witness herein, on behalf of the plaintiff [or, the defendant], upon interrogatories to be annexed [in which defendant will be at liberty to join—and that the trial of this action be stayed until the return of such commission].

[Or if after an issue of fact has been joined, it is desired to examine specified witnesses wholly or partly upon oral questions, may say, continuing from the * above: ⁴ for the examination of M. N. as a witness herein on behalf of the—plaintiff—upon oral questions—or, upon the written interrogatories hereto annexed, and upon such oral questions at said examination as

¹ Authorized by *N. Y. Code Civ. Pro.*, § 888, subd. 5.

² This application may be made to the court or a judge thereof, and if the action is in the Supreme Court, to a county judge of the county where the action is triable. *N. Y. Code Civ. Pro.*, § 889.

As to the county in which application must be made, see *N. Y. Code Civ. Pro.*, § 769; *Sturgess v. Weed*, 13 *How. Pr.*, 130; *Wells v. Jones*, 2 *Abb. Pr.*, 20, and Volume I, p. 121.

But if made pending appeal, or a motion for a new trial, it must be made to the court. *Id.*

Notice of the application must be given the adverse party unless he is in

default for want of an appearance. *Id.*

³ The moving party names the commissioner, unless cause is shown to the contrary, *Harris v. Wilson*, 2 *Wend.*, 627, except in divorce.

The adverse party may object to the commissioner named in the moving papers (*McLean v. Adams*, 45 *Hun.*, 189), but it should be by affidavit. *Biays v. Merrihew*, 3 *Johns.*, 251. The commission will not be granted until the commissioner is named. *Vanstophorst v. Maryland*, 2 *Dall.*, 401.

⁴ This form of examination is provided for by *N. Y. Code Civ. Pro.*, § 893.

the—plaintiff's—counsel may think proper—or, for the examination of M. N. on the written interrogatories hereto annexed, and O. P. upon oral questions, on behalf of the—plaintiff].

Form No. 1353.

Order for a commission.¹

[*Caption² and recitals as in Form 492 or 493, p. 4 of this Volume.*]

ORDERED, that a commission issue in this action, directed to C. C., Esq., of [counsellor-at-law], to examine under oath, * upon interrogatories to be annexed thereto, M. N., of [a witness on behalf of the [defendant]; [*here may, under N. Y. Statute, insert directions for return; but the former practice, and the better practice still, is to indorse them on the commission;*] that the [plaintiff] be at liberty to join in the said commission; and that the trial of this action be stayed³ until the return thereof † [and it is further ordered that dollars costs of this motion abide the event of the action⁴].

¹ This order may be adapted to the oral examination of some or all of the witnesses, wholly or partly, in accordance with *N. Y. Code Civ. Pro.*, § 893.

² May be made by the court or judge thereof, except where the application therefor is made pending an appeal or motion for a new trial, when it must be made by the court. *N. Y. Code Civ. Pro.*, § 888.

A referee has no power to issue a commission to examine a witness out of the State. *Rathbun v. Ingersoll*, 34 *Super. Ct. (J. & S.)*, 211 (*dictum*); *s. p.*, *Paddock v. Kirkham*, 102 *N. Y.*, 597.

The order should properly name the commissioners and the witnesses. See *Wright v. Jessup*, 3 *Duer*, 642. Though it is not irregular for the want of their names.

By *N. Y. Code Civ. Pro.*, § 892, unless the parties stipulate in writing, or the order granting the commission prescribes how it shall be returned, the judge must indorse upon the commission the proper direction for that purpose. Formerly the manner of return was to be fixed by the officer

settling the interrogatories. *Fleming v. Hollenback*, 7 *Barb.*, 271.

³ The order for a commission is not, *per se*, a stay of proceedings. *Maynard v. Chapin*, 7 *Wend.*, 520.

The court will usually stay the proceedings until the return of the commission. The granting a stay is in the discretion of the court or judge to whom the application is made; perhaps the court would review an order refusing to stay proceedings until the return of a commission. *Thatcher v. Bennett*, MS., 1 *Bliss Code*, 644.

A stay will not be refused upon affidavit that the witnesses named are incompetent, but the court will leave the question of competency to be determined at the trial. *Graves v. Delaplaine*, 11 *Johns.*, 200.

⁴ Provision is made for this order by *N. Y. Code Civ. Pro.*, § 912.

Before this enactment, in a case where the commissioner acted as interpreter, no special instructions in that particular having been given by either party, *held*, that the power was implied. *Leetch v. Atlantic, &c., Ins. Co.*, 4 *Daly*, 518. If party is to be examined, direct as to expenses. See *Delcomyn v. Chamberlain*, 37 *Super. Ct. (J. & S.)*, 359.

[For other clauses see Forms 1354 to 1360 (below).]

[If the commission is to issue from one of the principal courts to a foreign country, and the witness does not understand the English language, may say:] And it is further ordered, that the interrogatories and cross-interrogatories to be put to the said witness M. N. be framed in the English and also in the [French] languages; that only the interrogatories framed in the [French] language be put to the witness, and that his answers be taken, and the certificate thereto be made out in the same language. That A. B., the plaintiff herein, pay to the defendant Y. Z. the sum of dollars for the said Y. Z.'s expenses in procuring the said interrogatories on his behalf to be translated. Unless the interrogatories are settled by consent, they shall be settled by one of the justices of this court on [two] days' notice in both the English and [French] languages, and the expenses of an interpreter incidental to such settlement shall be paid by A. B., the plaintiff herein.

[Authentication as in Form 491, p. 3 of this Volume.]

[Enter this order even though made by a judge.¹ If it contains a stay, serve certified copy.]

1354-1360. STATEMENTS OF CONDITION OR TERMS SUITABLE TO BE INSERTED IN FOREGOING FORM.*

1354. *Costs.*—This order is granted on condition that the [moving party] pay to , or his attorney forthwith [or, within days²] dollars, costs of this action, before notice of trial, and \$10 costs of this motion; otherwise said motion is denied.

1355. *Examination to be limited.*—This motion is granted on condition that the [moving party], within days, file a specification of the particu-

¹ The order must be filed. *N. Y. Code Civ. Pro.*, § 890. And if not filed, the commission itself is rendered irregular. *Whitney v. Wyncoop*, 4 *Abb. Pr.*, 370.

N. Y. Code Civ. Pro., § 890, provides that "where the order is made by a judge out of court, it must be entered in the office of the clerk."

If a judge's order, it is subject to the control of the court. *Id.*, § 890.

² The court or judge may impose such terms as justice requires. *N. Y. Code Civ. Pro.*, § 889.

The court has no power to order a draft upon which the action is brought, to be delivered to the defendants for the purpose of being annexed to a commission to be inspected by defendants' witnesses residing out of the State. *Butler v. Lee*, 19 *How. Pr.*, 383.

But it may grant an order on condition that the party consent, or deny it unless the party consent. Vol. I, p. 258.

³ See Vol. I, p. 259.

lars which it is desired to prove [*here indicate as to what*], and that the commission and interrogatories be limited thereto.¹

1356. *Right to cross-examine.*—The [*adverse party*] shall have leave to cross-examine orally the said M. N. [*or, any witnesses produced by said [applicant], provided said [adverse party], within* days, stipulates to pay to said all the expenses of the commission attendant upon such cross-examination. In such case said [*applicant*] may subject any witness so cross-examined to an oral re-direct examination, said [*applicant*] to pay the expenses of such re-direct examination as well as of the examination on the original direct interrogatories.²

1357. *To speed the commission.*—This motion is granted upon condition that the [*applicant*] serve upon the adverse party the proposed interrogatories within days from the date of this order; and on the further condition that if the cross-interrogatories be served within days after service of the direct interrogatories, the commission be issued within days after service of the cross-interrogatories.

1358. *To speed the examination.*—This order is made upon condition that the [*applicant*] give to the [*adverse party*], within days after the issue of the commission, days' notice of the time and place of the examination of said witness; and that the said examination be continued and concluded without unnecessary interruption or delay.³

1359. *Leave reserved to apply for cross-commission.*—It is further ordered, that said [*adverse party*] shall have days, after notice of the return of said commission, to determine whether he desires to examine other witnesses, and to apply for leave to issue a commission for that purpose.

1360. *Limited stay. Substitute for stay in Form 1353, as thus:*—It is further ordered, that the trial of this action [*or, all proceedings on the part of* in this action] be and hereby are stayed for weeks only after the issuing of the commission, and that upon the return of said commission the cause resume its present place upon the calendar.

Form No. 1361.

Order to show cause why the witness should not be cross-examined orally.

[*Caption as in Form 492 or 493, p. 4 of this Volume.*]

On reading the affidavit of A. B., annexed:

ORDERED, that the defendants show cause why the witnesses named in the order for commission made in this action, on the day of , 18 , should not be orally cross-examined on the part of the plaintiff, and leave to so cross-examine be granted to the plaintiff; and why, unless the defendants con-

¹ Estate of Kendall, 2 Month. L. Bul., 97. For another form, see No. 1361.

² Smith v. Tallmadge, 3 Month. L. ³ Estate of Kendall (*above cited*).

sent to such oral examination, the order for commission should not be vacated; and why such further or other relief should not be granted to the plaintiff as may be just.

Service of this order, on or before the day of , shall be sufficient.

[Authentication as in Form 491, p. 3 of this Volume.]

Form No. 1362.

Order absolute thereon.¹

[Caption and recitals as in Form 492 or 493, p. 4 of this Volume.]

ORDERED, that the counsel for the respective parties, or either of them, be and they are hereby authorized and allowed to attend before the commissioners, upon the execution of the commission granted by order made in this action on the day of , 18 , and orally examine and cross-examine said witnesses, or either of them; such oral examination to be reduced to writing by the acting commissioner, and annexed to, and returned with, and as part of said commission. It is further ordered, that at least two days' previous notice, in writing, of the time and place of executing said commission, be served by the attorneys for the defendants on the plaintiff's attorney. It is further ordered, that in case the attorneys for the defendants, who moved for the commission, do not, within ten days after the service of a copy of this order, elect, and serve notice of such election on plaintiff's attorney, to permit the counsel for the plaintiff to examine said witnesses, and each of them, orally, as authorized by this order, and to comply with the terms and conditions hereof, then the order, made at special term, on the day of , 18 , granting a commission, be, and the same is, hereby vacated. The said order, made at special term, on the day of , 18 , is hereby modified in accordance with this order.

[Authentication as in Form 491, p. 3.]

¹ Supported by *Clayton v. Yarrington*, 16 *Abb. Pr.*, 273, note; and approved by *Anderson v. West*, 9 *Abb. Pr.*, N. S., 209. But in *Deshon v. Pockwood*, 16 *Abb. Pr.*, 272 n., a similar application was denied.

Form No. 1363.

Stipulation for issue of commission to take testimony without the State.¹

[*Title of court and cause.*]

It is hereby stipulated that a commission issue herein to C. C., Esq., of _____, counsellor-at-law, to examine on oath [*in case of a specified witness, continue as in Form 1353, from the * to the †; or, in case of an open commission, as in Form 1410, from the * to the †.*]

An order may be entered accordingly by either party without notice.

The interrogatories and cross-interrogatories to be administered shall be as follows [*stating them*].

[*Add directions as to execution and return.*]

[*Date.*]

[*Signatures of*],

Attorney for plaintiff.

Attorney for defendant.

[*File with clerk, and enter order thereon.*]

Form No. 1364.

Order for commission thereon.

[*Title of court and action.*]

On reading and filing the annexed consent of the attorneys for the parties hereto, dated the _____ day of _____, 18____, and on motion of A. T., attorney for [plaintiff]:

ORDERED, that commission issue to examine on oath [*continue as from the asterisk in Form 1353 or 1410*].

[*Date.*]

[*Signature and title of clerk.*]

¹ May take place of affidavit and notice of motion. *N. Y. Code Civ. Pro.*, § 908.

² *Ford v. Williams*, 24 *N. Y.*, 359, 366.

Entry of an order was said to be necessary to a commission issued on stipulation in *Mason & Hamlin Co. v. Pugsley*, 19 *Hun*, 282; but the court there put their decision in part on the ground that in that case there had been no stipulation.

In *Churchill v. Carter*, 15 *Hun*, 385, order was held unnecessary, and a stipulation that "the annexed commission do issue," was held a waiver of a seal; and that the omission of any allowance by the court, or signature of the clerk, was not ground for excluding it.

Another convenient form is to draw up the order in full and append a consent to its entry. Vol. I, p. 239.

Form No. 1365.

Interrogatories on commission; settled by consent.

[*Title of court and cause.*]

Interrogatories [and cross-interrogatories] agreed to be administered to M. N., a witness to be examined in this action, under the annexed commission.

FIRST INTERROGATORY [*and so on, as in Forms 1367-77*].

FIRST CROSS-INTERROGATORY [*and so on, as in Forms 1378-82*].

The above interrogatories [and cross-interrogatories] are agreed on, saving all just exceptions to the admissibility thereof, and of the answers thereto, as evidence in this cause [and cross-interrogatories are waived].

[*Date.*] [*Signature of*], Attorney for plaintiff.
 [*Signature of*], Attorney for defendant.

Form No. 1366.

Notice of settlement of interrogatories ¹ or cross-interrogatories.

[*Title of court and cause.*]

Please take notice, that the annexed interrogatories [*or, cross-interrogatories*] will be presented to the Hon. J. K.,² at his office, in the city of , on the day of , 18 , to be annexed to the commission allowed by order of the day of , 18 , herein.

[*Date.*] [*Signature and office address of*],
 [*Address*] To , Attorney for [*moving party*].
 Attorney for [*adverse party*].

[*Serve with proposed interrogatories, as in Forms 1367-77, at least four days before presentation of interrogatories, or with cross-interrogatories (Forms 1378-82) at least two days.*³]

¹ Necessary where they are not settled by consent. *N. Y. Code Civ. Pro.*, § 891.

As to principles of settlement, see *Uline v. N. Y. Central, &c. R. R. Co.*, 79 *N. Y.*, 175.

² The application must be made within the district in which the action is triable, or in a county adjoining that in which it is triable. *Erwin v. Voorhees*, 26 *Barb.*, 127 (holding that a deposition taken where the interroga-

tories were settled by a judge of a county other than an adjoining one, or one in the same district, was properly rejected at the trial).

See, also, *N. Y. Code Civ. Pro.*, § 769.

Even though the order for commission were made by the court, the settlement may be before a judge, unless the court or the judge asked to settle them otherwise direct.

³ Such notice and service is often

Form No. 1367.

Interrogatories on commission; settled by order.¹[*Title of court and cause.*]

Interrogatories to be administered to M. N., of _____, a witness to be examined, under the annexed commission, on behalf of the plaintiff [*or, defendant*], in the above-entitled cause.

FIRST. What is your name, age, occupation, and place of residence?

SECOND. Do you know the parties above named, or any of them? If yea, which of them, and how long have you known each of them?

THIRD. [*Here insert any questions appropriate to the cause,² see Forms 1368 to 1377 (below).*]

LASTLY. Do you know of any thing concerning the matters in question, that may tend to the benefit and advantage of the plaintiff [*or, defendant*]? If yea, declare the same fully and at large, as if you had been particularly interrogated concerning the same.³

[*Or in U. S. Court in equity.⁴*] Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.]

[*Annex documents to be identified, if any.*]

[*Signature and office address of,*
Attorney for [*moving party*].

dispensed with in case of cross-interrogatories.

¹ Serve on the adverse party with notice of settlement. See last Form.

If both parties join, each will serve on the other his interrogatories, and afterwards his cross-interrogatories.

² Subject to the power of the judge to preclude abuse, either party has a right to insert any question pertinent to the issue. *N. Y. Code Civ. Pro.*, § 892. Including cross-examination personal to the witness' character. *Uline v. N. Y. Central & Co., R. Co.*, 79 *N. Y.*, 175.

³ This interrogatory is proper (except in the United States court in equity, *see below*). *McCarty v. Edwards*, 24 *How. Pr.*, 236. And under

it the witness may testify to any facts pertinent to the issue, whether relating to matters partly brought out under the preceding interrogatories, or not. *Percival v. Hickey*, 18 *Johns.*, 257. And even matters to the detriment of the party moving the commission. *Van Ness v. Bush*, 14 *Abb. Pr.*, 33; s. c., 22 *How. Pr.*, 481.

Where it does not appear that the last general cross-interrogatory was put to and answered by the witness, the deposition cannot, in general, be read; otherwise if counsel were present. *Brown v. Kimball*, 25 *Wend.*, 259; *Kimball v. Davis*, 19 *id.*, 437. But the remedy now would be by motion to suppress.

⁴ *Rule No. 71, U. S. Court Rules in Equity, Jones' ed.*, p. 134.

1368-1377. INTERROGATORIES SUITABLE TO BE INSERTED IN FOREGOING FORM.

1368. *Additional witnesses to be asked same questions.*—Interrogatories to be addressed to and answered by C. G. J., Esq., J. H. R. N., Esq., and A. J. N., Esq., of Baltimore, Md., that is to say: Each of them are required to answer each interrogatory above indicated, to be answered by R. C., Esq.

[*Or thus:*] Repeat each and every of the foregoing questions, except that by the term "your firm," we refer to the firm of _____ instead of any firm in which the witness has or has had any actual, personal, joint, or separate interest.

1369. *Designation of witness whose name is unknown.*—Interrogatories to be addressed to and answered by Richard Roe, whose real name is unknown, but who is, in fact, the person having custody of the books, papers and entries of L. N. C.

1370. *Request for documents.*—Have you any books, papers, or entries of any kind belonging to, or which have belonged to, L. N. C., relating to his business within the last eight months? If yea, what books, papers, or entries have you, or where are they now? [*Or specify the one wanted.*]

Please produce the same before the commissioner to the end that copies may be made thereof, or of so much thereof as may be material.¹

1371. *Another form.*—If you have not already done so, please produce and annex to your deposition hereunder, any such letter of credit as above mentioned, and any and all drafts drawn thereunder, or in default of originals, please produce and annex copies thereof, and state why such originals are not produced and annexed, and whether such copies are true and correct copies of such originals.

If you have already produced and annexed such letter of credit, or such draft of, in response to any of the foregoing interrogatories, please refer to, and identify them in connection with your reply to this interrogatory, so as to distinguish them from any other such documents which may have been produced or annexed to your deposition hereunder.

1372. *Another form.*—Please look at the schedule hereto annexed, marked A, and purporting to be a _____, and state whether the documents therein mentioned, or any of them, and if so, which of them, are now in your possession or custody or under your control, either as liquidator of said bank or otherwise howsoever? Are there any of such documents which are not now in your possession or custody, or under your control? If so, state specifically which of said documents are not in your possession or custody, or under your control; and state specifically in respect to each of them, whether it was ever, and if so when and where and for how long a time, in your possession or custody, or under your control, and when and where, and how and to whom it passed out of your possession or custody, or beyond your control, and where and in whose possession or custody, or under whose control, according to the best of your knowledge, information or belief, the same now is; and what knowledge or information you have upon the subject, and when and where, and under what circumstances you last saw such document?

1373. *Request for contents.*—If any such communications were not in writing, or if you are unable to produce and annex the originals or copies of such affidavits, letters, or communications, state fully and particularly the contents or the substance thereof.

¹ See *Wright v. Cabot*, 89 N. Y., 570; *aff'd* 47 Super. Ct. (J. & S.), 229.

1374. *Search for originals.*—If in answer to the last preceding interrogatory you state that said contract was in writing, and you are not able to attach the same or a copy thereof to your answer thereto, state whether it was in duplicate or not, and whether you have made any efforts to find said writing or either of such duplicates, and if so, what; and with what result; and if said writing is lost or destroyed, state its substance.

1375. *Execution of a deed.*—Look at the deed [a copy¹ of which is] now produced and shown to you, marked A, and purporting to be executed by A. B. to C. D., on the _____ day of _____, 18 _____. Did you ever see it before? and if so, when and where, and under what circumstances?

In whose handwriting is the name of M. N. signed as subscribing witness?

When, where, and by whom, and in whose presence was said deed executed?

Did you sign the said deed as a subscribing witness? If so, when, where, and in whose presence?

Did you see the said deed delivered and accepted by any one? If so, by whom was it delivered, and by whom accepted, and when and where?

1376. *Solemnization of marriage.*²—If you have stated that you were the rector of _____ Church, in _____, in the State of _____, during either of those years last named, then be pleased to state, if during those years you were legally authorized to and did perform the marriage ceremony upon various individuals; during the years _____, did you ever perform the marriage ceremony in _____, at a hotel therein called _____, over persons who gave their names as S. C. W. D. and A. J. H., or names similar to these; did you ever marry, during these years, at said hotel or elsewhere, either or both of the parties in this action, under any name whatsoever; if yea, please state fully all of the particulars, and what you did?

Please state, if you know, who is authorized to perform the marriage ceremony in a legal manner in the State of _____, and in the city of _____; and, if you know, what are the requirements as to reporting and filing a record of the marriages legally performed, and whether you always and invariably followed the statute in this respect, and why did you do so?

1377. *Qualification of expert.*—If in answer to the foregoing interrogatory you state that you are an attorney and counselor-at-law or advocate, or engaged in the profession and practice of the law, state how long you have been such attorney, counselor, or advocate, or so engaged in the profession and practice of the law in the city of _____, or in the State of _____, and where?

State whether or not you know the law³ of _____ of the said State of _____, as it existed and was in force between the _____ day of _____, 18 _____, and the _____ day of _____, 18 _____, in regard to [&c.].

If in answer to the last interrogatory you state that you do know the law of the said State as it existed and was during the period above mentioned on the several subject-matters therein inquired of, please state whether or not the said law permitted [&c.].

¹ Documents to be identified by the witness, or copies of them, may be annexed to the interrogatories. *Commercial Bank v. Union Bank*, 11 *N. Y.*, 203. And it is not essential that the originals should be thus attached. *Ib.* Nor can either party be compelled to surrender an original document for this purpose. *Butler v. Lee*, 32 *Barb.*,

75; s. c., 19 *How. Pr.*, 383. Except, perhaps, in a case proper to make it a condition of allowing a commission. See note in 9 *Abb. N. C.*, 65.

² See note on proving marriage in 17 *Abb. N. C.*, 494.

³ If statute law is relied on prove it as such. See *N. Y. Code Civ. Pro.*, § 942.

Form No. 1378.

Cross-interrogatories on commission.¹

[As in Form 1358, inserting "Cross" before the word "Interrogatories."]

CROSS-INTERROGATORIES SUITABLE TO BE INSERTED IN FOREGOING FORM.

1379. *As to details.*—If you shall answer on your direct examination that you did [&c.], state exactly what you personally did in the matter? What was said by you and what was said to you by , and what was said and done in your presence [&c.].

1380. *As to sources of knowledge.*—If on your direct examination you have given any of the information called for by the interrogatories, or any one of them, state fully the grounds and source of your knowledge.

1381. *Execution of instrument.*—When did you first see the paper marked "A"? At whose request did you sign your name as a witness thereto? Where was that paper executed (if at all)? in what house, in what room, and at what time of day, and who were present in the room? Did you see M. N. write his name thereto? or did you only hear him, or some other person, say it was his signature, or words to that effect? What did the plaintiff say during the interview? Did he converse with M. N. on any subject, other than the execution of the paper, during the interview? and if so, on what subject, and what passed? How long did the interview last?

State who were present at the time, and also everything that was said by the plaintiff, or the said M. N., and all or any other persons, at that interview. Was any other paper executed by M. N., or the plaintiff, or any other person present at that time? Was any other subject conversed upon by the plaintiff, or the said M. N., at that interview? and if so, state what was said by each.

Where did you first see the paper marked "A"? Was it at the interview at which it was signed, or was it on a previous occasion? If on a previous occasion, state when, where, and under what circumstances.

1382. *Sanity of a testator.*—What was the condition of the mind of G. H. during his last illness, and what his capacity for transacting business during the last few days of his life? What his appearance, action, and conversation during these days as to coherency or incoherency? Was his conduct or speech rational or irrational? State all you saw or heard, having reference thereto, whether or not he knew you, and each of you, during these days, and his conduct towards you, the facts upon which you base any opinion you may give in regard to his mental capacity, and particularly in regard to it on the and days of , 18 ; state the same fully and particularly, as if specially interrogated in regard thereto.

Did the said G. H. make any statements or communications to you, or either of you, during his last illness, of any occurrences, annoyances, or importunities which had disturbed him? If yea, give such statement or conversations fully and particularly, when made to you, in whose presence, and what remarks and request, if any, he made to you or either of you thereupon.

¹ Cross-interrogatories cannot be the adverse party. Union Bk. of withdrawn on the execution of the Sandusky v. Torrey, 2 Abb. Pr., 269; commission, unless by the consent of 5 Duer, 626.

Form No. 1382a.

Allowance of interrogatories.

The within interrogatories and cross-interrogatories allowed.
 [Date.] [Signature of judge with initials of title.]

Form No. 1383.

Commission to take testimony on interrogatories or oral examination.¹

THE PEOPLE OF THE STATE OF NEW YORK,

To [name of commissioner,² and residence], greeting:

{ Seal } KNOW YE, That we, with full faith in your
 { of } prudence and competency, have appointed you
 { court.³ } commissioner[s], and by these presents do authorize
 you three together, and not otherwise⁴ [or, any one of you], to
 examine [name and address of each witness; if several, add:
 or such of them as may be produced before you] as witness[es]
 in an action now pending [or, in a proceeding to carry into
 effect a judgment heretofore entered—*or*, for the purpose of an
 anticipated new trial in an action heretofore tried] in our

Court [if a local court, add: of], wherein A. B.
 is plaintiff and Y. Z. is defendant, on the part of [himself] said
 plaintiff [or, defendant], on oath [and each apart], upon the
 interrogatories hereto annexed [if oral questions are allowed by
 the order, add or substitute direction accordingly, as thus: and
 to examine the said O. P. upon oral questions to be put to him
 by or on behalf of either of said parties after due notice to the
 other], and to take and certify the deposition of the witness[es]

¹ Oral examination is allowed only in causes in some of the principal courts.

² What variances are fatal and what not, see *Keene v. Meade*, 3 *Pet.*, 1 (holding that M. instead of W., or middle initial of a party's name, was not fatal); *Hays v. Phelps*, 1 *Sandf.*, 64 (holding John V. instead of James V. fatal); *Brown v. Southworth*, 9 *Paige*, 351 (wrong person named fatal); *Blatchett v. Laimbeer*, 1 *Sandf. Ch.*, 366 (misdescription of residence and occupation not fatal). See also *Denny v. Horton*, 11 *Daly*, 358.

³ At common law the seal of the court out of which the commission

issues is necessary. *Ford v. Williams*, 24 *N. Y.*, 359, 366; *Whitney v. Wynkoop*, 4 *Abb. Pr.*, 370. Under *N. Y. Code Civ. Pro.*, § 24, omission of the seal probably does not vitiate if the commission is signed by the attorney issuing it.

⁴ If it is not desired that any one of the commissioners may execute the commission without the presence of the other, a special direction should be inserted. *O'Brien v. Commercial Fire Ins. Co.*, 41 *Super. Ct. (J. & S.)*, 224. See, as to power of majority in the absence of restriction, *Abb. N. Y. Dig.*, tit. Powers.

and return the same [*if the order contained directions as to the return, insert them here; otherwise say:*] in accordance with the [stipulation and] directions annexed hereto, or indorsed hereon.¹

WITNESS [*add teste and authentication as in Form 1190*].²

[*Annex copy of statute; ³ N. Y. Code Civ. Pro., §§ 901, 902; also § 900 if oral examination is allowed.*]

Form No. 1384.

Direction to return commission.

[*Indorse on the commission:*]⁴ Let the within commission be returned by mail [*or, by an agent appointed by the commissioner*], directed to C. K., the clerk of the county of
[*Date.*] [Signature and title of judge.⁵]

[*Enforce attendance of witness according to the law of the place where deposition is taken.*⁶]

Form No. 1385.

Notice of examination by oral questions.⁷

[*As in Form 1412, naming the commissioner or commis-*

¹ See note 4 on page 698.

² Signature of the clerk is usual, but that of the judge is sufficient instead. *Goodyear v. Vosburgh*, 41 *How. Pr.*, 421.

³ Omission not necessarily fatal, if the commission is regularly executed and returned (*Williams v. Eldridge*, 1 *Hill*, 249), or if the substance of the statute is in the body of the commission (*Hall v. Barton*, 25 *Barb.*, 274).

⁴ This must be made by the judge who settles the interrogatories (*Fleming v. Hollenback*, 7 *Barb.*, 271), unless the direction is in the commission or in a stipulation. *N. Y. Code Civ. Pro.*, § 892. But where the statute requires the direction to be indorsed on the commission, a substantial compliance is sufficient; and the commission is regular, though the direction be in the body of the commission

(*Hall v. Barton*, 25 *Barb.*, 274; *s. p.*, *McCleary v. Edwards*, 27 *Barb.*, 239), or indorsed upon the interrogatories annexed. *Hurd v. Pendrigh*, 2 *Hill*, 502.

⁵ Essential (*Crawford v. Loper*, 25 *Barb.*, 449), but omission amendable. *Leetch v. Atl. Mut. Ins. Co.*, 4 *Daly*, 518.

⁶ The New York statute for compelling attendance of witnesses for the purpose of depositions to be used without the State, provides for applying to a judge of the supreme court, or a county judge—or also in case of civil actions or proceedings in a court of another State, or of a Territory, or of the United States, to a justice of the peace—upon affidavit and upon the commission if one has been issued, for a subpoena.

⁷ *N. Y. Code Civ. Pro.*, § 896.

sioners in place of the italic clause, with the words:] under the commission heretofore issued to him [*or, them*].

Form No. 1386.

Oath of witness.¹

You do solemnly swear to testify the truth, the whole truth, and nothing but the truth, as to the matters respecting which you are to be examined.

Form No. 1387.

Oath of interpreter.

You do solemnly swear that you will truly and faithfully interpret the oath and interrogatories to be administered to _____, a witness now to be examined, out of the English language into the _____ language, and that you will truly and faithfully interpret the answers of the said _____ thereto, out of the _____, into the English language.

Form No. 1388.

Deposition taken upon commission, by interrogatories or oral examination.²

[*Title of court and cause.*]

Deposition[s] of witness[es] produced, sworn or affirmed and examined the _____ day of _____, 18____, upon interrogatories [*if oral examination was had substitute or add:—and—upon oral examination*] under a commission issued out of the Court of _____, in a cause there brought between A. B., plaintiff, and Y. Z., defendant, as follows [the undersigned commissioner being the only one present after due notice to the others³].

M. N. [*if place of residence and vocation are not called for by an interrogatory, state them here, so as to compare with the designation in the commission or notice*], being duly and

¹ *N. Y. Code Civ. Pro.*, § 901. For formalities, affirmation, &c., see Volume I, p. 233.

² *N. Y. Code Civ. Pro.*, § 901.

³ Unless the statute, or the commission authorizes either of several commissioners to act separately (see note 4, p. 698), it should be stated here, as in

the certificate, that the others had notice and did not attend, or why they could not be notified or act. If either of several is authorized to act, and return is made by only one, it will be presumed that he only was present. *Williams v. Eldridge*, 1 *Hill*, 249.

able court to examine M. N., a witness in this cause, respectfully reports:

That the said witness attended before me, and being duly and publicly¹ sworn by me [*or*, by O. P., a judge of the Court of _____, the undersigned being prohibited by the law of this State from administering oaths²] to tell the truth, the whole truth, and nothing but the truth, was examined by me on the interrogatories herewith returned, in the presence of E. F., counsel for plaintiff, and G. H., counsel for defendant³ [*or*, That no one appeared in behalf of, &c.]. That the answers of the said witness thereto are truly stated in the accompanying deposition, signed by him [*or*, which he refused to sign, upon the ground that he was not certain that he had used the words stated in the answer to the third interrogatory, and which answer he refused to correct]. [And he signed the exhibits annexed thereto.] That the counsel for the plaintiff objected to the answer to the first interrogatory, on the ground that _____; and the counsel for the defendant objected to the answer to the fourth cross-interrogatory, on the ground that _____. [*Or*, That no objections were made to the answers or proceedings by counsel on either side.]

And I further certify that said deposition was read over by me to said witness before he signed the same.⁴

[*Date.*]

[*Signature of*],
Commissioner.

Form No. 1391.

Indorsement by commissioner on exhibit.

At the execution of a commission issued out of the Court of _____, for the examination of witness[es] between A. B., plaintiff, and Y. Z., defendant, this paper writing, marked Exhibit A [*or*, a paper of which the annexed paper writing marked Exhibit A is a copy⁵], was this _____ day of _____, 18 _____,

¹ "Publicly" may be presumed, though not stated. *Halleran v. Field*, 23 *Wend.*, 37.

² *Lincoln v. Battelle*, 6 *Wend.*, 475.

³ Each party has a right to appear by counsel without notice to the other. *Union Bk. of Sandusky v. Torrey*, 2 *Abb. Pr.*, 269; s. c., 5 *Duer*, 626.

Attendance of counsel is not a waiver of any requisite of the statute

to be complied with in the return of the deposition. *Thompson v. Clay*, (*Mich.*, 1886) 27 *Northw. Rep.*, 699.

⁴ Held necessary in *Ball v. Sykes*, 70 *Iowa*, 525; 30 *Northw. Rep.*, 929. *Contra*, *Darby v. Heagerty*, (*Idaho*, 1887) 13 *Pacif. Rep.*, 85.

⁵ *N. Y. Code Civ. Pro.*, § 901, subd. 3. See *Kelley v. Weber*, 9 *Abb. N. C.*, 62, and note.

produced by _____ and shown to M. N., and by him deposed unto at the time of his examination before

[Signature of],
Commissioner.

Form No. 1392.

Certificate of execution to be indorsed where there is not room to indorse the return in full.¹

The execution of this commission [*or*, of this order to take depositions] appears in the schedules hereunto annexed.

[Signature of],
Commissioner.

Form No. 1393.

Certificate of mailing; indorsed on the envelope.¹

Deposited in the post office at _____ [*or*, in the letter bag of the _____, now lying at _____, and bound for the port of _____], and the postage thereon paid by me, this _____ day of _____, 18 ____.

[Signature of],
Commissioner.

Form No. 1394.

Affidavit of agent bringing deposition.¹

[*Title of court and action.*]

[*Venue.*]

R. S., being duly sworn, says :

That on the _____ day of _____ last he received the packet now delivered by him to O. P., clerk of _____, from the hands of C. C. [counsellor at law], of _____, who is a commissioner,

¹ Under the New York statute (*N. Y. Code Civ. Pro.*, §§ 902, 903) annexation of the certificate of return to the deposition is sufficient.

² Omission of this certificate not fatal. *Brumskill v. James*, 11 *N. Y.*, 294; *Hall v. Barton*, 25 *Barb.*, 274.

The envelope should be addressed to the clerk of the court at his official residence, that is, the place of his

office, unless otherwise prescribed by the instructions, and be bound with tape, and the tape fixed by the seal of the commissioners at its crossings.

³ *N. Y. Code Civ. Pro.*, § 904; *Dwinnelle v. Howland*, 1 *Abb. Pr.*, 87 (express agent).

As to affidavit when agent is incapacitated, see § 905.

as deponent is informed and believes, named in the commission inclosed in the said packet, and that the same has not been opened or altered since deponent received it.

[*Jurat.*]

[*Signature.*]

Form No. 1395.

Indorsement by clerk or judge of receipt of deposition.¹

The within were received by the undersigned by mail from
[or, from the hands of R. S., agent named in the
annexed affidavit], and opened and immediately filed, this
day of , 18 .

[*Signature and title of clerk or judge.*]

Form No. 1396.

Notice of motion to suppress deposition.²

[*Title of court and action.*]

[*Move the court, by notice (Form 488) or order to show cause (Form 491), founded on affidavit and on the order for a commission and the commission (or on the order to take deposition), the deposition, and certificates, &c.—or such of them as are material—for an order*] to suppress the deposition³ of M. N., taken under a commission issued herein [on the

¹ *N. Y. Code Civ. Pro.*, §§ 906, 907.

² *N. Y. Code Civ. Pro.*, § 910. This motion is the proper remedy in case of any irregularities having occurred in the issuing, execution, or return of the commission, or in case of any other objections to the deposition, except as to the relevancy of the testimony, or the competency or credibility of a witness. *Union Bank of Sandusky v. Torrey*, 2 *Abb. Pr.*, 269, 271, note; *Zellweger v. Caffé*, 5 *Duer*, 87, 100. This motion should be made before the trial comes on, if possible. *Id.*; *Jackson v. Hobby*, 20 *Johns.*, 357; *Vilmar v. Schall*, 61 *N. Y.*, 564; *Hangen v. Hachemeister*, 53 *Super. Ct. (J. & S.)*, 532; *Denny v. Horton*, 11 *Daly*, 358; s. c., 3 *Civ. Pro. R. (Brown)*, 255; *Becker v. Winne*, 7 *Hun*, 458; *Wright v. Cabot*, 89 *N. Y.*,

570; s. c., 15 *Week. Dig.*, 357; *Newton v. Porter*, 69 *N. Y.*, 133.

A deposition should be suppressed if any false practice has been used to affect the testimony. *Creamer v. Jackson*, 4 *Abb. Pr.*, 413. See *Commercial Bank of Pennsylvania v. Union Bank*, 11 *N. Y.*, 203. But a deposition cannot be suppressed for an error affecting only a part of it. *Id.* For other grounds see also *N. Y. Code Civ. Pro.*, § 910. It may be returned for re-execution. *Wells v. Hub Publishing Co.*, 12 *Weekly Dig.*, 425.

³ A motion to suppress parts of depositions must specify with reasonable certainty the parts objected to. *Scott v. Indianapolis Wagon Works*, 48 *Ind.*, 75; s. p., *Champney v. Blanchard*, 39 *N. Y.*, 111.

day of , 18], on the ground that [*specifying it; see Forms 1397-1406 (below)*], and for such other and further relief as may be just, with the costs of this motion.

STATEMENTS SUITABLE TO BE INSERTED IN FOREGOING FORM.

1397. *Premature commission:*—the same was taken before the cause was at issue as to the said .¹

1398. *Unauthorized examiner:*—the commission was not addressed to nor returned by the person named in the order under which it was issued² [or, was not executed and returned by the person to whom it was addressed].

1399. *Ex parte examination:*—The commissioner irregularly and wrongfully allowed oral examination of the witness M. N. without notice³ to the [plaintiff and in his absence].

1400. *Witness's conduct; aid of counsel:*—the witness M. N. was allowed to have counsel while under examination, and read his answers to the interrogatories from or by the aid of a paper prepared by his counsel, and by the aid of the suggestions of his counsel.⁴

1401. *Omission to answer:*—the witness M. N. failed to answer fully all the interrogatories [or, cross-interrogatories—*or*, questions] propounded to him, to wit, the interrogatory.⁵

1402. — *to produce document:*—the witness M. N. failed to produce all the documents required of him, and necessary to render the deposition complete and competent, to wit, the deed by A. to B. mentioned in the interrogatory.⁶

1403. — *to annex document:*—the commissioner failed to annex to the deposition all the documents produced and examined upon, to wit⁶ [*&c.*].

1404. *Interested clerk:*—the commissioner irregularly and wrongfully allowed an interested person, to wit, A. B., the plaintiff, to reduce to writing in the deposition the answers of the witness M. N.⁷

1405. *Omission of testimony:*—a material portion of the testimony of the witness M. N., in answer to the interrogatory, was omitted from the deposition.⁸

¹ s. c. Hall Lumber Co. v. Gustin, 54 Mich., 624.

² In re Drexel, 1 Month. L. Bul., 6; Newton v. Porter, 69 N. Y., 133.

³ This objection is not available where the examination was solely on written interrogatories.

⁴ Creamer v. Jackson, 4 Abb. Pr., 413. Compare note 3 to Form 1388, and North Carolina R. R. Co. v. Drew, 3 Woods, 691.

⁵ Vilmar v. Schall, 61 N. Y., 564; Denny v. Lourie, 2 Month. L. Bul., 40; Union Bank v. Torrey, 2 Abb.

Pr., 269; s. c., 5 Duer, 626; Palmer v. Great Western Ins. Co., 47 Super. Ct. (J. & S.), 455; Smith v. Griffith, 3 Hill, 333.

⁶ Kelley v. Weber, 9 Abb. N. C., 62, and note. Compare 21 How. (U.S.), 88.

⁷ N. Y. Code Civ. Pro., § 901. But see dictum in Dawson v. Poston, 28 Fed. Rep., 606, against suppression on the ground that the party or counsel wrote answers for adoption by the witness.

⁸ Creamer v. Jackson, 4 Abb. Pr., 413.

1406. *Imperfect return.*—the certificate or return annexed to the deposition fails to state whether [*&c.*, or otherwise specify distinctly any defect of form relied on in any of the papers¹].

Form No. 1407.

Order suppressing deposition.

[*Title (court order) and recitals as in Form 493, p. 4 of this Volume.*]

ORDERED, that the deposition of M. N., taken under a commission issued herein on the day of , 18 , be suppressed, and be not received as evidence in this action² [with dollars costs of this motion to the].

Enter: [*signature of judge by initials of name and title.*]

II. OPEN COMMISSION (WITNESSES NOT NAMED).

Form No. 1408.

Affidavit to move for open commission or an order to take depositions of witnesses produced by either party.³

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That she is in the above entitled action [*or otherwise state relation to the cause*]; and all the parties thereto are of full age and competent.⁴

¹ See, as to motions on such grounds, *Union Bank v. Torrey*, 2 *Abb. Pr.*, 269; s. c., 5 *Duer*, 626; *Creamer v. Jackson*, 4 *Abb. Pr.*, 413; *Burrill v. Watertown B. & L. Co.*, 51 *Barb.*, 105.

² A conditional order may be made. *Palmer v. Great Western Ins. Co.*, 47 *Super. Ct. (J. & S.)*, 455.

³ *N. Y. Code Civ. Pro.*, § 894.

The order will not be made if the adverse party is an infant or the committee of a person judicially declared to be incapable of managing his affairs.

⁴ *Id.*, § 895.

Where it is shown, in an application for such a commission by the contestant of a will, that the infants would be entitled to a larger share in case of intestacy, their interest is not adverse to that of the party making the application, and the surrogate is at liberty to direct such commission: *Bull v. Kendrick*, 4 *Dem.*, 330.

The applicant cannot be examined in his own behalf on an open commission. *N. Y. Code Civ. Pro.*, § 895.

II. That an issue of fact has been joined therein by the service, on the day of , 18 , of the [defendant's answer to the complaint herein], and [the place of trial is the county of , and] the cause has not yet been noticed for trial [*or, if noticed, state when next circuit is held; see Form No. 489, p. 2 of this Volume*].

III. That the issues of fact are substantially as follows [*stating them, for instance, thus*]:

First. Whether the above-named was ever lawfully married to one M. N., or any other person, prior to the day of , 18 , in the State of , or elsewhere, as alleged in said complaint [*and so on*].

IV. That deponent has fully and fairly stated the case in this action to A. T., her counsel, who resides at No. , street, in the city of , and has fully and fairly disclosed to him the facts which she expects to prove to substantiate the affirmative [*or, negative*] of each of the foregoing issues, and that she cannot safely proceed to the trial of the action without first obtaining due proof thereof by the examination of persons who are or have been residents in said State of ,¹ as she is advised by her said counsel after such statement, and verily believes.

V. That deponent is unable to state the names of witnesses by whom she expects to prove the same [*add qualifications, if any, as thus:*] other than this: that, as she is informed and believes, the alleged marriage of said to M. N., was solemnized by a clergyman resident in , in said State, whom, if now living, she desires to examine as to the fact of said marriage, and if he be dead, or cannot be found, she desires that the records of his church be proved by the clerk, or other officer thereof, whose name and description is unknown to deponent.

VI. That deponent expects to ascertain whether said M. N. is now living, or when he died, by inquiries to be made of any of the relatives or acquaintances of said M. N., now living at , in said State. [*Here state extent and sources of present information, showing inability to name particular witnesses.*²]

¹ An open commission will not be granted to examine within the United States witnesses who do not reside and who, at the time of making the application, are not in the United States or Canada. *N. Y. Code Civ.*

Pro., § 895; *Purdy v. Webster*, 3 *How. Pr.*, *N. S.*, 263; s. c., 9 *Civ. Pro. R.* (*Browne*), 144.

² An open commission, being troublesome and expensive, should not be ordered unless it satisfactorily appears

VII. That deponent has made the utmost efforts to find some person residing in this State who has sufficient knowledge of the facts she expects to prove by witnesses in the State of , as aforesaid, but has not succeeded, and there is no person now residing in this State, to deponent's knowledge, by whom such facts, or any part of them, can be proved.

[VIII, IX, and X, if required, as in Form 1346.]

[Jurat.]

[Signature.]

Form No. 1409.

Notice of motion¹ or order to show cause for open commission or order to take deposition.

[As in Form 488, p. 1 of this Volume (or, if order to show cause, as in Form 491, p. 3), substituting for the italic matter between the ‡ and ¶ the following:] that an open commission issue in this action, directed to C. C., Esq., of , counsellor-at-law, or one or more other competent persons therein named, and authorizing them, or any one of them, to examine any witnesses who may be produced by either party on or before a day specified therein, upon oral questions to be put to the witness when he is produced, as to the issues in said action, and to take and certify the deposition of each witness so examined, and return the same and the commission, pursuant to statute and the direction of the court [and further directing that the trial of this action be stayed until the return of such commission].

[Or if order to take depositions is sought, say, instead of the above: directing that the depositions of any witnesses who may be produced by either party on or before the day of , 18 , be taken as to the issues herein upon oral questions to be put to the witness when he is produced before a person mutually agreed upon by the parties hereto, or a chancellor, or a judge of a court of record, or the mayor or

that an ordinary commission will not accomplish the purpose sought. *Dickinson v. Bush*, 17 *Weekly Dig.*, 17; *Henry v. Mead*, 4 *Month. L. Bull.*, 10.

For allegation as to reluctant witness, which strengthens the affidavit, see *Jones v. Hoyt*, 10 *Abb. N. C.*, 324, holding that in an action for breach of warranty and false representations, the fact that the witnesses sought to be examined by plaintiff had sustained long-continued business rela-

tions with defendant, supplemented by more or less of friendship, and were unwilling to testify, is sufficient to authorize an open commission.

¹ This motion must be made only after joinder of an issue of fact. *N. Y. Code Civ. Pro.*, § 894.

Move the court or a judge thereof, or in the Supreme Court, may apply to the county judge in the county where the action is triable. *Id.*

Compare note 1, p. 710.

other chief magistrate of the city, or a justice of the peace of the State or Territory, where the witness is.]

Form No. 1410.

Order for open commission.¹

[*Name of*] Court [*or if a court² order*], At a special term [*etc., as in Form 493, p. 4*].
[*Title of action.*]

On reading and filing the affidavit of A. B. [plaintiff above named], verified the day of , 18 , making satisfactory proof that one or more witnesses not within this State are material and necessary in the prosecution [*or, defense*] of this action; and on the pleadings [*name any other papers necessary*] herein, [and on proof of due notice of the motion], and after hearing A. T., of counsel for the plaintiff, and T. Z. [*or, no one appearing*] in opposition; now, on motion of A. T., for the [plaintiff]: *

ORDERED, that an open commission issue out of this court in this action directed to [*naming one or more persons*], authorizing him [*or, them, or any one of them*] to examine on oath* [*naming witnesses who are known*; and] any witness who may be produced before him [*or, them*], by either party, on or before the day of , 18 , at a time and place within the [State of], to be specified by due written notice to the other party, upon oral questions to be put to the witness when he is produced, under the issues in this action [*or may specify, if desired, the subject of examination, and may restrict it*], and to take and certify the deposition of each witness on or before the day of , 18 , and return the same by mail [*or may direct return by agent*] with the commission pursuant to law. [*Here add any other special directions, as thus:* and it is ordered that said commissioner, or commissioners, in-

¹ Allowed after issue of fact joined in an action in the Supreme Court, a Superior City Court, the New York City Court, and in county courts. *N. Y. Code Civ. Pro.*, § 893. And in proceeding in the surrogates' courts. § 2538. As to proceedings under State writs, see § 1997; and in particular, mandamus, § 2068; and prohibition, § 2094.

But only to take testimony within

the United States and Canada. *Id.*, § 895.

And not to take testimony of a party on his own behalf, unless by consent. *Id.*

² May be made by the court or a judge thereof, or if the action is in the Supreme Court, by a county judge of the county where the action is triable. *Id.*, § 894.

sert in the deposition all of the questions and answers, word for word.]†

[For other directions see Form 1354 to 1360.]

[Authentication as in Form 491, p. 3.]

[Stipulation and order thereon, in lieu of affidavit and notice of motion, as in Forms 1363, 1364.]

Form No. 1410a.

Open commission.

[Adapt from Form 1383.]

III. ORDER TO TAKE DEPOSITIONS.

[Affidavit as in Form 1409.]

Form No. 1411.

Order to take deposition of witness to be produced without the State, before a person agreed on, or a judge, etc.¹

[As in Form No. 1410 to the *, continuing:]

ORDERED, that the depositions of M. N. and O. P. may be taken in the [State] of _____, on behalf of the _____ [or, that the depositions of such witnesses as the _____ may produce for the purpose may be taken in the—State—of _____, on his behalf in this action—or, that the depositions of such witnesses as either party may produce for the purpose may be taken on his behalf in this action in the State of—&c.], [may specify, if agreed, the name of the officer or other person, thus: before Hon. J. K., of the city of _____] [or fix it by notice; see next Form], between the _____ day of _____ and the _____ day of _____, 18____, under section 899 of the Code of Civil Procedure. Such depositions must be returned [here specify particular mode].

[It is further ordered, that if the—defendant—within _____ days, file with the clerk of this court, and to the—plaintiff—give notice of the name of an agent, resident in the city of _____, and State of _____, to whom notice of the time and place of taking said depositions, and the names of witnesses to be examined may be given, service of notice of the examination of a

¹ N. Y. Code Civ. Pro., § 898. tion, the preceding Forms may be adapted.
For affidavit and notice of mo-

witness must be given to such agent days before his examination.]

[Enter, and take certified copy and annex copy of N. Y. Code Civ. Pro., §§ 900-902.]

Form No. 1412.

Notice of taking deposition.¹

[Title of court and cause.]

Please take notice, that the deposition of M. N.,² who resides at No. street, in the city of , and county of , in the State of [if several, give name and residence of each], will be taken in this cause on behalf of the above-named [plaintiff], before [naming the person agreed on, or if no person has been agreed on, or the depositions are taken in pursuance of an order for the taking of depositions generally, name one of the officers enumerated in N. Y. Code Civ. Pro., § 899], of , at his office³ at No. street, in the city of , and State of , on the day of , 18 , at o'clock, . m., and pursuant to such adjournments⁴ as may be by him appointed.

[Date.] [Signature and office address of⁵],
[Address] To Attorney for .
 Attorney⁶ for .

[Under N. Y. Code Civ. Pro., §§ 896, 899, serve five judicial days before the day set, and one judicial day in addition for each fifty miles, by the usual route of travel, between the residence of the attorney for the adverse party and the place where the deposition is to be taken.]

[Deposition, etc., adapt from Forms 1388 to 1395.]

¹ N. Y. Code Civ. Pro., § 899.

² Where the deposition of one person is taken under a notice designating only another, it will be excluded. *Patterson v. Wabash, &c., Ry. Co.*, 54 Mich., 91; 19 Northw. Rep., 761.

³ A mere verbal inaccuracy in designating the name of the place of taking the deposition will not vitiate the service, as by saying *Connellsburg* instead of *Mc Connellsburg*. *Gibson v. Gibson*, 20 Pa. St., 90.

⁴ A party duly notified of the taking of a deposition, who does not attend, cannot object at the trial to its admission on the ground that the taking thereof was adjourned for the

proper cause without notice to him from the place named in the notice to the witness's house. *Lowd v. Bowers* (N. H., 1886), 3 Atlan. Rep., 431.

⁵ As to necessity of signature, see Vol. I, p. 225, n. 4.

⁶ As to necessity of direction, see *Ib.*

⁷ As to manner of service, see Vol. I, p. 404.

The notice need not be served by the party at whose instance the deposition is taken, or his attorney. *Colton v. Rupert* (Mich., 1886), 27 Northw. Rep., 520, holding that proof of service need not show that the server was authorized.

ARTICLE VII.

EXAMINATION WITHIN THE STATE, BY CONSENT.

[For examination by consent out of the State, see a previous Article, pp. 692, 711.]

FORMS.

- | | |
|--|--|
| (1413.) Stipulation to take testimony
(within the State). | (1414a.) Certificate to deposition. |
| (1414.) Deposition taken within the
State by consent. | (1415.) Stipulation to take deposition
of a witness within the
State (short Form). |

Form No. 1413.

Stipulation to take testimony (within the State).¹

[*Title of court and action.*]

It is hereby stipulated that the deposition of M. N., to be used herein on behalf of the [plaintiff—*or*, of A. B., the plaintiff herein, to be used on his own behalf], may be taken, * pursuant to § 879 of the New York Code of Civil Procedure, before Hon. J. K., one of the judges of this court, at chambers, at the city hall [*or*, the county court house—*or*, before R. F., Esq., of , a referee hereby appointed for the purpose,² at his office, No. , street], in the city of , on the day of , 18 , upon the annexed interrogatories [*or*, either orally or upon such interrogatories as may be before that time agreed upon by written stipulation],† and that such deposition may be read in evidence on the trial of this action, with the like effect as if the evidence was given before the court, and subject to like objections [*if questions are to be oral, may add: except as to the form of questions, objections to which are to be made and noted at the time of the examination.*]

[*Date.*]

[*Signature and office address of*],

Attorney for plaintiff.

[*Signature and office address of*],

Attorney for defendant.

[*Subpoena the witness or party as in other cases, if necessary to secure attendance.*]

¹ Sanctioned by common practice, and by *N. Y. Code Civ. Pro.*, § 879, except where the witness is in jail under sentence for felony.

For taking deposition by consent without the State, see Form 692.

² Such referee has implied power to administer an oath. *N. Y. Code Civ. Pro* § 879.

Form No. 1414.

Deposition taken within the State by consent.¹[*Title of court and action.*]

Deposition of M. N., a witness for the plaintiff [*or, defendant*] in this action, taken by consent [*if written interrogatories were agreed on, say.:*], under the annexed interrogatories agreed upon [*or if examination is oral, take down questions and answers; or the answers in narrative form*]. The said M. N., being duly sworn, makes answer:

TO THE FIRST INTERROGATORY [*and so on*].TO THE FIRST CROSS-INTERROGATORY [*and so on*].[*Witness's signature.*]

Subscribed and sworn to }
before me, the day }
of , 18 }

[*Signature and title of judge or referee.*]

[*File, together with the certificate and stipulation,² within ten days after taking.*]

Form No. 1414a.

Certificate to deposition.

[*Can be readily adapted from Form 1389, p. 701.*]

Form No. 1415.

Stipulation to take deposition of a witness within the State (short Form in absence of contest³).

[*As in Form 1413, to the *, continuing:*] before a notary public [*or, commissioner of deeds,—or, justice of the peace*] on days' notice, at [*naming place, as thus: chambers of the Supreme Court,—and continuing as in Form 1413, from the † to the end*].

¹ The deposition of a party taken by consent is admissible in evidence notwithstanding the death of the adverse party after it was taken, and the continuance of the action by his personal representatives, and even though it relates to personal transactions had with the deceased. *Macdonald v. Woodbury*,

30 *Hun.* 35; and see note in 18 *Abb. N. C.*, 407.

² *N. Y. Code Civ. Pro.*, § 880.

³ This is common practice, though not expressly sanctioned by statute.

As to relief from the stipulation in case of the refusal of a witness to appear, see *Warner v. Moses* (*Ct. of App., Chan. Div.*), 29 *Weekly R.*, 201.

ARTICLE VIII.

EXAMINATION OF WITNESSES CONDITIONALLY (DE BENE ESSE).

FORMS.

(1416.) Affidavit to obtain order to examine a witness conditionally (*de bene esse*).

(1417.) Order thereon.

(1418.) Deposition taken conditionally (*de bene esse*).

Form No. 1416.

Affidavit to obtain order to examine a witness¹ conditionally (*de bene esse*).

[*As in Form 1321, p. 667, substituting for paragraph VI the following:*]

V. That M. N., a proposed witness herein, resides in the city of _____, at No. _____ street, where he now is [*or*, and that he is now sojourning at _____—*or*, and that he regularly transacts business at No. _____ street, in the city of _____²—*and, if a resident of the State but not of the county where the examination is sought, add:* where he has an office for the regular transaction of business in person³], and that [as deponent is informed and believes⁴] * said M. N. [*here state ground of application; as, in case of intended departure, thus:*] is a civil engineer and contractor, and is about to leave the city and county of New York to attend an important matter in [Manchester, England], and will be absent for more than a year, and will not be able to attend the trial of this action.

[*Or, departure of non-resident, thus:*] That said M. N. resides at _____, in the State of _____, and is now at _____, in the county of _____, in this State, on a visit, and intends, within _____ days from the _____ day of _____, 18____, to leave said _____, where he now is, for the purpose of returning to his

¹ *N. Y. Code Civ. Pro.*, § 872.

As to taking thus the testimony of a party in his own behalf, see *Briggs v. Taylor*, 4 *Civ. Pro. R.*, 328. The statute applies in surrogates' courts (*N. Y. Code Civ. Pro.*, § 2538), except in the case of sick or infirm witnesses whose testimony the surrogate is required to take by attending in person, or by order for examination before the surrogate of his county. § 2539, &c.

² See *N. Y. Code Civ. Pro.*, § 872, subd. 4.

³ *Id.*, § 872, subd. 5.

⁴ The allegation as to intended departure may be on information and belief, if it appear from the affidavit that such belief arises from investigations made by the deponent or from statements made to him by the adverse party. *Burr v. Sears*, 18 *Abb. N. O.*, 447.

aforesaid residence ; and unless he is examined conditionally before then, deponent will lose the benefit of his testimony.

[*Or, departure of transient person, thus:*] That said M. N. is a mariner, employed upon the ship , now at the port of , and he is about to leave said to go on board said ship, which is within a week or two to sail for some foreign port not known to deponent, upon which voyage said M. N. is going in her;¹ and unless he is examined conditionally before then, deponent will lose the benefit of his testimony.

[*Or, return of foreign witness, thus:*] That said M. N. resides at , and has been attending in this city during the past term to testify as a witness in this cause on behalf of the [*applicant*]; but that said cause did not come to trial, and said M. N. intends leaving this place, upon his return, on or before day next; and that unless he is examined conditionally before then, deponent will lose the benefit of his testimony.

[*Or, illness, thus:*] That said M. N. lies now, at , dangerously ill of , as deponent is informed and believes, and he is not expected to recover [*or, cannot be expected to be able to attend the trial of this cause on account thereof*], as appears by the annexed affidavit of P. Q., his physician [*or, by the annexed certificate of P. Q., his physician, which was signed by said P. Q. in the presence of deponent, on the day of , 18*].

[*Or, old age, thus:*] That said M. N. is of the age of years, and upwards, and is feeble and infirm, and has not been able, for months last past, to leave his house by reason thereof; and he is not now able, nor is there reason to suppose that he will be able, to attend the trial of this cause.

[*If any of the foregoing allegations is on information and belief, state sources and grounds.*]

[*Conclude as in Form 958, p. 429, beginning with paragraph VIII.*]

Form No. 1417.

Order for examination of a witness conditionally (de bene esse).²

[*Title of court and cause.*]

On the annexed affidavit of A. T. [*and mention other papers relied on*], and on motion of A. T., attorney for ,

¹ Compare *The Samuel*, 1 *Wheat.*, 9.

² *N. Y. Code Civ. Pro.*, § 873.

ORDERED, that M. N. appear before me [at chambers] at the county court house in the city of , on the day of , 18 , at o'clock in the noon of that day, to be examined as witness[es] on behalf of the [plaintiff] in this action.

Service of a copy of this order and of the annexed affidavit on the attorney for the defendant, and also on the above-named M. N., within [the county¹ of , in] this State, on or before the day of , 18 , shall be sufficient.²

[Date.] [Signature of judge with initials of title.]

[May compel attendance of witness by proceedings for contempt;³ see pp. 593-598.]

Form No. 1418.

Deposition taken conditionally (de bene esse).⁴

[Title of court and cause.]

Before Hon. J. K., Judge

[or, Before R. F., Esq., Referee].

Deposition of M. N., taken at the instance of the [defendant] above named under the annexed order, this day of , 18 [pursuant to section 873 of the N. Y. Code of Civil Procedure].

The said M. N. being duly sworn [or, affirmed], and being examined by Z. T., Esq., counsel for defendant, deposes and says:

On his direct examination.

[Insert substance, or question and answer.⁵]

On his cross-examination.

[Insert substance, or question and answer.]

[For note of adjournment, objections, &c., see Form 1339, &c., pp. 678-679.]

[Signature of witness.]

Subscribed and sworn to before me this day of , 18 .

[Signature and title of judge or referee.]

¹ N. Y. Code Civ. Pro., § 886, for case of a non-resident.

² Cowen v. Ferguson, 18 Abb. N. C., 241.

³ The witnesses' remedy for failure to serve subpoena in addition to order, is by motion to vacate the order. Cowen v. Ferguson, 18 Abb. N. C., 241.

⁴ N. Y. Code Civ. Pro., § 882.

⁵ It is not essential that the questions should be taken down (see Gib-

son v. Pearsall, 1 E. D. Smith, 90); nor that the judge take down the examination himself. He may administer the oath, and then, after the witness has been examined in his presence, and the examination has been written down by counsel, the judge reads it over to the witness before it is signed and certified. McDonald v. Garrison, 18 How. Pr., 249; s. c., 9 Abb. Pr., 34. See N. Y. Code Civ. Pro., § 880.

[File order and affidavit on which it was granted, and proof of service (or the stipulation), with deposition,¹ duly certified, within ten days after deposition completed.²]

I hereby certify³ that pursuant to an order granted by me on the day of , 18 [and a warrant subsequently issued by me thereon—*or*, pursuant to a stipulation entered into by the parties to this cause, dated the day of , 18], M. N., whose deposition is herein contained [*or*, hereto annexed], attended before me, with the counsel for the respective parties, on the day of , 18 , at ; and that [after hearing counsel] I proceeded to take the deposition of the said M. N., who being first by me duly sworn [*or*, affirmed] to tell the truth, the whole truth, and nothing but the truth, was examined by the respective parties, and testified as set forth in the within [*or*, annexed] deposition, which he subscribed in my presence, after the same had been carefully read over to him.

[*Date.*]

[*Signature and title of judge.*]

¹ For jurat where interpreter is employed, see Form 1388.

² *N. Y. Code Civ. Pro.*, § 880.

³ No special form of certificate is required by the N. Y. statute. *Code Civ. Pro.*, § 880. It may be presumed

that the acts were done before the certificate was given. *Sheldon v. Wood*, 2 *Bosw.*, 267; *aff'd* on other points in *Byxhie v. Wood*, 24 *N. Y.*, 607.

ARTICLE IX.

COMPELLING ATTENDANCE OF WITNESS AT TRIAL.

FORMS.

- | | |
|---|--|
| (1419.) Subpœna. | (1424.) Affidavit to obtain <i>habeas corpus ad testificandum</i> . |
| (1419a.) Subpœna to a party. | (1425.) <i>Habeas corpus ad testificandum</i> . |
| (1420.) Subpœna ticket. | (1426.) Affidavit of witness to prevent arrest or obtain discharge, when arrested in a civil action or proceeding in violation of privilege. |
| (1421.) Subpœna <i>duces tecum</i> . | (1427.) Order thereon. |
| (1422.) Affidavit to procure order for the production of books and papers at the trial. | |
| (1423.) Order thereon. | |

Form No. 1419.

Subpœna.¹

{ *Seal, if used,* } The People of the State of New York to
 { *here or below.* } [naming witnesses], greeting :

WE COMMAND YOU, † that all business and excuses being laid aside, you and each of you appear and attend before § one of the justices of our supreme court, at a circuit court [*or*, at a special term], to be held in and for the city and county of [New York], at the city hall² in said city [*or*, before one of the justices of the Superior Court of the city of New York, at a trial—*or*, special—term to be held at the city hall in said city—*or*, before one of the judges of the Court of Common Pleas for the city and county of—New York—at a trial—*or*, special—term, to be held at the city hall in said city—*or*, before the county court of the county of _____, appointed to be held at—*dec.*—*or*, before R. F., Esq., the referee appointed herein, at his office, No. _____ street, in the city of _____], on the day of _____, at _____ o'clock in the _____ noon, to testify and give evidence in a certain cause now pending in the said court, then and there to be tried, * between A. B., plaintiff, and Y. Z., defendant, on the part of the plaintiff [*or*, defendant]; * and

¹ A subpœna from the New York Supreme Court, a superior city court (*N. Y. Code Civ. Pro.*, § 278), a county court (*id.*, § 347), or a surrogate's court (*id.*, § 2481, subd. 3, § 2515), may be served (as prescribed in *id.*, § 852) in any county of the State. A subpœna from the City Court of New York may be served in New York,

Richmond, Kings, Queens and Westchester (*id.*, § 338).

² A subpœna ticket was held good, though it did not specify the place where the court was to be held, as such places of meeting were regulated by public act. *People v. Van Wyck*, 2 *Cal.*, 334.

for a failure to attend, you will be deemed guilty of a contempt of court, and will be responsible to the aggrieved party for loss and hindrance, and all other damages sustained thereby, and will forfeit fifty¹ dollars in addition thereto: †

{ *Seal, if used,* } WITNESS: [*&c., with signatures,*³ *as in*
{ *here or above.*² } *Form 1190, p. 586.*]

Form No. 1419a.

Subpœna to a party.

[*As in either preceding Form, substituting for the words between * **] between yourself [and] as plaintiff[s] and said Y. Z., defendant, on the part of the .

Form No. 1420.

Subpœna ticket.

By virtue of a writ of subpœna to you directed, and herewith shown to you, you are commanded [*continue as in the subpœna, Form 1419, from † to †, which, for a party, may be modified as above.*]

[*Date.*] [*Signature and office address of attorney.*]
[*Address to witnesses.*]

Form No. 1421.

Subpœna duces tecum.⁴

[*As in Form 1419, inserting after the second * the following clause:*] and that you bring with you, and then and

¹ The penalty fixed by the N. Y. statute. *Code Civ. Pro.*, § 853.

² The omission of a seal, teste, and signature of clerk is now excused in New York by virtue of *Code Civ. Pro.*, § 24. But this, it seems, does not justify its omission in the United States courts.

³ In a special proceeding (as distinguished from an action), and for this purpose supplementary proceedings are a special proceeding, take also the signature of the judge or referee before whom the witness is required to

be present. *N. Y. Code Civ. Pro.*, §§ 854, 255; *Knowles v. De Lazare*, 8 *Civ. Pro. R. (Browne)*, 386.

Whether this rule applies to State writs generally, see § 1997; as to mandamus in particular, § 2082; and prohibition, § 2099.

⁴ By *N. Y. Code Civ. Pro.*, § 867, a subpœna *duces tecum* to produce a book of account, must be served five days before the day of attendance, or a special order must be obtained.

If production of books or papers of a corporation is required, the sub-

there produce [*here designate the documents fully, e. g., thus:*] certain articles of agreement, purporting to have been made by and between you and A. B. and C. B., on or about the day of , 18 , relative to the sale of lands in the county of ; and all letters and copies of letters in your possession or control relating in any wise to the said agreement or its subject.¹

[*Or in case of production of corporate books,² may say:* two books known as Common Stock Ledgers of the C. & N. Railway Company, No. 1 and No. 2; two books known as Preferred Stock Ledgers of the said Company, No. 1 and No. 2; one book known as the Stock Ledger of the P. Railroad Company of , and one book containing minutes of the directors' meetings of the last-mentioned company. Also all original vouchers and receipts for the payment to the defendant, or to G. W. S. for defendant, by the C. & N. Railway Company, of any sums for services as trustee from 18 to 18 , and all other papers, writings and books relating in any manner thereto, now in your custody or under your control.]

Form No. 1422.

Affidavit to procure order for the production of books and papers at the trial.³

[*Title of court and action.*]

[*Venue.*]

A. T., being duly sworn, says:

I. That he is the attorney for the plaintiffs in this action [*or otherwise state his relation to the cause*].

poena *duces tecum* or order must be directed to the president or other head of the corporation, or the officer in whose custody the paper is. *Id.*, § 868. If personal attendance of a particular officer of the corporation or public officer is desired, a subpoena without a *duces tecum* clause should also be served. § 869.

¹ See *Central Nat. Bk. v. Arthur*, 2 *Sweeney*, 194; *United States v. Hunter*, 15 *Fed. Rep.*, 712; *Oregon Steamship Co. v. Otis*, 14 *Abb. N. C.*, 388. For another Form, see p. 675.

Subpoena *duces tecum* to an officer of a telegraph company, to produce messages, need only describe them with such practicable certainty that he may know what is required of

him; and he must use reasonable diligence to find and produce them if they are within his custody. *United States v. Babcock*, 3 *Dill.*, 566.

² This subpoena must be directed to the president or other head of the corporation, or to the officer in whose custody the book or paper is. *N. Y. Code Civ. Pro.*, § 868.

This section applies to foreign as well as domestic corporations. *United States v. Tilden*, 18 *Abb. L. J.*, 416. But if the books are kept without the State, and the witness has no control over them there, it is not a contempt of court to fail to produce them. *Id.*

³ *N. Y. Code Civ. Pro.*, § 867.

II. That on the day of , 18 , deponent applied to the officers of the Bank in , for information regarding the account of A. B., of , between the of , 18 , and the of , 18 , as to [dec.], and was instructed by said officers that a subpoena to M. N., bookkeeper of said bank, would suffice to prove from said bookkeeper's knowledge the fact of [dec.]; that consequently this deponent caused a copy of the annexed subpoena to be served on said bookkeeper on the of .

III. That he did not insist upon the production of the original of said books, because he was led to believe from said statement that only one item, and that within the knowledge and recollection of said bookkeeper, could be proved, and because the bank officers objected strenuously to producing their books in court; that from an interview had yesterday with said M. N., deponent for the first time learned that the proof in the possession of said bank consists of about a dozen items spreading over said period from , , to , , and is of the highest importance for the plaintiffs' case.

IV. Deponent further says that this case is on the day calendar and likely to be reached to-day, and that an order of this court is necessary, requiring the president of said Bank to produce, at the trial of this cause, the ledger of said bank showing the account of the firm of A. B. & Co. with said bank between the of , 18 , and the of , 18 , and the balance in favor of said firm on deposit with said bank.

V. That no previous application [dec., as on p. 2].

[Jurat.]

[Signature.]

Form No. 1423.

Order to produce documents at a trial.¹

[Title of court and action.]

It appearing to my satisfaction that the production of

¹ May be made "by a judge of the court, or in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause and authorized to hear testimony." *N. Y. Code Civ. Pro.*, § 867.

It may be made by a referee, in supplementary proceedings against the judgment-debtor. *Pruden v. Tall-*

man, 6 *Civ. Pro. R. (Browne)*, 360, or against an officer of a corporation as a witness, directing him to produce the books of the company. *Holmes v. Steitz*, *id.*, 362 *n.*

If the order is oppressive, or if for any reason the party or person should be relieved from any or all of its provisions, the application for relief should be made rather to the judge

[*naming the books, &c., as thus:*] the ledger of the Bank, in the city of , showing the account of the firm of A. B. & Co. with said bank, and the balance of said firm in said bank, between the day of , 18 , and the day of , 18 , is, in the interest of justice, necessary at the trial of this cause :

ORDERED, that M. N., the president [*or other head of the corporation—or the officer in whose custody the document is*] of the Bank, of the city of , produce the ledger showing the account as aforesaid, before one of the justices of the court, at a circuit court to be held in and for the city and county of , at the county court house [*or, city hall*], in said city [in Part III of said court], on the day of , 18 , at o'clock in the noon.

[*Date.*] [*Signature of judge with initials of title.*]

Form No. 1424.

Affidavit to obtain habeas corpus ad testificandum.¹

[*Title of court and cause.*]

[*Venue.*]

A. B., being duly sworn, says :

I. That he is the plaintiff in the above entitled cause.

II. [*State nature of cause, &c., as thus:*] That said cause is an action for the recovery of damages for alleged deceit and fraud, and is now pending in this court [*or, the court of*], and is at issue by the service of the answer of the defendant Y. Z.

III. That the defenses are [*state what, e. g.:*] payment and the statute of limitations.

IV. That the deponent has fully and fairly stated the cause to A. T., Esq., his counsel therein, who resides at No. , street, in the city of ; and has fully and fairly

who made the order or to his court than to the appellate court. *Matter of Kelley*, 11 *Weekly Dig.*, 308.

¹ The contents of this affidavit are prescribed by *N. Y. Code Civ. Pro.*, § 2012.

If a petition is used, verify the facts by affidavit annexed.

Habeas corpus ad testificandum may be used to produce a prisoner for the purpose of his identification by another witness, even though his own testimony is not supposed to be wanted. *Attorney-General v. Fadden*, 1 *Price*, 403.

disclosed to him the facts which deponent expects to prove by the witness hereafter named.

V. That deponent is advised by his said counsel, and verily believes, that the testimony of M. N., of _____, is material and necessary for him upon the trial of this action, and that without his testimony deponent cannot safely go to trial.

VI. That said M. N. is now a prisoner in the custody of the sheriff of _____, and confined in the jail of _____ county, at _____ . [State cause of detention, showing that it is not on a conviction for felony.¹]

VII. That this action is noticed for trial at a circuit court to be held in the county of _____ [or, before R. F., the referee herein], on the _____ instant; and that this application to procure the attendance of the said M. N. as a witness for this plaintiff [or, defendant] is without any fraud or connivance between this deponent and the said M. N.

[Jurat.]

[Signature.]

Form No. 1425.

Habeas corpus ad testificandum.²

[Seal.] The People of the State of New York, to the Sheriff of the county of _____, greeting:

WE COMMAND YOU, that you have the body of M. N., detained in our prison, under your custody as it is said, under safe and secure conduct, before [as in Form 1419, from the § to the second *], and immediately after the said M. N. shall then and there have given his testimony in the said action, that you return him to our said prison under safe and secure conduct. And have you then there this writ.

WITNESS [&c., with signatures, as in Form 1190, p. 586].

[Indorse allowance as in Form 21, p. 56 of Vol. I.]

¹ The writ cannot be issued to bring up a prisoner sentenced to death, nor one confined under any other sentence for a felony, except in behalf of the people on the trial of an indictment. *N. Y. Code Civ. Pro.*, § 2011.

² This writ may be granted by a court of record other than a justice's court, or a judge of such court, or a justice of the Supreme Court, upon the application of a party to an action or special proceeding for the purpose of bringing the prisoner before the court. *N. Y. Code Civ. Pro.*, § 2008.

Or by a justice of the Supreme Court, a judge of a superior city court, a county judge or a special county judge, on the application of a party to a special proceeding pending before any officer or body authorized to examine a witness therein. *Id.*, § 2010.

Or it may be granted by the judges named in the last section upon the application of a party to an action pending before a justice of the peace, or in a justice's court of the city, or a district court of the city of New York. *Id.*, § 2010.

Form No. 1426.

Affidavit of witness to prevent arrest or obtain discharge, when arrested in a civil action or proceeding in violation of privilege.¹

[*Title of court, and action in which witness is required.*²]

[*Venue.*]

M. N., being duly sworn, says:

I. That he resides at _____, in _____.

II. That on the _____ day of _____, 18____, at _____, he was duly served with a subpoena [*or, order*] herein, requiring his attendance as a witness [*or, to be examined*] in the above entitled cause, before [*name court or officer*], at [*name place of attendance*], on the _____ day of _____, 18____, and his fees were then and there duly paid.

III. That he was not so subpoenaed [*or, ordered to attend*] by his own procurement for the purpose, or with the intent, of avoiding arrest, but according to the best of his knowledge, information and belief he was so subpoenaed [*or, ordered to attend*] in good faith on the part of said A. B. for the purpose of taking deponent's testimony herein.

IV. That on the _____ day of _____, while going to [*or, remaining at*] _____, aforesaid, for the purpose of being so examined [*or, while returning from*] _____, aforesaid, whither he had gone for the purpose of being so examined], he was arrested and is now held in custody by the sheriff of _____, under an order [*or, attachment*], of which a copy is hereto annexed [*or describe it so as to show it a civil action or proceeding*].

[*If an order is asked:*] V. That no previous application for an order to discharge deponent has been made [*except, &c., as on p. 2*].

[*Jurat.*³]

[*Signature.*]

¹ See *Matthews v. Tufts*, 87 N. Y., 568; *Greer v. Young*, 120 Ill., 184, 8 *Western Rep.*, 438, and *cas. cit.*; *Frisbie v. Young*, 11 *Hun*, 474; *Brett v. Brown*, 13 *Abb. Pr.*, N. S., 295; *Sherman v. Gundlach* (*Minn.*, 1887), 24 *Rep.*, 335, and *cas. cit.*

By *N. Y. Code Civ. Pro.*, § 864, this affidavit, if presented to the officer, exonerates him from liability for refusing to arrest.

If disregarded by the officer, the court from which the subpoena or order was issued, or a superior court

judge in any part of the State, or a county judge or a superior city court judge within his district may make an order of discharge. §§ 861, 862; see next Form.

² Application may be made to the court or a judge of the court where the arrest was made if preferred. § 564, *Form 909*, p. 390.

³ Under *N. Y. Code Civ. Pro.*, § 864, an affidavit presented to the officer to prevent arrest may be sworn to before him.

Form No. 1427.

Order discharging from arrest in violation of privilege.¹

[*Name of*] Court [*or if a court order*], At a special term [*or, circuit, &c., as in Form 493, p. 4 of this Volume*].

[*Title of cause.*]

On the annexed affidavit, which affords satisfactory proof that the witness therein named has been arrested in violation of his lawful privilege :

ORDERED, that he be at once discharged from said arrest.²

[*Authentication as in Form 491, p. 3.*]

¹ See note to last Form.

² Under *N. Y. Code Civ. Pro.*, § 861, this order must be made by the court from which the subpoena issued, or order to attend made, or by a judge thereof; and by § 862, "a justice of the Supreme Court in any part of the State, or a county judge, or a judge of a superior city court within his district, has the like authority."

§ 564 contains a general provision that in case of an application in the action in which the arrest was had, "the court or judge may make the order [discharging a privileged person from arrest] without notice, or may require notice to be given to the sheriff, or to the plaintiff, or to both."

ARTICLE X.

AUTHENTICATION OF RECORDS.¹I. UNITED STATES JUDICIAL RECORD.
FORMS.

(1428.) Certificate authenticating copy.

II. UNITED STATES DEPARTMENTAL
RECORD.

(1429.) Certificate authenticating copy of a paper in a United States department.

III. STATE OR TERRITORIAL JUDICIAL
RECORD.

(1430.) Certificate authenticating judgment or other record of a court of another State.

(1431.) Certificate of judge annexed to the foregoing.

IV. STATE OR TERRITORIAL NON-
JUDICIAL RECORDS.

(1432.) Certificate authenticating copy record of another State, Territory, &c., not pertaining to a court.

(1433.) Certificate of presiding justice, governor, or Secretary of State, &c., to be annexed to the above.

(1434.) Certificate by clerk to authority of presiding justice who has certified a non-judicial record.

(1435.) Exemplification of record of conveyance.

V. STATUTES OF SISTER STATE, TERRITORY, &c.

(1436.) Certificate authenticating a law of another State.

I. UNITED STATES JUDICIAL RECORD.

Form No. 1428.

Certificate authenticating copy.²

I [name], clerk of the court of , hereby certify that the foregoing is a full and true copy of [designation of paper], entered in [or, issued from] my office in the case of A. B. v. Y. Z., the day of , 18 , and remaining in my custody as required by law.

IN WITNESS whereof I hereto subscribe my name and affix the seal of said court, at , this day of .
[Seal.] [Signature and title of clerk.³]

¹ For the rules of law applicable, see *Abb. Trial Ev.* as to judgments, p. 535, &c.; as to statutes, p. 21, &c.; where the authorities are collected.

² *N. Y. Code Civ. Pro.*, § 943.

³ Deputy may sign in name of and for clerk. *Garneau v. Dozier*, 100 U. S., 7.

If the statute admitting authentication made according to the law of another State does not require evidence of official character to accompany the official act which it authorizes, none is necessary. *Carpenter v. Dexter*, 8 Wall., 513.

II. UNITED STATES DEPARTMENTAL RECORD.

Form No. 1429.

**Certificate authenticating copy of a paper in a United States
department.¹**

I, A. R. S. [Librarian of Congress], hereby certify that the foregoing is a true copy of the original record of [copyright in the Library of Congress].

IN WITNESS whereof I have hereto set my hand
[Seal.] and affixed the seal of my office, at
this day of , 18 .
[Signature and title.]

III. STATE OR TERRITORIAL JUDICIAL RECORD.

Form No. 1430.

**Certificate authenticating judgment or other record of a court
of another State.³**

THE STATE OF _____, } ss.:
County of _____, }

I, S. W., clerk of the _____ court in and for the county of _____, State of _____ aforesaid, do hereby certify that the foregoing is a true and perfect copy of the whole judgment-roll [or, of the record and proceedings] in the case of _____ v. _____ [if other papers than the judgment-roll are desired, may add or substitute description, as thus: and also that the execution thereto annexed, with the indorsement thereon, is a true and perfect copy of the original execution and indorsement], as the said judgment [and execution] appears on record and on file in my office, in the city of _____.

Witness my hand and the seal of said court, at
[Seal.^s] the city of _____, this _____ day of _____,
18 _____. [Signature of] _____,
Clerk.

¹ *N. Y. Code Civ. Pro.*, § 944.

See also *Merchants' Exch. Nat. Bk. v. Cardozo*, 35 *Super. Ct. (J. & S.)*, 162.

² Under *U. S. R. S.*, § 905. Sustained by cases cited in *Abb. Tr. Ev.*, p. 542, &c.

This mode of proof is not exclusive of others. *Id.*, 541, where other modes are stated.

³ It has recently been held that the

seal may be affixed by merely making the impression of the seal on the paper. *Hunt v. Hunt* (*N. J. V. Chan.*, 1887), 36 *Alb. L. J.*, 44, so held on general principles of modern procedure). *Wells v. Davis*, 105 *N. Y.*, 670 (so holding by virtue of the New York statute, *Code Civ. Pro.*, § 29, which allows this for court seals. Compare Vol. I of this work, p. 11.

Form No. 1431.

Certificate of judge annexed to the foregoing.¹

THE STATE OF
 County of [or, First Judi- } ss. :
 cial District of said State], }

I, P. J., presiding judge [or, sole judge] of the court, in and for the county of said State [or, of the first judicial district of said State of , and which said district includes the county of], do hereby certify that² [C. K., whose genuine signature is annexed to the above certificate, was, at the date thereof, a clerk of the court of county aforesaid; that the official acts and doings of said clerk are entitled to full faith and credit; and that] the above attestation is in due form of law. [If there are several judges of co-ordinate powers, may say: And I do further certify that there is no judge, chief justice, or presiding magistrate of said court; that the same is composed of justices, each of whom have and exercise co-equal and co-ordinate powers and jurisdiction.³]

[If the clerk has certified the records of a court which has been abolished, and its records transferred, may say:] I further certify that the Court of Common Pleas, named in said copy, has been abolished by law, and the said District Court established in its stead, to which the records, proceedings and jurisdiction of said Court of Common Pleas are transferred.⁴

[Seal.] Given under my hand and seal, this day
 of , 18 .
 [Signature and title of judge.⁵]

¹ Essential under the Act of Congress. Wells, Fargo & Co. v. Davis, 105 N. Y., 670.

See authorities collected in Abb. Tr. Ev., 543.

² The judge is not required to state that the person who certifies the record is the clerk of the court, or that the seal attached by him is the seal of the court. Ducommun v. Hysinger, 14 Ill., 250.

³ P., McQueen v. Farrow, 4 Mo., 212; Linch v. McLemore, 15 Ala., 632; Haynes v. Cowen, 15 Kans., 637; Horner v. Spelman, 78 Ill., 206.

Hence the clause here inserted in

brackets is not necessary under the Act of Congress, but may aid the attestation if the party needs to rely on the law of the forum, as some other defect may perhaps require him to do.

⁴ Approved in Slaughter v. Cunningham, 24 Ala., 260.

⁵ Sustained by Capen v. Emery, 5 Metc., 436.

⁶ A certificate by the clerk that the certifying judge is such officer, is not necessary under the Act of Congress. Gavit v. Snowhill, 2 Dutch., 76.

But such certificate does no harm. Young v. Chandler, 13 B. Mon., 252.

IV. STATE OR TERRITORIAL NON-JUDICIAL RECORDS.¹

Form No. 1432.

Certificate authenticating copy record of another State, Territory, &c., not pertaining to a court.²

STATE OF _____, County,³ }
Office of Recorder of Deeds of _____ County, } ss..

I, M. N., recorder of deeds of the said county of _____, do hereby certify that I am the keeper of the records and office books kept in the office of the recorder of deeds of said county of _____, a public office of said State of _____, not appertaining to a court.

I do further certify that I have compared the foregoing with the original record of a deed [*or, mortgage*] now remaining of record in the office of said recorder of deeds of county aforesaid, in book _____ of deeds, page _____, and that the foregoing is a correct transcript therefrom, and of the whole of such original.

[*If the officer has no seal of office, add:*] I do further certify that I, as such recorder of deeds, have no seal of office, and that there is no seal of said office.⁴

IN TESTIMONY whereof I have hereunto subscribed my name [*if he has seal, add:* and affix the seal of my office], at _____, in said county, this _____ day of _____, 18 _____.

[*Signature of*],
Recorder of Deeds of _____ County.

Form No. 1433.

Certificate of presiding justice, governor, or secretary of State, &c.,⁵ to be annexed to the above.

STATE OF _____, }
Office of [Secretary of State], } ss.:

I, C. S., Secretary of State [*or, Governor*] of the said State

¹ To compel amendment of such a record, see *People ex rel. Haase v. German Hospital*, 8 *Abb. N. C.*, 332.

² Under *U. S. R. S.*, § 906. *Markoe v. Aldrich*, 1 *Abb. Pr.*, 55. This mode is not exclusive.

³ Any county without the State where used, and subject to the jurisdiction of the United States.

⁴ This is not perhaps essential; and where the office is one which in this State has no seal, our courts will presume that no seal existed there. *Waterville Manufacturing Co. v. Brown*, 9 *How. Pr.*, 27.

⁵ May be by the presiding justice of the county, parish, or district in which the record office is kept, or the

of _____, do hereby certify that the above-named M. N. is, and has been during the year 18____, the [recorder of deeds] of _____ county, in said State of _____, and the keeper of the records and office books kept in the office of the recorder of deeds of said county of _____, a public office not appertaining to a court.¹

[I do further certify that there is no seal of said office of recorder of deeds, and that said recorder of deeds has no seal of office or official seal.]

I do further certify that the foregoing attestation by said M. N. is in due form, and by the proper officer.

[Seal.] IN TESTIMONY whereof I hereunto set my hand, and affix [the great seal of said State² of _____] at _____, this _____ day of _____, 18____.
[Signature of _____],
Secretary of State.

Form No. 1434.

Certificate by clerk to authority of presiding justice who has certified a non-judicial record.³

STATE OF _____, }
County of _____, } ss. :

I, C. K., clerk [or, prothonotary] of the _____ court of _____, of which M. N., above named, is presiding justice, hereby certify that said court is a court of record; that C. S., whose name is subscribed to the foregoing certificate, was at the time of making the same the presiding justice of said court, duly elected [or, commissioned], and qualified as such; and that [I am well acquainted with the handwriting of such judge, and verily believe] his signature to the same is genuine.

[Seal.] IN TESTIMONY whereof I have hereunto set my hand and affixed the seal of said court, at _____, this _____ day of _____, 18____.
[Signature of _____],
Clerk.

Governor or Secretary of State, the Chancellor or Keeper of the Great Seal of the State, or Territory, or county.

parish—or, district, *designating it*] of which I am presiding justice.

² If the certificate is by the presiding justice substitute "my seal," and append the following certificate.

³ U. S. R. S., § 906.

¹ If the certificate is by the presiding justice, add here: And that said office is kept within the county [or,

Form No. 1435.

Exemplification¹ of record of conveyance.²

STATE OF _____, }
 County of _____, } ss.:

Amongst the records in the office and custody of the undersigned M. N., recorder of deeds in and for the county above named, appears the following:

[Here take in a complete duplicate of the record with its title, authentication, incidental memoranda, &c., &c.]

County of _____, ss.:

And I, M. N., recorder of deeds in and for said county, do hereby certify that the foregoing is a true and correct copy of the said [deed of assignment of J. E. H. and wife to T. D. E.], and a full exemplification of the records of said case, as the same remains of record in my said office.

IN TESTIMONY whereof I have hereunto set my
 [Seal.] hand and affixed the seal of my said office,
 at _____, this _____ day of _____, 18 ____.

[Signature and title.]

[Append certificate of judge; see Form 1433.]

V. STATUTES³ OF SISTER STATE, TERRITORY, &c.

Form No. 1436.

Certificate authenticating a law of another State.⁴

STATE OF _____, }
 Office of Secretary of State, } ss.:

I, C. D., Secretary of State of the said State of _____, do

¹ For the distinction between exemplification and certified copy, see Vol. I, p. 80.

A certified copy of an entire record is often called an exemplification, the distinction now being formal where the copy is entire.

² This Form is available under *N. Y. Code Civ. Pro.*, § 947, on showing that the original cannot be produced. For certificate of acknowledgment or proof of original, see *id.*, and Vol. I, p. 14.

For authentication according to sister State law, to be read in evidence here, see same section, and Vol. I, p. 16, note.

³ Includes private acts. *Persse & Brooks Paper Co. v. Willett*, 19 *Abb. Pr.*, 416; *Succession of Rice*, 21 *La. Ann.*, 614.

⁴ Under *U. S. R. S.*, § 905. This mode is not exclusive. See *Abb. Tr. Ev.*, 22, &c.; *N. Y. Code Civ. Pro.*, § 942.

hereby certify that I have compared the foregoing with the original law or statute of said State, now remaining on file and of record in my office ; and that the same is a correct transcript therefrom, and of the whole of such original. I do further certify that such law or statute was duly enacted on the day of _____, 18____, and took effect on the _____ day of _____, 18____ ; [*if effect was conditioned on promulgation, add:* and was, in pursuance of section _____ thereof, duly published in The _____, and The _____, prior to the _____ day of _____, 18____] and that such law or statute was, on the said _____ day of _____, and has ever since been, and now is, in full force and effect in said State of _____, as one of the laws or statutes of said State.

IN WITNESS whereof I have hereunto set my
 [Seal.¹] hand and affixed the great seal of said State,
 at _____, this _____ day of _____, 18____.
 [Signature of],
 Secretary of State.

¹ See note 2, p. 731. It must be tary of State is insufficient. Sisk v. the great seal; the seal of the Secre- Woodruff, 15 Ill., 15.

CHAPTER XIV.

TRIAL AND JUDGMENT.

ARTICLE I.—CHANGING PLACE OF TRIAL.

- II.—JUDGMENT BY DEFAULT, OR FAILURE TO ENTER APPEARANCE, OR TO PLEAD.
- III.—TRIAL OF ISSUES OF LAW [DEMURRER].
- IV.—PROCEEDINGS IN CASE OF TRIAL BY JURY.
- V.— — TRIAL BY THE COURT.
- VI.— — TRIAL BY REFEREE.
- VII.—STATEMENTS OF RELIEF APPROPRIATE TO VARIOUS SPECIAL CASES.
- VIII.—PROCEEDINGS IN PECULIAR ACTIONS.
- IX.—AMENDING OR CONFIRMING JUDGMENT, AND LIMITING TIME TO REVIEW, &C.
- X.—VACATING OR OPENING JUDGMENT.
- XI.—FURTHER DIRECTIONS.
- XII. ASSIGNMENT, SET-OFF, DISCHARGE AND SATISFACTION.

ARTICLE I.

CHANGING PLACE OF TRIAL.

[For removal of cause from a local court for the purpose of having a different place of trial, see Volume I, p. 729.]

I. FROM AN IMPROPER TO THE PROPER COUNTY.

FORMS.

- (1437.) Demand for change.
- (1438.) Consent to change place of trial.
- (1439.) Order changing place of trial by consent.
- (1440.) Affidavit to move to change place of trial to proper county.

- (1441–1443.) Statements suitable to insert in foregoing Form.
- (1444.) Notice of motion to change place of trial.

II. CHANGE ON DISCRETIONARY GROUNDS.

- (1445.) Affidavit to move to change place of trial because impartial trial cannot be had.
- (1446.) Affidavit to change place of trial for convenience of witnesses.

(1447.) Order to show cause why place of trial should not be changed, with stay meanwhile.

(1448.) Affidavit to oppose change.

(1449.) Order changing place of trial.

(1450.) Order that cause in inferior local court of record be tried at circuit in another county.

III. CHANGE BY CONSENT.

(1451.) Stipulation to change place of trial; without prejudice.

I. FROM AN IMPROPER TO THE PROPER COUNTY.¹

Form No. 1437.

Demand for change.²

[*Title of court and cause.*]

I hereby demand that the place of trial of this cause be changed to the proper county, viz., the county of .³

[*Date.*]⁵ [Signature and office address of],
[Address] To , Attorney for defendant.⁴
Attorney for plaintiff.

Form No. 1438.

Consent to change place of trial.⁶

[*Title of court and cause.*]

I hereby consent that the place of trial of this cause be changed from the county of to the county of ; and that an order to that effect may be entered without further notice.

[*Sign, date, and address, as above.*]

¹ This motion is matter of right. *Veeder v. Baker*, 83 *N. Y.*, 156; *Kleiners v. Loeb*, 64 *Wisc.*, 343; 25 *Northwestern Rep.*, 216. See also an extended note in 74 *Am. Dec.*, 241. A substituted defendant may move. *Howell v. Stetefeldt Furnace Co.*, 69 *Cal.*, 153, 10 *Pac. Rep.*, 390. As to evasion by removal to U. S. court, see 35 *Alb. L. J.*, 46, and Volume I, p. 783. As to amending complaint to change place of trial, see p. 454 of this Volume; *Rector v. Ridgwood Ice Co.*, 38 *Hun*, 293; aff'd, *it seems*, without opinion in 101 *N. Y.*, 656; *Moulton v. Beecher*, 1 *Abb. N. C.*, 193, 235; *Moss v. Gilbert*, 18 *id.*, 202; *Faherty v. Schuyler Steam Towboat Line*, 43 *Hun*, 432.

² The service of this demand is an essential prerequisite to a motion. *N.*

Y. Code Civ. Pro., § 986; *Vermont Central R. R. Co. v. Northern R. R. Co.*, 6 *How. Pr.*, 106. It must be served with or after appearance and with or before the answer. *Van Dyck v. McQuade*, 18 *Hun*, 376; *s. p.*, *Levy v. Goldberg*, 40 *Wisc.*, 308; *Gill v. Bradley*, 21 *Minn.*, 15.

³ A demand designating another than the proper county is nugatory. *Beardsley v. Dickerson*, 4 *How. Pr.*, 81.

⁴ On a demand by one of several defendants being refused, all of the several defendants may move. *Sherman v. Gregory*, 42 *How. Pr.*, 481.

⁵ *N. Y. Code Civ. Pro.*, § 986. Must be served, if at all, within five days after demand.

Form No. 1439.

Order changing place of trial by consent.¹

At a special term [*&c.*, as in
Form 493, p. 4].

[*Title of cause.*]

Upon reading and filing the annexed consent, and on motion of Z. T., attorney for defendant:

ORDERED, that the place of trial of this cause be, and the same hereby is changed from the county of _____ to the county of _____, the latter being the proper county.

Enter:² [*signature of judge by initials of name and title.*]

Form No. 1440.

Affidavit to move to change place of trial to proper county.³

[*Title of court and cause.*]

[*Venue.*]

Y. Z. being duly sworn, says:

I. That he is one of the defendants⁴ above named.

II. That the summons and complaint were served on this defendant on the _____ day of _____, 18 ____; * and that before answering, this deponent caused an appearance to be entered and the annexed demand in writing to be served [*or*, that with his answer deponent caused the annexed demand in writing to be served] on the attorneys for the plaintiff on the _____ day of _____, 18 ____; and that the plaintiff's attorney has not consented [*or*, did not within five days thereafter serve a consent] to change the place of trial.

¹ See also Form 1451.

² Enter in original county.

³ *N. Y. Code Civ. Pro.*, § 986. This motion must be made within fifteen days after demand. After that time has passed it is not matter of right (*Duche v. Buffalo Grape Sugar Co.*, 11 *Abb. N. C.*, 233), but is still within the power of the court, in furtherance of justice.

⁴ Let defendant make the affidavit if practicable. *Johnson v. Lynch*, 15

How. Pr., 199. If by attorney or agent, state reasons.

If the party is a corporation, any recognized officer may make the affidavit. *Commercial Ins. Co. v. Mohlman*, 48 *Ill.*, 313. So may an agent whose duties include the controversy in question. *Jones v. Chicago, &c., R. R. Co.*, 36 *Iowa*, 68; and see Volume I, p. 506.

If the party is an infant the guardian *ad litem* may make it.

III. [*Here state ground of right to change; see next Form.*¹]

IV. [*If stay or extension is asked, or order to show cause, state condition of the cause; see p. 2. And if extension is asked, state as to previous extensions.*]

V. [*If stay or extension is asked, add oath to merits as in Form 981, p. 447.*]

[*Jurat.*]

[*Signature.*]

[*Notice of motion, or order to show cause; see Forms 1444-7.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1441. *Non-residence.*²—That the defendants [and each and every of them] did, at the time of the commencement of this action [and still do] reside in the city of _____, in the county of _____, in this State. And that the plaintiff is a non-resident of this State and resides in _____.

1442. *Foreign corporation.*³—That deponent is acquainted with an officer of the corporation plaintiff, and has for some years last past had business dealings with the said plaintiff; and from information derived from the said officer, and from the aforesaid dealings [*and state any other sources*], the deponent believes, and therefore says, that the said plaintiff is a foreign corporation, created by or under the laws of the State of _____, and is engaged in business at _____, in that State, where its principal office is located, and that it did so exist, and was so engaged at the time of the commencement of this action.

1443. *Local action.*⁴—That the action is brought [*state subject of action; for instance, thus:*] by the plaintiff as owner of certain real estate situate in the village of _____, and county of _____, to restrain this defendant from erecting a bridge across a highway in said village, and thereby connecting certain buildings owned and occupied by said defendant as a hotel, situate upon the real estate of deponent, and situate on each side of said highway, and is for the determination of the rights of the respective parties in and to such highway, and the extent of their interest in the real estate constituting said highway, and adjacent thereto, as by reference to said complaint will more fully appear.

¹ If this motion is seasonably made it cannot be opposed on grounds of impartial trial or convenience of witnesses. *Acker v. Leland*, 96 *N. Y.*, 883. Nor can a cross-motion on those grounds be made till after issue. *Bonnell v. Esterly*, 30 *Wisc.*, 549.

² The test is residence, not domicil. *Lyon v. Lyon*, 30 *Hun.*, 455.

³ *Internat'l Life Ass. Co. v. Sweetland*, 14 *Abb. Pr.*, 240. As to domestic corporation, see *Duche v. Buffalo Grape Sugar Co.*, 11 *Abb. N. C.*, 233.

⁴ *Leland v. Hathorn*, 42 *N. Y.*, 547; *Roche v. Marvin*, 92 *id.*, 398; *Acker v. Leland*, 96 *id.*, 383; *Wyatt v. Brooks*, 42 *Hun.*, 502; *Moss v. Gilbert*, 18 *Abb. N. C.*, 202; *Yates County Natl. Bk. of Penn Yan v. Blake*, 43 *Hun.*, 162; *N. Y. Code Civ. Pro.*, § 982. As to penal actions, see *Ithaca Fire Dept. v. Beecher*, 99 *N. Y.*, 429; *Leonard v. Ehrich*, 40 *Hun.*, 460; *Taylor v. Attrill*, 31 *id.*, 132.

Form No. 1444

Notice of motion to change place of trial.¹[*Title of court and action.*]

Please take notice, that on an affidavit of which a copy is herewith served on you, and upon the complaint in this action, and the demand to change the place of trial heretofore served on you, the undersigned will move the court, at a special term to be held [at chambers] at² , on the day of , 13 , at o'clock, that the place of trial in this action be changed from the county of to the proper county, viz., the county of [designating it], and for such other and further relief as may be just,³ with the costs of this motion if opposed by plaintiff.⁴

[*Date.*] [Signature and office address of],
 [Address] To Defendant's attorney.
 Plaintiff's attorney.
 [Also to co-defendants not joining.]

[For affidavit to oppose, see Form 1448; order, see Form 1449.]

¹ Motion is necessary to enforce the demand, if consent be not given. *Vermont Central R. R. Co. v. Northern R. R. Co.*, 6 *How. Pr.*, 106. It must be made within ten days after plaintiff's failure for five days to serve consent to change. *N. Y. Code Civ. Pro.*, § 986. The ten days is computed from the expiration of the five days. *Duche v. Buffalo Grape Sugar Co.*, 11 *Abb. N. C.*, 233. The court have power in their discretion to grant a motion on later notice. *Thompson v. Heidenrich*, 66 *How. Pr.*, 391; *Clark v. Campbell*, 54 *id.*, 166.

All the defendants should unite in making the motion (*Sailly v. Hutton*, 6 *Wend.*, 508; *Legg v. Dorsheim*, 19 *id.*, 700), unless good reason is shown for their not joining in the motion (*Bergman v. Noble*, 10 *Civ. Pro. R.*, 190), as for instance, that those who do not join have suffered a default (*Chace v. Benham*, 12 *Wend.*, 200; *Welling v. Sweet*, 1 *How. Pr.*, 156), or

unless their liability is several as in the case of maker and indorser, in which case either may move (*Sherman v. Gregory*, 42 *How. Pr.*, 481). If the action be in form against several, and process has been served upon part only, the motion may be made by the latter. *Brittan v. Peabody*, 4 *Hill*, 61, note, subd. 2.

Where all do not unite, notice of the motion should be given to those who do not. *Mairs v. Remsen*, 3 *Code R.*, 138. The motion may stand over to allow such notice to be given. *Id.*

² As to place of moving, see Form 1447, note 3, and Vol. I, p. 134, &c.

³ See Volume I, p. 184.

⁴ If a notice of motion to change venue asks for costs absolutely, on granting it, costs will be allowed plaintiff for appearing merely to object to costs. *Phelps v. Wasson*, 2 *How. Pr.*, 126. But this rule should not apply after demand disregarded.

II. CHANGE ON DISCRETIONARY GROUNDS.¹

Form No. 1445.

Affidavit to move to change place of trial because impartial trial cannot be had.²

[As in Form 1440 to the *.]

III. That this action is brought to recover [*here state the nature of the cause of action, e. g.:*] damages for an alleged libel upon the plaintiff, published in the _____, and at _____, in the county of M., and which the defendant is charged with being the author of.

IV. That an impartial trial cannot be had in the county of M., the county designated in the complaint as the place of trial of this action, as this deponent verily believes, the grounds of which belief are as follows [*setting forth the circumstances*].³

V. [*If stay or extension is asked, or order to show cause, state condition of the cause, see p. 2; and if stay is asked, show diligence; ⁴ and if extension is asked, state as to previous extensions.*]

VI. [*If stay or extension is asked, add oath to merits; see p. 447, Form 981.*] [*Signature.*]
[*Jurat.*]

¹ Under the discretionary power conferred by N. Y. Code Civ. Pro., § 987, to change the place of trial in order to secure impartial trial, the convenience of witnesses or the ends of justice, the court may send the cause to a county which under the previous provisions of the statute would not be the proper county. *Gorman v. South Boston Iron Co.*, 32 Hun, 71.

² N. Y. Code Civ. Pro., § 987, subd. 2. See *Moulton v. Beecher*, 1 Abb. N. C., 193.

³ The affidavit should state in detail facts and circumstances which induce the belief that an impartial trial cannot be had, in order that the court may judge whether the belief is well founded; it is not enough to present the affidavits of individuals, however respectable, to their belief that an impartial trial cannot be had.

Bowman v. Ely, 2 Wend., 250; *People v. Bodine*, 7 Hill, 147; *People v. Vermilyea*, 7 Cow., 108, 137; *Scott v. Gibbs*, 2 Johns. Cas., 116. *Contra*, *Taylor v. Gardiner*, 11 R. I., 182.

It is not now required that an actual effort should be first made to impanel a jury; but other circumstances than an actual trial are sometimes held sufficient evidence that an impartial trial cannot be had. *People v. Webb*, 1 Hill, 179; *People v. Long Island R. R. Co.*, 4 Park. Cr., 602; *Budge v. Northam*, 20 How. Pr., 248. See also *People v. Long Island R. R. Co.*, 16 id., 106.

⁴ If stay is asked, the papers must show that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined. N. Y. Gen. Rules, No. 47, of 1888.

Form No. 1446.

Affidavit to change place of trial for convenience of witnesses.¹

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is the defendant [*or*, the attorney for the defendant] above named.²

II. That the summons and complaint in this action were served on this defendant on the day of , 18 ; and that issue was joined herein by the service of this defendant's answer [*or*, by the service of the plaintiff's reply], on the day of , 18 .

III. [*May state place where cause of action³ arose, as thus:*] That this action is brought to recover for iron sold and delivered by the plaintiff to the defendant; and the defense is a breach of warranty in said sale; that said breach consisted in the unfitness of said iron for the purposes for which it was sold and warranted by the plaintiff, for use in defendant's factory in said town of ; that the sale and warranty were made in said town by plaintiff's agent, and the use of the said iron was attempted by defendant and its unfitness ascertained at his said factory there.

IV. [*Oath to merits as in Form 981, p. 447.*⁴]

IV. That the next circuit court in the county of [*place of trial named by plaintiff*], is appointed to be held on the day of next.

That the next circuit court in county [*to which it is desired to remove the cause*] is appointed to be held at , on the day of next.⁵

¹ *N. Y. Code Civ. Pro.*, § 987, subd. 3. This motion must be made with reasonable diligence after an issue of fact is joined. *Darragh v. McKim*, 2 *Hun.* 337 (holding eleven months' delay fatal).

It cannot be made before issue of fact. *Moore v. Pillsbury*, 43 *How. Pr.*, 142 (denying the motion pending demurrer).

² The affidavit should be made by the party if practicable; if made by attorney, state reason. *Scott v. Gibbs*, 2 *Johns. Cas.*, 116.

For other rules see note 4 to Form 1440.

³ The place of transaction may be stated and may aid the allegation as to the convenience of witnesses. *Ackerman v. Delude*, 29 *Hun.* 137; *Murray v. Minier*, 16 *Weekly Dig.*, 117; *N. Y. Gen. Rules*, No. 48, of 1888.

⁴ See also *State Bank of Syracuse v. Gill*, 23 *Hun.* 406. Or state that affidavit of merits has been served and filed. *N. Y. Gen. Rules*, No. 23, of 1888.

⁵ The state of the calendars may be

V. That there has been no circuit in either county at which this cause could be noticed for trial since issue was joined as aforesaid.¹

VI. That this defendant has fully and fairly stated to his said counsel² the facts which he expects to prove by each and every one of the following witnesses, viz., E. F., G. H. and J. K.;³ that each and every one of them⁴ are material and necessary⁵ witnesses for his defense on the trial of this cause, as he is advised by his said counsel and verily believes;⁶ and that without the testimony of each and every one of the said witnesses this defendant cannot safely proceed to the trial of this cause,⁷ as he is also advised by his said counsel and verily believes; and that each and every one of said witnesses reside in the county of _____, viz., E. F. in the town of _____, G. H. in the town of _____, and J. K. in the town of _____, in said county.⁸

considered. *Abrahams v. Bensen*, 22 *Hun*, 605.

¹ If there has been delay, excuse must be alleged. See note 1, p. 740.

² There is no necessity of stating disclosure to and advice of counsel, if the party affiant is himself an attorney and counsellor. *Ackerman v. Delude*, 29 *Hun*, 137.

³ That this averment is necessary, see *Onondaga County Bank v. Shepherd*, 19 *Wend.*, 10.

The court may allow the affidavit to be amended in this respect and resworn. *Gorman v. South Boston Iron Co.*, 32 *Hun*, 71.

⁴ It must appear that each and every one of the witnesses are material and necessary, and that without the testimony of each and every one he cannot safely proceed to the trial of the cause. *Carpenter v. Continental Ins. Co.*, 31 *Hun*, 78; *Onondaga County Bank v. Shepherd*, 19 *Wend.*, 10; *Anonymous*, 3 *id.*, 425; *Anonymous*, 6 *Cow.*, 389; *Constantine v. Dunham*, 9 *Wend.*, 431. Stating that without the testimony of each of the witnesses the party could not safely proceed to trial, but omitting to add the words, *and every one of them*, is held insufficient. *Id.*

But an affidavit though informal may be enough if the court is satisfied of the above facts. *John T. Noye Co. v. Whitmore*, 23 *Weekly Dig.*, 524.

⁵ It must appear that the witnesses are necessary as well as material.

Satterlee v. Groot, 6 *Cow.*, 33. See *Young v. Scott*, 3 *Hill*, 32, 35.

⁶ The statement as to the advice of counsel is essential (*Anonymous*, 8 *Wend.*, 425; *Constantine v. Dunham*, 9 *id.*, 431; and see *Johnson v. Rogers*, 3 *Cow.*, 14) unless the affiant is himself a counsellor, when the affidavit may be modified accordingly. *Cromwell v. Van Rensselaer*, *id.*, 346.

⁷ The omission of this averment is a fatal defect. *Carpenter v. Continental Ins. Co.*, 31 *Hun*, 78; *Satterlee v. Groot*, 6 *Cow.*, 33; *Anonymous*, *id.*, 389; note 4, *supra*; and see *Anonymous*, 7 *Cow.*, 102.

⁸ The affidavit should state the names of the witnesses residing in the county to which the defendant seeks to change the venue (*Anonymous*, 6 *Cow.*, 389); and it must state the particular town or village of their respective residences. The statement that they are residents of the county merely, is not sufficient (*Westbrook v. Merritt*, 1 *How. Pr.*, 195); but a description of their residence, as A. B., of the town of Hudson, &c., is sufficient without in terms alleging that they reside in such town or such county. *Pierce v. Gunn*, 3 *Hill*, 445. The place of trial will be determined by the county in which the witnesses reside, rather than by the distance which they will have to travel. *Hull v. Hull*, 1 *Hill*, 671; *People v. Wright*, 5 *How. Pr.*, 23.

Convenience of witnesses who re

VII. That the facts which he expects to prove by said witnesses are as follows:¹ [*stating each, for instance, in an action on a note, as thus*] By E. F. the fact that the note mentioned in the complaint was made by this defendant without consideration, and for the accommodation of the payee therein named, and that that fact was known to the plaintiff at the time he received said note. By G. H. that the plaintiff discounted said note at a usurious rate of interest, as alleged in the answer herein. [*And so on.*]

VIII. [*If order to show cause is asked, state reason, as thus:*] That the next circuit court appointed to be held in the county of _____, is on the _____ day of _____ next, and there is no special term at which an order to change the place of trial can be made in this action after the _____ day of _____ next, until the _____ day of _____ next. And no previous application [*&c., as on p. 2*].

[*Jurat.*]

[*Signature.*]

Form No. 1447.

Order to show cause why place of trial should not be changed, with stay meanwhile.²

[*Title of court and action.*]

On the annexed affidavit, and on the pleadings, and demand therein mentioned, let the plaintiff show cause at a special term to be held [at chambers] at _____,³ on the _____ day of _____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why the place of trial of this action should not be changed from the county of _____ to the county of _____; and why the defendant should not have the costs of this motion, if opposed by plaintiff,⁴ and such other relief as

side without the State, will not be considered. *N. J. Zinc Co. v. Blood*, 8 *Abb. Pr.*, 147; *Bowles v. Rome*, *Watertown, &c., R. R. Co.*, 38 *Hun.*, 507.

¹ The omission to specify the facts, which the defendant expects to prove by each of his witnesses, may render the affidavit insufficient. Very little reliance is placed by the courts upon a general allegation of the materiality of witnesses, unless it be shown where in they are material. *People v. Hayes*, 7 *How. Pr.*, 248. And the affidavit should state in detail the facts which the defendant expects to prove by each of the witnesses, naming them re-

spectively, where there is any probability of any contest as to the convenience of witnesses. See *Price v. Fort Edward Waterworks Co.*, 16 *How. Pr.*, 51.

² *N. Y. Code Civ. Pro.*, § 986; *N. Y. Gen. Rules*, No. 47, of 1888.

³ The motion must be made in the county designated by the summons and complaint (even though it was not the proper county), or in the same district, or an adjoining county. *Bangs v. Selden*, 13 *How. Pr.*, 163; and see Vol. I, p 134, &c.

⁴ See note 4 to Form 1444.

may be just. And until the determination of this motion, let all proceedings on the part of the plaintiff be stayed, and particularly [*specifying any proceedings, other than subpoenaing witnesses, desired to be stayed*¹].

Service of this order and the papers on which it is granted, made on or before the day of , 18 , shall be sufficient.

[*Authentication as in Form 491, p. 3.*]

Form No. 1448.

Affidavit to oppose change.²

[*Title of the cause.*]

[*Venue.*]

A. B., the plaintiff above named, being duly sworn, says :

I. That he has fully and fairly stated to A. T., his counsel in this cause, who resides at , in the county of , the facts which he expects to prove by each and every one of the following witnesses, viz., C. D., of the town of , E. F., of the town of , G. H., of the town of ; all of whom reside in the town of , in said county of ; and that they are, each and every one of them, material and necessary witnesses for this plaintiff on the trial of this cause, as he is advised by his said counsel, and verily believes ; and that without the testimony of each and every one of said witnesses, this plaintiff cannot safely proceed to the trial of this

¹ By *N. Y. Gen. Rules, No. 47, of 1888*, an order to stay proceedings for the purpose of moving to change the place of trial, "shall not stay the plaintiff from taking any step, except subpoenaing witnesses for the trial, without a special clause to that effect."

² *N. Y. Code Civ. Pro., § 986*. If defendant's motion was made before answer to change from an improper to a proper county, it cannot be opposed for sake of impartial trial or the convenience of witnesses, but defendant must wait, and if the motion be granted, move in the other county, after issue, for a contrary change. *Gifford v. Town of Gravesend*, 8 *Abb. N. C.*, 246.

convenience of witnesses, cannot be defeated by counter affidavits contradicting his defense, for this would be to try the merits on affidavits. *Wigin v. Phelps*, 10 *Hun*, 187.

But counter affidavits from the witnesses mentioned in defendant's affidavit, showing that they are ignorant of the matters to which defendant proposes to call them, are admissible.

Where convenience of witnesses is in question, the plaintiff's affidavit should be in form and substance similar to that required of a defendant. *Onondaga County Bank v. Shepherd*, 19 *Wend.*, 10; *American Exchange Bank v. Hill*, 22 *How. Pr.*, 29.

The same rules govern the one that govern the other; as to which, see Form 1446, and notes.

Defendant's motion, founded on

cause, as he is also advised by his said counsel, and verily believes.

II. That the facts which this plaintiff expects to prove by said witnesses are as follows: [*state them in detail as to each witness, naming him, and showing their materiality, as in Form 1446.*]

[*May state also place of transactions, &c.;¹ plaintiff's inability to bear expense.²*]

[*May add willingness to admit facts relied on by defendant.*]

[*Jurat.*]

[*Signature.*]

Form No. 1449.

Order changing place of trial.³

[*Caption (court order) and recitals as in Form No. 493, p. 4.*]

ORDERED, that the place of trial of this action be and hereby is changed from the county of _____ to the county of _____ [*may state ground if desired; see Vol. I, p. 257*], with dollars costs⁴ of this motion to defendant [to abide the event of this action].

Enter⁵: [*signature of judge by initials of name and official title.*]

[*Serve certified copy on plaintiff's attorney.⁶*]

¹ Cook v. Pendergast, 61 Cal., 72; N. Y. Gen. Rules, No. 48, of 1888.

² Cromwell v. Romer, 18 Weekly Dig., 440.

³ N. Y. Code Civ. Pro., § 987.

Express direction to the clerk to transmit papers, being given by the statute, § 988, need not be embodied in the order. And see Cooper v. Arctic Ditchers, 56 Ind., 233.

This is a clerical duty. Fisk v. Albany & Susq. R. R. Co., 41 How. Pr., 365.

⁴ On this motion to change the place of trial, the costs are usually made to abide the event of the suit, whether the motion be granted or denied. Gidney v. Spelman, 6 Wend., 525; Norton v. Rich, 20 Johns., 475; but see Worthing v. Gilbert, 4 id. 492.

But it may be otherwise where plaintiff has not complied with a demand under the Code. Hubbard v. National Protection Ins. Co., 11 How. Pr., 149.

On granting a motion made after notice for trial, payment of costs of preparing for trial up to the time of the stay will be imposed. Carpenter v. Watrous, 5 Wend., 102.

As to costs in special cases, see Purdy v. Wardell, 10 id., 619; Donaldson v. Jackson, 9 id., 450.

⁵ Enter in the office of the clerk of the county from which the place of trial is changed. N. Y. Code Civ. Pro., § 989.

Subsequent papers must be filed with the clerk of the court or county to which the change is made. N. Y. Gen. Rules, No. 2, of 1888. See later rules.

⁶ Otherwise plaintiff may proceed as if the change had not been made. Root v. Tayler, 18 Johns., 335; Keep v. Tyler, 4 Cow., 541.

Mere notice of the order is not sufficient. Keep v. Tyler (*above*).

Form No. 1450.

Order that cause in inferior local court of record be tried at circuit¹
in another county.

At a special term [*&c.*, as in Form
493, p. 4].

In the Matter of the Application }
of Y. Z., for a trial at circuit }
in county. }

[*Title of inferior court and action.*]

On reading and filing the petition of Y. Z., verified the day of , 18 , [and the affidavits of and , thereto annexed,] and on proof of due service thereof and of the annexed order to show cause [*or*, notice of motion], and on the pleadings in the action therein mentioned, whereby it appears that an issue of fact has been joined in the action therein mentioned in the court, and that the case is a proper one for trial of said issue at circuit in the county of , instead of the county of ; and on motion of Z. T. for the petitioner, and after hearing A. T. for plaintiff [*or*, no one appearing] in opposition thereto, and on motion of A. T. for the petitioner:

ORDERED, that the issue of fact arising upon the pleadings in said action of A. B. against Y. Z., in the court, be tried at a circuit court in the county of , upon [*stating terms, if any, imposed*].

Enter: [*signature of judge by initials of name and title.*]

[*File order and motion papers in office of clerk of county where made. Serve certified copy order on adverse party, and on clerk of county with note of issue, when cause is put on calendar.*]

¹ N. Y. Code Civ. Pro., § 218.

For petition, &c., see Vol. I, p. 739, &c.

III. CHANGE BY CONSENT.

Form No. 1451.

Stipulation to change place of trial,¹ without prejudice.

[*Title of court and action.*]

The parties to this action hereby stipulate and consent that the place of trial thereof be changed from the county of _____ to the county of _____.

[*Saving clause may be as follows:*] That such change of place of trial shall not prejudice the plaintiff's right to apply to any justice of this court of the _____ district, for a commission to take the testimony of witnesses in _____, nor, in case such commission be issued, the right to have interrogatories settled before such justice. Such commission, when executed, shall be returned to the clerk of the county of _____, and all depositions duly taken and returned by virtue of any such commission, may be read on the trial of this cause wherever the same may take place, in the same manner and with the like effect, and subject to the same objections, and no other, as if the same had been taken by a commission issued as in an action triable in said _____ county, and had been returned to the office of the clerk of said county.

An order to this effect may be entered by either party without further notice.

[*Date.*]

[*Signature of*], Attorney for plaintiff.

[*Signature of*], Attorney for defendant.

[*Order adapt from Form 1439. Enter in county originally named.*²]

¹ *N. Y. Code Civ. Pro.*, § 988.

A written stipulation is desirable, or draw up the proposed order and take written consent to its entry. See Vol. I, p. 451.

Such a stipulation, if intended to evade the power of the court, is subject to its control. *People v. Globe Mut. Ins. Co.*, 57 *How. Br.*, 481. Compare Vol. I, p. 239.

A consent to a reference out of

the county is not equivalent to a change of place of trial. *Brush v. Mullany*, 12 *Abb. Pr.*, 344, and *cas. cit.*

² In *Fitch v. Hall*, 18 *How. Pr.*, 314, an order to change, entered by stipulation in the county to which the change was made, was held effectual, at least so far as to require a motion to set it aside.

ARTICLE II.

JUDGMENT BY DEFAULT, ON FAILURE TO ENTER APPEARANCE, OR TO PLEAD.

I. BY THE CLERK (IN ACTIONS FOR LIQUIDATED DAMAGES¹ ON CONTRACT). FORMS.

- (1452.) Notice that clerk will assess amount of recovery.
- (1453.) Statement of costs and disbursements thereon.
- (1454.) Affidavit to proceedings.
- (1454a.) — on corporation failing to serve order for trial.
- (1455.) Judgment by clerk on default.

II. ON APPLICATION TO THE COURT.

A. In other than cases of Attachment and Publication, or Divorce, Foreclosure or Partition.

- (1456.) Notice of application to court.
- (1457.) Demand by defendant not appearing, of notice of reference or writ of inquiry.
- (1458.) Affidavit to proceedings, to enter judgment on application to the court (general Form).
- (1459.) Order by the court for judgment on default.
- (1460.) Order for judgment for special relief (short Form).
- (1461.) Another Form; reciting notice of no personal claim, &c.
- (1462.) Another Form; where damages are to be assessed by writ of inquiry, &c.

- (1463.) Writ of inquiry.
- (1464.) Notice of execution thereof.
- (1465.) Inquisition of damages.
- (1465a.) Return (to be indorsed).
- (1466.) Judgment after assessment of damages.

B. Where service was by publication and attachment levied.

- (1467.) Affidavit to proceedings to obtain personal judgment.
- (1468.) Order of reference to take proof.
- (1469.) Undertaking for restitution.
- (1470.) Order for judgment.
- (1471.) Judgment thereon.

C. In foreclosure.

- (1472.) Affidavit to proceedings.
- (1473.) Notice of application thereon.
- (1474.) Order of reference to take proof.
- (1475.) Report preliminary to judgment.
- (1476–1478.) Statements of findings suitable in peculiar cases.

D. For want of reply.

- (1479.) Affidavit of no reply, &c.
- (1480.) Notice of motion (or order to show cause) for judgment.
- (1481.) Order thereon.
- (1482.) Judgment thereon.

I. BY THE CLERK (IN ACTIONS FOR LIQUIDATED DAMAGES ON CONTRACT).

Form No. 1452.

Notice that clerk will assess amount of recovery.²

[Title of court and action.]

Please take notice, that the amount which the plaintiff is

¹ *N. Y. Code Civ. Pro.*, §§ 419, 420, 1212. Allowable only in actions on contract; but a judgment is a contract within this rule. 20 *Abb. N. C.*, 218, 221. If the action is on a statutory liability, though for liquidated damages (*Gadsden v. Woodward*, 38 *Hun*, 548, a case of individual liability of trustee of corporation for failing to file report), or on contract, but for unliquidated damages, such as breach

of warranty—or in any case if there was not personal service of summons (with complaint or notice of amount) or an appearance—apply to the court, not to the clerk.

² If defendant has appeared generally, five days' notice of the assessment is necessary. *N. Y. Code Civ. Pro.*, § 1219. (In city court, two days. § 3161.) Five days' notice of adjustment of costs, except where the attor-

entitled to recover in this action * will be determined, and his costs and disbursements, the items whereof are herewith stated, will be adjusted, by the clerk of _____, † at his office, in _____, on the _____ day of _____, 18____, at _____ o'clock _____ M.

[Date.] [Signature and office address of],
[Address] To _____, Plaintiff's attorney.
Defendant's attorney.

Form No. 1453.

Statement of costs and disbursements thereon.¹

Amount claimed in summons..\$	Brought up.....\$
Interest.....	Affidavits ²
[Protest fees].....	Transcript and filing ⁵
	Postage incurred; prospective.
	Sheriff's fees on execution ⁶
Costs by statute ³	Paid _____ for serving defend-
Additional defendants served	ant with summons and com-
with process ²	plaint ⁷
Clerk entering judgment ³	Satisfaction ⁸
Carried over.....\$	

Form No. 1454.

Affidavit to proceedings, to enter judgment with the clerk.

[Title of court and action.]

[Venue.]

A. T., being duly sworn, says :

I. That he is the [managing clerk in the office of the] plaintiff's attorney herein. *

[If a defendant has failed to appear] II. That the defendant Y. Z. has failed to appear, although duly personally served with summons herein as appears by the annexed affidavit of M. N. [or state service here; see Volume I, pp. 627-635]; and his time to appear has expired.

[If a defendant has appeared and failed to answer] III. That the defendant W. X. appeared herein on the _____ day of _____, 18____ [and a copy of the complaint was duly

neys reside or have their offices in the same city or town. *Id.*, § 3263. (In city court, two days, and one, respectively. § 3161.)

¹ N. Y. Code Civ. Pro., § 3262.

² *Id.*, § 3251.

⁴ *Id.*, § 3298.

⁶ *Id.*, §§ 3256, 3307, subds. 6, 10.

⁷ See *id.*, § 3251, subd. 1; § 3307,

subd. 1.

³ *Id.*, § 3301.

⁵ *Id.*, § 3301.

⁸ *Id.*, § 3304.

by the pleadings be tried. [Wherefore the answer—or, demurrer—so served was thereupon forthwith returned to their attorney, with a notice of the objection thereto indorsed thereon, of which notice a copy is hereto annexed.¹] [Signature.]

[*Jurat.*]

[*The judgment entered with the clerk will contain a recital accordingly.*]

Form No. 1455.

Judgment by default entered by the clerk.*

[*Title of court and action.*³]

The summons [*if complaint was served at same time, add:* with a copy of the complaint] in this action having been duly personally served on the defendant [*or, all of the defendants*⁴] above named, on the day of , 18 , and the time to appear and plead having fully expired, and said defendant not having [*or, none of the said defendants having*] appeared or pleaded.

[*Or where defendant appeared:*] This action having been commenced by the issue of a summons [*if complaint was issued at same time, add:* and complaint], and the defendant Y. Z. [*or, all of the defendants*] above named having voluntarily appeared herein, on the day of , 18 [*if complaint was served on demand, add:* and having been duly served with a copy of the complaint], and having made default in pleading, * and due notice of this application having been given him [*or, them*]; †

[And the damages having been duly assessed at the sum below stated :⁵] § Now, on motion of A. T., attorney for plaintiff:

¹ See note 2 to Form 986.

² Sustained by *Maples v. Mackey*, 89 N. Y., 146 (holding that a recital of due service and default supports the judgment of a court of general jurisdiction, although the proof of service may be defective); and see *Pringle v. Woolworth*, 90 *id.*, 502.

³ See that defendants' names are correctly stated in the judgment, even though incorrectly stated in the proof of service. See *Miller v. Brenham*, 68 N. Y., 83; *Miller v. Stettiner*, 7 *Bosw.*, 692; *Quivey v. Porter*, 37 *Cal.*, 458, 464; *Townsend v. Ratcliff*, 50 *Tex.*, 148. Compare *Smith v. Jackson*, 20 *Abb. N. C.*, 422; *Ford v. Doyle*, 37 *Cal.*, 346.

If the variance is not insignificant better apply to the court for leave to amend. See Volume I, p. 611.

⁴ If there are several it is better to name them or say expressly, "all the defendants," or all except, &c. If there are more than two defendants a recital that "the defendants" were served does not show so clearly as desirable that all were served.

⁵ It is not necessary to recite the fact or mode of assessment before the clerk. *Am. Exch. Bank v. Smith*, 6 *Abb. Pr.*, 1. But, by *N. Y. Code Civ. Pro.*, § 1213, either party may require the clerk to reduce it to writing and file it.

IT IS ADJUDGED, that A. B., the plaintiff [*if in particular capacity, say:*] as receiver [*&c., or otherwise*], recover of the defendant¹ [*if in particular capacity, say:* as surviving partner of the firm of—*&c., or otherwise*] the sum of _____ dollars, with [_____ dollars interest² to date, and] _____ dollars costs and disbursements, amounting in all to _____ dollars.

[*If against several jointly indebted on contract, only part of them having been served,³ add:*] But this judgment can be enforced only against the joint property of all the defendants herein, and the separate property of the said defendants [*naming them*], who were served as aforesaid [*and, if they are subject to arrest*], and against the persons of the said last-named defendants. [Signature of clerk.]

[Date.]

II. ON APPLICATION TO THE COURT.

A. IN OTHER THAN CASES OF ATTACHMENT AND PUBLICATION, OR DIVORCE, FORECLOSURE OR PARTITION.

Form No. 1456.

Notice of application to the court for judgment.⁴

[*Title of court and action.*]

Please take notice, that the plaintiff will apply to this court,⁵ at a circuit [*or, at a special term to be held—at chambers—at the city hall*] in the city of _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel may be heard, * for the relief demanded in the complaint [*may add, if desired*], and for a writ of inquiry directed to the sheriff of the county of _____ to assess the dam-

¹ In case of appearance, proof of service is not a necessary part of the record of judgment. *Smith v. Holmes*, 19 *N. Y.*, 271. But if appearance is withdrawn, there must be proof of service. *McArthur v. Leffler*, 110 *Ind.*, 526; 7 *Western Rep.*, 521.

² *Bullard v. Sherwood*, 85 *N. Y.*, 253; rev'g 22 *Hun*, 462.

³ *N. Y. Code Civ. Pro.*, § 1932; *Long v. Stafford*, 103 *N. Y.*, 274, and cases cited.

⁴ Must be served on any defendant who has duly appeared. See Volume I, pp. 407, 712; *Wood v. Lambert*, 3 *Sandf.*, 724; s. c., 1 *Code R., N. S.*,

214. And on any defendant actually confined in jail for want of bail, who has not appeared. *N. Y. Code Civ. Pro.*, § 799. Eight days' notice is required (*N. Y. Code Civ. Pro.*, § 1219), except in *N. Y. City Court*, where two days' suffices. § 3161.

⁵ In the supreme court may apply at any special term in the district embracing the county in which the action is triable, or, except in the first district, in an adjoining county; such application may also be made at a circuit court in the county in which the action is triable. *N. Y. Gen. Rules*, No. 26, of 1888.

ages of the plaintiff herein—or, for a reference—*stating object*—or for such other or further relief as may be just].

[*Date, signature and address, as in Form 1452.*]

Form No. 1457.

Demand by defendant not appearing, of notice of reference or writ of inquiry.¹

[*Title of court and action.*]

Please take notice, that the undersigned demands notice of the execution of any reference, or writ of inquiry, which may be granted upon any application to the court for judgment in this action.

[*Date.*] [*Signature and address of*], Defendant in person.

[*Or, signature and office address of*, Attorney for the defendant Y. Z.]

[*Or, signature and address of*, Agent for the defendant Y. Z.]

[*Address*] To
Attorney for plaintiff.

Form No. 1458.

Affidavit to proceedings, to enter judgment on application to the court (general Form).

[*As in Form 1454 to the *.*]

II. That this action is brought [*if brought by leave,² say*: pursuant to leave duly granted by order of this court—or, of the Court of —entered the day of , of which a copy is hereto annexed;] [*Here state object³ briefly, as thus*: to recover the possession of a lot of land in the city of and county of], and is triable in the county of .⁴

III and IV. [*Allege, or annex and refer to, proof of service and default, as in Form 1454.*]

¹ *N. Y. Code Civ. Pro.*, § 1219.

² See Volume I, p. 544, &c. If plaintiff sues by guardian *ad litem*, allege appointment. See Volume I, p. 584, &c.

³ The nature of the action is material also in enabling the judge to determine the regularity of the proceedings. In an equity case the court

may look into the merits on such an application. *Thomson v. Wooster*, 114 *U. S.*, 104.

⁴ Under *N. Y. Gen. Rules*, No 26, of 1888, the application may be made at any special term in the district, or, except in the first district, in an adjoining county; also at a circuit in the county where the action is triable.

V. [*In action affecting specific real property, allege filing of notice of lis pendens as in Form 1472, VII.*]

VI. [*If application is made ex parte, and for an order preliminary to judgment, add: That no previous application, &c., as on p. 2.*]
[*Jurat.*] [Signature.]

Form No. 1459.

Order by the court for judgment on default.

At a special term [*&c., or, a circuit—&c., as in Form 493, p. 4.*]

[*Title of action.*]

[*Recitals as in Form 1455, to the †*] and the court having computed¹ the amount [*or, having assessed the damages*] which the plaintiff is entitled to recover herein [*or, having taken an account of the transactions mentioned in the complaint—or, having taken proof of the facts alleged in the complaint*], for the purpose of enabling it to render judgment herein:

[*Continue, if a mere money judgment, as in Form 1455 from the §, or in other cases as in Forms below.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1460.

Order for judgment for special relief (short Form such as may be indorsed on draft of judgment).

At a special term [*&c., or, circuit—&c., as in Form 493, p. 4.*]

[*Title of action.*]

ORDERED, that on filing the papers within mentioned, judgment be entered herein for the plaintiff against the defendant, as within [with dollars costs of this motion].

¹ The court have power to assess the damages, &c., without reference or writ of inquiry, but it is not usual save in simple cases of a liquidated demand. *Renner v. Marshall*, 1 *Wheat.*, 215.

The relief must not be more favor-

able to plaintiff than that demanded in the complaint. Cases cited in note to *Pierson v. Morgan*, 20 *Abb. N. C.*, 434; *Zwickey v. Haney*, 63 *Wisc.*, 465; 23 *Northwestern Rep.*, 577; *N. Y. Code Civ. Pro.*, § 1207.

Form No. 1461.

Another Form; reciting notice of no personal claim, or indorsed summons in partition, divorce or penal action, or arrest, or guardian ad litem.

At a special term [&c., or, a circuit—&c., as in Form 493, p. 4].

[*Title of action.*]

The summons, with a copy of the complaint in this action [or, with a notice in this action pursuant to section 419 of the Code of Civil Procedure, of which a copy is hereto annexed—and if in partition, may add: and with a notice pursuant to section 1541—or in divorce, may add: and with an inscription on the face thereof pursuant to section 1774—or in a penal action, may add: and with an indorsement pursuant to section 1897—of which a copy is hereto annexed], having been duly personally served on Y. Z., the defendant, on the day of , 18 [if defendant has been arrested otherwise than by *ne exeat*, add: and twenty days since the arrest of the defendant herein having expired¹—or if a defendant is an infant: and twenty days since the appointment of a guardian *ad litem* for the defendant W. X. having expired²], and said defendant having made default in appearing [or, in pleading]: †

[*Continue as in next Form from the †.*]

Form No. 1462.

Another Form; where damages are to be assessed by writ of inquiry, or a reference is to be had.

[*Caption as in last Form. Recitals according to the circumstances; see Forms 1455, 1459, 1460, continuing:.*] Now, on motion of A. T., attorney for the plaintiff, it is

ADJUDGED, that the plaintiff do recover of the defendant the damages by him sustained on account of the cause of action alleged in the complaint [and that he do recover also the possession—&c.; see Forms 1711 to 1742]; and further, it is

ORDERED, that said damages be assessed by a jury,³ and that a writ of inquiry⁴ be for that purpose issued to the sheriff of [the county of place of trial⁵].

¹ *N. Y. Code Civ. Pro.*, § 566.

² *Id.*, § 1218.

³ Or it may be directed at circuit, for better protection of defendant. *Dillaye v. Hart*, 8 *Abb. Pr.*, 394; *O'Donnell v. Hecker*, 3 *How. Pr.*, N. S., 384.

⁴ For the practice see *Thompson v. Lumley*, 7 *Daly*, 74; *Samuels v. Bryant*, 14 *Abb. Pr.*, N. S., 442; *Cazneau v. Bryant*, 4 *Abb. Pr.*, 403; s. c., 6 *Duer*, 668; *Harder v. Harder*, 26 *Barb.*, 409.

⁵ *N. Y. Gen. Rules*, No. 26, of 1888.

3. 1000 60 7 1902

[Or, ORDERED, that it be referred¹ to R. F., Esq., of _____, to
—here state inquiry—and report to this court with all convenient
speed.]

[In either case may add: It is further ordered, that on the
filing of the inquisition returned on said writ of inquiry—or,
the report of said referee—judgment may be entered in
accordance therewith and with this order, without further
notice.]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1463.

Writ of inquiry.

[Seal.] The People of the State of _____, to the Sheriff of
the county of _____, greeting:

WHEREAS, in an action brought by A. B. against Y. Z. in
our _____ Court, such proceedings were had, upon the due
personal service of the summons and complaint therein upon
said Y. Z., that the said A. B. obtained [judgment for his
damages therein alleged, and] an order of the said court,
directing the plaintiff's damages in the said action to be assessed
by a jury, a copy of the complaint in said action being hereunto
annexed, therefore we command you that by the oaths of twelve
good and lawful men of your county, you diligently inquire
what damages the said A. B. hath sustained for and on account
of the matters alleged in said complaint, and that you with all
convenient speed [*or may say: on or before the _____ day of*
_____ 18 _____] return to the office of the clerk of the county of
[*or, of the said _____ Court*] the inquisition taken by
you, by virtue of this writ, under your seal and the seals of
those by whose oaths you shall take that inquisition, together
with this writ.

WITNESS [*teste and signatures, as in Form 1190, p. 585*].

Form No. 1464.

Notice of execution of writ of inquiry.²

[*As in Form 1452, substituting for the words between the **

¹ Reference is not ordered where the question is one of damages, unless it depends on a long account. Hewitt v. Howell, 8 How. Pr., 346.

² N. Y. Code Civ. Pro., § 1219; Kelsey v. Covert, 6 Abb. Pr., 336, note;

s. c., 15 How. Pr., 92. Notice by anticipation expressed to be "provided: an interlocutory judgment shall have been obtained in the cause," is good. Oothout v. Rooth, 12 Johns., 151 (where motion to set aside writ of inquiry was

and the †:] as damages will be assessed by a jury before S. H., sheriff of the [city and] county of _____,

Form No. 1465.

Inquisition of damages.

STATE OF _____, }
County of _____, } ss.:

INQUISITION, taken at [the county court house], in the city of _____, in the county of _____, on the _____ day of _____, 18____, before S. H., sheriff of said county, by virtue of the annexed writ to him delivered, to inquire of matters in the said writ specified, by the oaths of [*here name the jurors*], good and lawful men of the said county, who, being chosen, tried and sworn, say, upon their oath, that A. B., in said writ named, has sustained damages, by reason of the premises in the said writ mentioned, to the amount of _____ dollars.

IN WITNESS whereof, as well I, the said sheriff, as the said jurors, have set our seals to this inquisition the day and year above written.

Jurors.
[*Signature and seal of each.*]

[*Signature and seal of*],
Sheriff.

Form No. 1465a.

Return by sheriff of inquisition of damages to be indorsed on writ.

The execution of the within writ appears by the inquisition hereunto annexed.

[*Date.*]

[*Signature of*],
Sheriff.

Form No. 1466.

Judgment after assessment of damages, &c.

[*Title of court and cause.*]

[*Recitals according to the case; see Forms 1455 and 1461*] and the damages sustained by the plaintiff by reason of the matters alleged in the complaint having been assessed by a referee appointed by the court [*or, by a jury under the direc-*

denied); and see Anon., 4 Sandf., 693. given before default entered, was set aside.
But compare Colvin v. Alvord, 1 How. Fr., 99, where an assessment, on notice

tion of the court,—*add, if notice was required*: after due notice to the defendant], now, on motion of A. T., attorney for the plaintiff :

IT IS ADJUDGED, that the plaintiff recover of the defendant
[or, defendants, *naming them*] dollars, the damages thus
assessed, with dollars costs of the action, making to-
gether dollars. [Signature of],
[Date.] Clerk.

B. WHERE SERVICE WAS BY PUBLICATION, AND ATTACHMENT LEVIED.

Form No. 1467.

Affidavit to proceedings to obtain personal judgment after service by publication, and attachment.¹

[*Title of court and action.*]

A. T., being duly sworn, says :

I. That he is the [managing clerk for the] plaintiff's attorney herein.

II. That on the _____ day of _____, 18____, an order, a copy of which is hereto annexed, was duly made herein for service of the summons upon the defendant Y. Z. by publication.

III. That the summons and complaint were, on the day
of , 18 , duly filed in the office of the clerk of ,
by this deponent [*or, as appears by the annexed affidavit of M.*
N.—or, annexed certificate of said clerk].

IV. That the summons was duly served by publication, and by mailing the same with a copy of the complaint [*or*, by personal delivery of the same with a copy of the complaint], as appears by the annexed affidavits of M. N. and O. P.; but that no answer or demurrer herein by said defendant has been served on the plaintiff's attorney, and said defendant has not appeared in the action, and the time allowed by law therefor since said service has expired.²

¹ *N. Y. Code Civ. Pro.*, §§ 1216, 1217.

¹ It must appear by the affidavit of service, or by this affidavit, that 20 days beside the six weeks allowed for publication have elapsed since the beginning of the publication, even where there was delivery personally without the State. Volume I. p. 370;

Brooklyn Trust Co. v. Bulmer, 49 N. Y., 84; Pier v. Amory, 40 Wisc., 547; Market Natl. Bk. v. Pacific Natl. Bk., 11 Abb. N. C., 104; s. c., 89 N. Y., 397, aff'g 14 Weekly Dig., 233.

As to jurisdiction on service by publication, see *Pennoyer v. Neff*, 95 *U.S.*, 714; *Burton v. Burton*, 45 *Hun*,

V. That on the day of , 18 , an attachment against the property of said was duly issued in this action, and delivered to the sheriff of , by whom the same was, on the day of , 18 , at , levied on property belonging to the said defendant, whereof the following is a description: [*specific description; or annex and refer to a schedule*] and that the value of said property is dollars, according to the sheriff's inventory duly made thereof.

VI. That said defendant is [*or, is not, as the case may be*] a resident of this State.

VII. [*If an order of reference is asked, add: That no previous application, &c., as on p. 2.*] [*Signature.*]
[*Jurat.*]

Form No. 1468.

Order of reference to take proofs before personal judgment on service by publication.¹

At a special term [*&c.—or, circuit, &c.—as in Form 493, p. 4.*]

[*Title of action.*]

Upon the summons and complaint herein, and the affidavit of A. T., verified the day of , 18 , and on motion of A. T., attorney for the plaintiff:

ORDERED, that it be referred to R. F., Esq., of , counsellor-at-law, * to take proof of the demand alleged in the complaint [*or specify particular inquiry; if defendant in default is a non-resident or foreign corporation, add:*] and to examine the plaintiff, or his agent, on oath, respecting any payments that have been made to said plaintiff, or to any one for his use [*may add: and to take proofs and report as to the form and sufficiency of the undertaking to be given as a condition of awarding judgment herein*], and * to report to the court with all convenient speed.

Enter: [*signature of judge by initials of name and title.*]

[*Report may readily be adapted from Forms on pp. 764, 766.*]

68; *Eliot v. McCormick*, 144 *Mass.*, 10; 3 *New. Eng. Rep.*, 871; *Cloyd v. Trotter*, 118 *Ill.*, 391; 7 *Western Rep.*, 425.

And see cases collected in 21 *Am. L. Rev.*, 715.

As to the case of a foreign corporation, see also *Pope v. Terre Haute Car Co.*, 87 *N. Y.*, 137; aff'g 24 *Hun*, 238.

¹ *N. Y. Code Civ. Pro.*, § 1216.

Form No. 1469.

Undertaking for restitution, where summons was served by publication.¹

[*Title of court and action.*]

WHEREAS, in this action, in which service of the summons upon the defendant Y. Z. was made by publication, the plaintiff is about to apply to the court for judgment upon failure of the defendant to appear or plead:

Now, THEREFORE, we, M. N., of No. , street, in the village of , merchant, and O. P. [*stating, in the same way, his residence and occupation*], do hereby, pursuant to the statute, undertake that said plaintiff A. B. will abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

[*Date.*]

[*Signatures.*]

[*Acknowledgment as in Form 495, p. 6.*]

[*Affidavit of sufficiency and approval of judge as in Forms 496-498, pp. 6 and 7 of this Vol.*]

[*Justification, if required, as in Vol. I, p. 482.*]

Form No. 1470.

Order for judgment, where summons was served by publication.

At a special term [*&c.—or, a circuit
—&c., as in Form No. 493, p. 4.*]

[*Title of action.*]

The summons and complaint in this action having been filed in the office of the clerk of the county of [or, of the clerk of this court], on the day of , 18 , and, the defendant Y. Z. being a foreign corporation [or, a non-resident], having property within this State, and service of the summons upon such defendant by publication having been ordered, and, pursuant to said order, the summons having been duly published in the , and the , once in each

¹ See *N. Y. Code Civ. Pro.*, § 1216 and § 1217, subd. 3.

It is not essential that plaintiff sign this undertaking, nor that there

be more than one surety, if the court or judge accepts it without. *N. Y. Code Civ. Pro.*, § 811; Vol. I, p. 469.

week for six successive weeks [*or otherwise as the case may be*¹], commencing on the day of , 18 ; and a copy of the summons and complaint having been duly mailed to [*or, having been thereafter personally served*² on] said defendant Y. Z. [addressed to their president M. N.], at [*if there are other defendants who were personally served, or who have appeared, here state the proceedings as to them, in the manner prescribed in the preceding Forms in this section*]; and the time to appear and plead having expired, and no answer or demurrer having been served on the plaintiff's attorney, and the defendant having failed to appear, and an attachment having been issued against, and levied upon property belonging to the defendant Y. Z., and proof thereof made by the affidavit of A. T. ; and the defendant W. X. being a resident of this State, and the plaintiff having now in court made proof of the demand mentioned in the complaint [*or, if the defendant is a non-resident, the defendant being not a resident of this State, the plaintiff having now in court made proof of the demand mentioned in the complaint*], and [A. T., the agent of] the plaintiff having now in court been examined on oath respecting any payments that have been made to the plaintiff, or to any one to his use, on account of such demand [*or refer to referee's report; see last Form*], whereby it appears that no such payments have been made [*or, if any were made, state the amount*]; and the plaintiff having produced an undertaking with [two sureties], approved by the court, that he will abide the order of the court touching the restitution of any estate or effects which may be directed by the judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of the judgment, in case the defendant or his representative applies and is admitted to defend the action, and succeeds in the defense:³ Now, on filing said affidavit of A. T., and said undertaking [*continue as in Form 1455 from the §*].

Enter: [*signature of judge by initials of name and title.*]

Form . No. 1471.

Judgment thereon.⁴

[*Title of action.*]

On motion of A. T., it is hereupon adjudged that the

¹ Stillwell v. Tomlinson, 36 N. J. L., 359. And see Vol. I, p. 368.

² See 20 Abb. N. C., 57.

³ Required by N. Y. Code Civ. Pro., § 1216.

⁴ It is better to recite the proceedings as in last Form, and add, "and the court having ordered judgment thereon as follows;" then continuing as in this Form.

plaintiff A. B. recover against the defendant Y. Z. the sum of
dollars, together with dollars costs and disburse-
ments, amounting in the whole to dollars.

[Date.]

[Signature of],

Clerk.

C. IN FORECLOSURE.

Form No. 1472.

**Affidavit to proceedings in foreclosure, on moving for judgment, or
for preliminary reference to compute.**

[Title of court and action.]

[Venue.]

A. T., being duly sworn, says:

I. That he is [the managing clerk for] the plaintiff's attorney herein.

II. That this action is brought to foreclose a mortgage on land situate in , in the county of .¹

III. That the whole amount of the mortgage is due [or, if not all due, say: That dollars of the principal of said mortgage is due, with interest from the day of 18 , and that the residue of the principal is to become due as follows: dollars on the day of next [&c.].

IV. That the summons and complaint herein have been duly served on the defendant W. X. more than twenty days since, as appears by the affidavits of O. P. and Q. R. annexed, and the summons and notice of object of action have been duly served upon the defendant Y. Z. more than twenty days since, as appears by the affidavit of O. P. annexed.²

V. That none of the said defendants have [appeared or] put in an answer or demurrer [except the defendant W. X., whose answer admits the right of the defendant as stated by the complaint³], and there are no infant defendants [except

¹ If brought by leave or by guardian *ad litem*, allege the fact. See Vol. I, pp. 550-589.

² See forms of those affidavits, &c., Vol. I, pp. 627, &c., 639, &c., 680, 681, &c. If the service was made by the

person making the above affidavit, the appropriate allegations may be inserted above, instead of referring to affidavits annexed.

³ *N. Y. Gen. Rules*, No. 60, of 1888.

the defendant Y. Z., who is an infant, and has by his guardian *ad litem* duly appointed herein by order of the day of , 18 , interposed the usual general answer, not controverting any material allegation of the complaint].

VI. That none of the defendants are absentees [except the defendant W. X., who has been served by publication as aforesaid—*or*, who has appeared by W. T., his attorney].

VII. That due notice of the pendency of this action, a copy whereof is hereto annexed, was filed in the office of the clerk of [more than] twenty days since, and at or after the time of filing the complaint, as required by law.¹

VIII. [*If there has been amendment, state it as thus:*] and that since the filing of said notice the summons and complaint in this action have not been amended by making new parties to the action, or so as to affect property not described in said notice, except by substituting the name of the defendants U. V. and T. V. in place of the words, "the heirs of W. V., deceased, whose names are unknown;" and that by order of this court, entered on consent of all parties, the day of , 18 , said summons, complaint, and notice of *lis pendens* was duly amended accordingly on the day of , 18 .

IX. [*If any defendant has appeared:*] That notice of this application has been duly given to the defendant W. X. [*or*, has been waived by the defendant W. X., as appears by his notice of appearance hereto annexed].

X. [*If an order separate from the judgment is asked for, and the application is ex parte, add:* That no previous application, &c., as on p. 2.] [Signature.]
[*Jurat.*]

Form No. 1473.

Notice of application thereon.²

[*Title of court and action.*]

Please take notice, that on the summons and complaint herein [*here specify other papers relied on, as thus:* the

¹ As to requisites of *lis pendens*, see p. 12 of this Volume.

If it is intended to take a reference to compute and apply for judgment afterward, this allegation may be omitted now, and a certificate or affi-

davit to the point produced on applying for judgment. *Id.*

² As to place, see note 5 on p. 751. The cause need not be put on the calendar. *N. Y. Gen. Rules, No. 60, of 1888.*

notice of no personal claim, and notice of pendency of action, heretofore filed herein, and the order appointing a guardian *ad litem* for the infant defendants heretofore entered], and upon the affidavit of A. T., a copy of which is hereto annexed, the undersigned will apply¹ to this court, at a special term thereof, to be held [at chambers] at the court house, in the city of _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon of that day, or as soon thereafter as counsel can be heard [for an order of reference² to compute the amount due to the plaintiff, and] for the relief demanded in the complaint, with costs and an extra allowance, and for such other and further relief as may be just.

[Date.] [Signature and office address of],
 [Address] To _____ Plaintiff's attorney.
 Attorney for defendant [who has appeared].

Form No. 1474.

Order of reference to take proof, &c.

[Title (court order) and recitals, according to the case; see Form 493, p. 4.]

ORDERED, that it be referred to R. F., Esq., of _____, counsellor-at-law, to compute the amount due to the plaintiff, for principal and interest on the bond and mortgage set forth in the complaint in this action [and the amounts due to such of the defendants as are prior incumbrancers³].

[Where the whole is not due, add: and also to compute the whole amount due, and yet to become due, secured by said mortgage, and remaining unpaid, with interest; and to ascertain the situation of the mortgaged premises, and whether the same can be sold in parcels without prejudice to the interests of the parties; and if he shall be of opinion that a sale of the said premises in one parcel will be most beneficial to the parties, then that he report his reasons for such opinion—and if there is a question among the defendants as to the order in which parcels should be sold, may add:—and also to examine and determine the order in which the said parcels should be sold for the payment of the plaintiff's demand, in view of the equitable right of the parties.]

[Where any defendants are infants having answered gener-

¹ An order to show cause may be taken. *Blatchford v. Thomal*, 1 *Monthly Law Bul.*, 36.

² The court have power to grant judgment without reference.

³ See 18 *Abb. N. C.*, 368.

ally, or are absentees, add: and also to take proof of the facts and circumstances stated in the complaint; and to examine the said plaintiff or his agent on oath as to any payments that may have been made.]

Enter: [*signature and title of judge by initials.*]

Form No. 1475.

Report preliminary to judgment of foreclosure.

[*Title of court and action.*]

To the Court of .

Pursuant to an order of this court, entered [*or, dated*] the day of , 18 , whereby it was referred to me [*stating concisely the object of the reference*], I respectfully report * :

I. That before proceeding to act thereunder, I was first duly sworn faithfully and fairly to determine the questions referred to me, and to make a just and true report thereon according to the best of my understanding.

II. That I have computed the amount now due to the plaintiff in this action as aforesaid, and that the amount so due on the said bond and mortgage, for the principal and interest, up to and including the day of the date of this report, is dollars, and the schedule marked A, hereto annexed as a part of this report, contains a statement and account of the principal and interest moneys due to the plaintiff as aforesaid, the period of the computation of the interest, and its rate.

[*Where the whole is not due, add:*] III. That I have computed the amount secured to be paid by said bond and mortgage, and which remains unpaid, but not yet due, with interest thereon to, and including the day of the date of this my report, and the same is dollars; and the schedule marked B, hereto annexed as a part of this report, contains a statement and account of the said principal and interest moneys respectively, the period of the computation of the interest, and its rate.

[*For other clauses suitable to various cases, see Forms 1476 to 1478 (below).*]

[*Date.*]

[*Signature of*],
Referee.

Schedule A.

Abstract of Documentary Evidence.

One bond, dated the day of , 18 , made by W. X. to A. B., in the penal sum of dollars, to secure

the payment of the sum of dollars, on the day of , 18 , with interest at the rate of per centum per annum. Marked Exhibit A.

One mortgage of even date with said bond, made by W. X. and Y. Z. to A. B., as collateral security for the payment of the amount mentioned in the condition of the said bond, and acknowledged the day of , 18 , and recorded in the office of the clerk [*or, register*] of county, in Liber of Mortgages, page , on the day of , 18 . Marked Exhibit B.

[*Signature of*],
Referee.

Schedule B. [If principal is not due.]

The same bond and mortgage mentioned in Schedule A.
Principal sum secured and unpaid, but not yet due, \$
[Interest thereon from the day of , 18 , to
the day of , 18 , being years
and days, at per cent. per annum,] .

Whole amount secured and unpaid, but not yet due [in-
cluding interest thereon to this day], \$
Whole amount already due as per Schedule A .

Total due and yet to become due, with interest to this
day of , 18 , ... \$

[*Signature*],
Referee.

[*If affidavit to filing notice of pendency was not presented on applying for reference, present it or clerk's certificate with this report.*]

1476-1478. STATEMENTS OF FINDINGS SUITABLE FOR
FOREGOING REPORT IN PECULIAR CASES.

1476. [*Where the premises cannot be sold in parcels, add :*] IV. That I have ascertained the situation of said mortgaged premises, and am of the opinion the same cannot be sold in parcels without injury to the interests of the parties, for the reason that [the said premises consist of a single house-lot and dwelling thereon, in the city of , which cannot be divided].

1477. [*Or where the premises should be sold in parcels, add :*] IV. That I have ascertained the situation of said premises, and find [*here state condition, as thus :*] that they consist of a small farm within the limits of the village of M.; and that the defendant Y. Z., after giving the mortgage in suit, upon the whole tract, laid out a portion of the tract which fronts upon a new street of said village, in house-lots, a diagram of which lots is annexed, and marked Schedule C. That the mortgagor subsequently sold lot numbered 1

to the defendant W. X., and at a still later date sold lot numbered 2 to the defendant U. V. That the remaining lots are vacant, and that upon a sale they will not probably produce enough to satisfy the judgment herein. That the other portion of said farm can be sold separately without prejudice to the defendants, but will not probably produce more than enough to satisfy the judgment herein, and cannot advantageously be divided for the sale. And I therefore am of opinion that the part of the mortgaged premises not so laid out in lots should be first sold, and afterwards, if necessary to resort to the residue, they should be sold in the following order : first, lots 3 and 4; second, lot 2; third, lot 1.]

1478. [*Where there are infants having answered generally, or absentees defendants, add :*] V. That I have taken proof of the facts and circumstances stated in said plaintiff's complaint, and have examined the said plaintiff [*or, and the plaintiff being now abroad in* , have examined his agent, 'M. N.] on oath as to any payments which may have been made to him or to any person for his use, on account of the demand mentioned in said complaint, and which ought to be credited thereon, and such proofs, except those which are documentary, and such examinations, are annexed as a part of this report, and marked Exhibits A and B, and I am of opinion that the facts and circumstances stated in said complaint are true.

D. JUDGMENT FOR WANT OF REPLY.

Form No. 1479.

Affidavit of no reply, &c., to move for judgment.²

[*Title of court and action.*]

[*Venue.*]

Z. T., being duly sworn, says :

I. That he is the defendant's attorney in this action. That the answer herein was served on the plaintiff's attorney on the day of , 18 [and an order of the court requiring a reply thereto within days was served on him on the day of , 18], and that no copy of any reply or demurrer thereto has been served on deponent. [*Signature.*]

[*Jurat.*]

Form No. 1480.

Notice of motion (or order to show cause) for judgment on failure to reply or demur to answer.

[*Title and commencement ; see Form 1456*] for an order that for want of a reply or demurrer the defendant have

¹ *Frith v. Cooke*, 53 *L. T. R.*, N. S., 798. the clerk on admission of cause of action less admitted counter-claim, see

² For form of judgment entered by Form 1067, p. 496.

judgment against the plaintiff [for dollars] upon the counter-claim set forth in the answer herein [*and may add: and that a reference be ordered to compute the amount due the said defendant upon the counter-claim set forth in the answer herein—or, to take the account of—describing it—or, that a writ of inquiry be issued herein to the sheriff of to assess the damages due the defendant under the counter-claim set forth in the answer herein, and that the report of said referee—or, the verdict on said inquisition—be returned to this court for its further action*], and for such other and further relief as shall be just, with the costs of the action and this motion.

[*Signature and office address of*],

Attorney for [*moving party*].

[*Date.*]

[*Address*] To

,
Attorney for [*moving party*].

Form No. 1481.

Order for judgment for want of reply or demurrer to counter-claim.

At a special term [*&c., as in Form 493, p. 4, of this Vol.*].

[*Title of action.*]

On reading and filing the affidavit of A. B., verified the day of 18 , and the defendant's answer herein, setting up a counter-claim [*or, with an order requiring plaintiff to serve a reply thereto within days*], having been duly served on the plaintiff more than twenty days since, and no reply or demurrer having been interposed by the plaintiff: Now, on motion of T. Z., attorney for defendant, and after hearing A. T. [*or, and on reading and filing proof of due notice of this motion, and no one appearing*] for plaintiff in opposition,

ORDERED, that judgment be entered herein in favor of the above-named defendant against the above-named plaintiff for the sum of dollars [*and may order writ of inquiry or reference, or state other relief sought; and see Forms 1462 to 1466, and Forms under Judgment*], besides the costs and disbursements of this action, together with ten dollars costs of this motion.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1482.

Judgment on failure to reply or demur to answer.

[*Title of court and action.*]

The defendant in this action, having duly served his answer on the day of last, setting up a counter-claim to the plaintiff's cause of action, and the plaintiff having failed to reply or demur thereto [*and if writ of inquiry or reference has been held, recite it; see Forms 1462 to 1466*]: Now, on motion of T. Z., attorney for defendant,

It is ADJUDGED, that said defendant recover [*&c., stating relief*].

[*Signature of clerk.*]

[*Date.*]

• ARTICLE III.

TRIAL OF ISSUES OF LAW [DEMURRER].

FORMS.

- (1483) Notice of trial of demurrer.
 (1484) Note of issue on trial of demurrer.
 (1485) Decision on demurrer—by findings overruling demurrer.
 (1486.) The same; findings sustaining demurrer.
 (1487.) Another form of decision on demurrer—by order.
 (1488.) Interlocutory judgment on demurrer.
 (1489.) Order for final judgment on demurrer.

Form No. 1483.

Notice of trial of demurrer.¹[*Title of court and action.*]

Please take notice, that the issue[s] of law herein will be brought to trial at a special term of this court² [*or, at a circuit court*], appointed to be held in and for the county of _____, at the city hall, in the city of _____ [*or, at the court house in the town of _____*], on the first Monday [*or other first day of term*] of _____ next, at _____ o'clock in the forenoon of that day, unless the same has been previously tried.

[*Date.*] _____ [*Signature and office address of*],
 [Address] To _____ Attorney for _____
 Attorney for _____

Form No. 1484.

Note of issue on trial of demurrer.³[*Name of court and term.*]

A. B., plaintiff,
 against
 Y. Z., defendant.

A. T., plaintiff's attorney.
 Issue of law.
 T. Z., defendant's attorney.

Issue joined [*date*]. [*In case of issue passed without post-*

¹ For some variations of the above Form, adapted to peculiar cases, see Form 1490.

² In the N. Y. Supreme Court, issues of law must be tried *at a circuit or a special term*, according as the rules prescribe. *N. Y. Code Civ. Pro.*,

§ 976. The notice in this respect should conform to the actual practice of the court for which the notice is given. See *Osborne v. City of Detroit*, 28 *Fed. Rep.*, 385.

³ *N. Y. Code Civ. Pro.*, §§ 978, 979. Local rules should also be noticed,

ponement, add: but date of issue as of—*specifying date when passed.*]

Number of cause on previous calendar 263 [*or*, Not on previous calendar].

Plaintiff's [*or*, defendant's] notice.

[Demurrer.]

[*Signature and office address of attorney.*]

Form No. 1485.

Decision on demurrer—by findings¹ overruling demurrer.

[*Title of court and action.*]

The issue of law raised by the demurrer of the defendant Y. Z. to the complaint herein, coming on to be heard by the court at a special term held by the undersigned—and after hearing Z. T., Esq., of counsel for defendants, in support of the demurrer, and A. T., Esq., of counsel for plaintiffs, in opposition, and due deliberation being had thereon, I decide and find as follows:

Conclusions of Law.²

* I. That the said complaint states facts sufficient to constitute a cause of action. [*Or*, none of the grounds of demurrer assigned by the defendant are sufficient to entitle him to any judgment herein.]

[*If leave to answer is not given*] II. That plaintiff is entitled to final judgment overruling said demurrer and for the relief demanded in the complaint herein, with costs to be adjusted by the clerk [*leave to move on affidavits for leave to answer may, in the discretion of the court, be given as thus:* but said defendant to have the right within five days after the service of a copy of this order to move for leave to withdraw his demurrer and to answer the complaint upon payment of said costs].

[*Or if leave to answer is granted:*] II. That plaintiff is entitled to an interlocutory judgment which shall adjudge that

such as that of Chemung county (*N. Y. Gen. Rules*, 1876 [*Hunt's ed.*], 277), that if the cause is in equity or preferred, the note of issue must state the facts; and that in Albany county (*id.*, 272) notes of issue must designate whether the cause is for argument or for trial.

¹ *N. Y. Code Civ. Pro.*, §§ 1010, 1021. See note in 21 *Abb. N. C.*, on Decisions on Demurrer.

² Findings of fact are not necessary. *Dunham v. Cudlipp*, 94 *N. Y.*, 129, 133. But may be desired, and are not objectionable, in final judgment absolute.

the demurrer is overruled, with costs to be adjusted by the clerk and included in said interlocutory judgment, and shall direct that in case the defendant does not, within twenty days after service of a copy of such interlocutory judgment on his attorney with notice of its entry † answer the complaint, and pay said costs to plaintiff or his attorney, § then plaintiff may enter final judgment against said defendant as follows [*stating it—or, for the relief demanded in the complaint, and may add: and for that purpose that the plaintiff's damages be assessed by a jury and that a writ of inquiry issue to the sheriff of the county of —naming place where action was triable*].

[*In either case add:.*] III. And I hereby direct judgment to be entered as aforesaid. [*Signature and title of judge.*]

[*Date.*]

Form No. 1486.

The same; findings sustaining demurrer.

[*As in last Form to the *, continuing:* I. That said complaint does not state facts sufficient to constitute a cause of action—or otherwise, according to the tenor of the demurrer.]

II. That defendant is entitled to final judgment sustaining the demurrer and dismissing the complaint with costs.

[*Or if leave to amend is granted:* II. That defendant is, entitled to an interlocutory judgment which shall adjudge that the demurrer is sustained with costs to be adjusted by the clerk and included in said interlocutory judgment, and shall direct that in case the plaintiff does not within twenty days after service of a copy of such interlocutory judgment on his attorney with notice of its entry, † file and serve an amended complaint² and pay said costs to defendant or his attorney, § then defendant may enter final judgment against plaintiff sustaining the demurrer and dismissing the complaint with costs.]

¹ See p. 754, or may direct reference. *Id.*

² If severance is allowed it may be directed by substituting for the words between the † and the § the following: divide this action into separate actions, and serve on the attorney for each defendant respectively a copy of the complaint in the action affecting such defendant [and amend each

such complaint so as to state facts sufficient to constitute a cause of action], and at the same time pay to the respective attorneys for the demurring defendants the costs of each of said demurrers, to be adjusted (permission so to divide the action and to amend the complaint being hereby granted to the plaintiff); then, &c. *N. Y. Code Civ. Pro.*, § 497.

[*In either case add :*] III. And I hereby direct judgment to be entered as aforesaid. [*Signature and title of judge.*]
[*Date.*]

Form No. 1487.

Another form of decision on demurrer—by order.¹

At a special term [*dec., as in Form 493, p. 4.*]

[*Title of cause.*]

This action having been duly brought to trial on the issue of law joined herein, and after hearing A. T. in support of the demurrer, and T. Z. [*or, after proof of due notice of trial to the , and no one appearing*] in opposition; now, on motion of A. T., for ,

ORDERED, that said demurrer be sustained [*or, overruled*], and that defendant [*or, plaintiff*] have leave to enter interlocutory judgment thereon for , but with leave to the plaintiff [*or, defendant*] to amend the complaint [*or, answer—or, reply—or, to withdraw said demurrer and answer*] within twenty days after entry and service of such judgment on payment of costs to be taxed and included in such judgment.

[*May add directions for final judgment; see two last Forms.*] Enter: [*signature of judge in full with title.*]

Form No. 1488.

Interlocutory judgment on demurrer.²

[*Title of court and cause.*]

* This cause having been regularly brought on for trial upon the issues of law formed by plaintiff's complaint and defendant's demurrer, at a special term [*or, circuit*], held by Hon. J. K., one of the justices of this court, who having heard the parties by their counsel, and after due deliberation has duly made and filed his decision in writing directing interlocutory judgment to be entered † to the following effect, now on motion of A. T., attorney for [plaintiff], it is

¹ Such an order has generally been treated as a sufficient "decision" of the issue; but the previous Forms are preferable.

² Entry of interlocutory judgment is necessary. *Liegeois v. McCrackan*, 22 *Hun*, 69; appeal dismissed in 83 *N. Y.*, 624.

ADJUDGED AND DECREED [*proceed according to directions of findings or order for judgment*].¹

[*Serve copy with notice of entry.*]

Form No. 1489.

Order for final judgment on demurrer.²

At a special term [*dec., as in Form 493, p. 4*].

[*Title of the cause.*]

[*As in last Form from the * to the †, continuing thus:*] containing a direction that if defendant should not within twenty days pay costs and answer, final judgment should be entered to the following effect, and said interlocutory judgment having been duly entered and served, and defendant not having elected to answer, and his time to do so having expired [*if application was made to the court on the default, recite it, and the order and the assessment or reference had if any; see Forms 1461, 1462*].

[*Continue as in other Forms.*]

[*Judgment; see, for entry by the clerk, 1455; and Forms 1466, 1471, for entry by order of the court.*]

[*Serve copy of judgment, with notice of entry, to limit time to appeal.*]

¹ It is common but quite superfluous to recite the findings at length. They must be annexed to the judgment roll (*N. Y. Code Civ. Pro.*, § 1237), and form a necessary part of a certified

copy of the judgment whenever it is brought in question by appeal or otherwise, or offered in evidence.

² *N. Y. Code Civ. Pro.*, § 1222.

ARTICLE IV.

PROCEEDINGS IN CASE OF TRIAL BY JURY.

SECTION I.—BRINGING ON THE TRIAL.

II.—VARIOUS PROCEEDINGS INCIDENTAL TO THE TRIAL.

III.—VERDICT, AND MOTION FOR NEW TRIAL.

IV.—CASE, AND EXCEPTIONS.

V.—COSTS, AND JUDGMENT.

SECTION I.

BRINGING ON THE TRIAL.

FORMS.

- | | |
|--|---|
| (1490.) Notice of trial. | be inserted in foregoing Form. |
| (1491.) Affidavit of merits to prevent inquest. | (1502.) Order postponing trial. |
| (1492.) The same—made by counsel. | (1503.) Stipulation, on putting cause over for the circuit, that it shall not abate by death. |
| (1493.) Note of issue for trial of fact. | (1504.) Notice of motion for a special jury. |
| (1494.) Notice of motion to strike cause from calendar. | (1505.) Order for a special jury. |
| (1495.) Affidavit to move to place on short cause calendar. | (1506.) Notice of striking special jury, where order does not fix the time. |
| (1496.) Affidavit to oppose motion to place on short cause calendar. | (1506a.) Motion for foreign jury. |
| (1497.) Notice of motion to put cause on short cause calendar. | (1507.) Order at special term transferring cause to be tried by jury. |
| (1498.) Affidavit to move for postponement. | (1508.) Stipulation that issues be tried by a jury. |
| (1499–1501.) Statements suitable to | (1509.) Order thereon. |

Form No. 1490.

Notice of trial.¹

[Title of court and cause.]

Please take notice, that the above cause will be brought to trial [if plaintiff's notice, add: and an inquest taken therein] at [if to be moved on a particular day, substitute for the word "at" the day, as thus: (on the first day of)] the next circuit [or, next special term—or, trial term—or, in the county court, the

¹ N. Y. Code Civ. Pro., § 977.

next term,—of this] court [appointed to be held in and for the county of _____, at the county court house [or, city hall] in the town [or, city] of _____, on the _____ day of _____, 18 [if a previous notice has been served for a term not yet ended, at which the cause may possibly be reached, add: unless the same has been then already tried¹].

[If preference is asked,² add or serve a separate notice, saying:] And an application will be made to the court, at the opening thereof, for leave to move the same as a preferred cause [and if the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried, add: on the grounds shown in the accompanying affidavit], at the same time a motion will be made to give this action preference upon the calendar, because [stating reason as thus:] executors are the sole plaintiffs.³

[If judgment is to be at the same time asked against defendants who have appeared and failed to plead, may add: and at the same time application will be made for judgment and an assessment of damages⁴ against the defendant W. X.

[Date, signatures, addresses, &c., as in Form No. 1494.]

Form No. 1491.

Affidavit of merits to prevent inquest.⁵

[Title of court and action.]

[Venue.]

Y. Z., being duly sworn, says:

That he is the defendant⁶ in the above-entitled action, and that he has fully and fairly stated the case⁷ to _____, his

¹ Unnecessary in the first district and in the county of Kings, where only one notice of trial is necessary. *N. Y. Code Civ. Pro.*, § 977.

² See pp. 629, 630, of this Volume.

³ *N. Y. Code Civ. Pro.*, §§ 789, 791, 793. Required by local rule in Onondaga county (*Rule of March, 1881*); Onondaga county (*Rule of 1881*). It is safe practice also in other courts. The court has inherent power to grant a preference irrespective of the statute. See *Studwell v. Charter Oak Ins. Co.*, 19 *Hun*, 127, where the clause was held unnecessary. *Smith v. Keepers*, 5 *Civ. Pro. R. (Brown)*, 66.

⁴ May modify according to Form 1456.

⁵ Not necessary in equity cause. *Devlin v. Shannon*, 8 *Hun*, 531. Nor in any case if the answer is verified. *N. Y. Code Civ. Pro.*, § 980. As to require-

ments in the U.S. Circuit Court for the Southern District of New York, see its rules Nos. 22, 25, 26.

⁶ If not by the defendant, state reason, and deponent's relation to the cause so as to show his means of knowledge.

⁷ It is wise to follow the settled form of an affidavit of merits, as slight deviations have been held to render the affidavit insufficient. In general it should state that defendant has "fully and fairly stated the case to his counsel." See *Onondaga County Bank v. Shepherd*, 19 *Wend.*, 10; *Bleecker v. Storms*, 2 *How. Pr.*, 161; *Cary v. Livermore*, *id.*, 170. Stating that the party has fully stated "his case," or "this case," has been held sufficient under old Rule 61 of the Supreme Court. *Brownell v. Marsh*, 22 *Wend.*, 636; and see *Brown v. Masten*, 2 *How. Pr.*, 187, 195. So,

counsel, who resides at No. , in street, in the of , and that he has a good¹ and substantial defense on the merits² to the action,³ as he is advised by his said counsel,⁴ after such statement,⁵ and verily believes to be true.⁶

[*Jurat.*]

[*Signature.*]

Form No. 1492.

The same—made by counsel.

[*Commencement and conclusion as in other cases.*]

That he is the attorney and counsel of the above-named defendant Y. Z., retained to defend this action, and that from

stating that the party has fully, &c., "stated the facts of this case," has been held sufficient; it implies that he has stated all the facts which make the whole case. *Jordan v. Garrison*, 6 *How. Pr.*, 6. But stating that he has fully, &c., stated the facts of *his case*—has stated *his case* in this cause—has fully, &c., stated *his defense*—has stated the facts of his defense, or the like, is insufficient. *Morgan v. McDonald*, 70 *Cal.*, 32; *Fitzhugh v. Truax*, 1 *Hill*, 644; *Brownell v. Marsh*, 22 *Wend.*, 636; *Richmond v. Cowles*, 2 *Hill*, 359; *Ellis v. Jones*, 6 *How. Pr.*, 296; *Tompkins v. Acer*, 10 *id.*, 309; *Richards v. Swetzer*, 3 *id.*, 413; 1 *Code R.*, 117.

So, under old Rule 61, a statement that the party "has made a full and fair statement of all the facts of the case in the above cause to," &c., "as far as the facts have come to his knowledge, and he believes them to exist," was insufficient. If the party cannot comply with the language of the rule, he should disclose his excuses. *Brown v. St. John* and *Tousey*, 19 *Wend.*, 617.

¹ "Full" defense is not equivalent for "good." *Bank of Utica v. Root*, 4 *Hill*, 535.

² As to whether the words "on the merits" are strictly necessary, see *Briggs v. Briggs*, 3 *Johns.*, 449; *Meech v. Calkins*, 4 *Hill*, 534; *Tompkins v. Acer*, 10 *How. Pr.*, 309.

³ Stating a defense to "the demand," or "the bond," or "note," or "declaration," is held not sufficient.

Meech v. Calkins, 4 *Hill*, 534; *Mason v. Moore*, 2 *How. Pr.*, 70; *Chemung Canal Bank v. Supervisors of Chemung*, *id.*, 162; *Durant v. Cook*, *id.*, 43; *Howe v. Hasbrouck*, *id.*, 67. So of a statement that defendant "has a good and substantial defense upon the merits to the whole or some part of the plaintiff's demand." *Chemung Canal Bank v. Supervisors of Chemung*, *id.*, 162.

⁴ In general the affidavit should show the advice of counsel. *Swartwout v. Hoage*, 16 *Johns.*, 3; *Bruen v. Adams*, 3 *Cal.*, 97; *Cannon v. Titus*, 5 *Johns.*, 355; *Hart v. McGarry*, 1 *How. Pr.*, 74; and see *N. Y. Gen. Rules*, Nos. 23, 24. But it has been held that when the affidavit sets forth the facts relied on as merits, so that the court can see that there are merits, absence of oath to advice of counsel may be excused.

⁵ The fact that the advice was after the statement is essential; but if these words are omitted it will be deemed implied by the form of the preceding allegations. *Brown v. Seys*, 2 *How. Pr.*, 276.

⁶ An affidavit that deponent "is advised by said counsel that said defendants have a good and substantial defense to said suit on the merits, which advice deponent believes to be true," was held insufficient, in *Brittan v. Peabody*, 4 *Hill*, 61.

So of an affidavit in which the word "believed" was used instead of "believes" to be true. *Wharton v. Barry*, 1 *How. Pr.*, 60.

the statement of the case in this action, made to deponent by defendant Y. Z., deponent verily believes that defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint [or to some part thereof¹].

[Add also reason why the affidavit is not made by defendant.²]

Form No. 1493.

Note of issue for trial of fact.³

[Name of court and term.]

A. B., plaintiff, against W. X. and Y. Z., defend- ants.	}	A. T., plaintiff's attorney. Issue of fact. Triable by jury [or, by court without jury]. T. W., attorney for defendant W. X. T. Z., attorney for defendant Y. Z.
---	---	--

Last pleading served the day of , 18 [in a cause which has been passed without postponement, add: but date of issue to be as of—specifying date when passed].

Number of cause on previous calendar, 263 [or, Not on previous calendar]. [Preference is claimed—stating in what class and on what ground.⁴] [In N. Y. City Court, add: Cause noticed for term—or, for the day of next.⁵]

Plaintiff's [or, defendant's] note.

[Signature and office address of attorney.]

Form No. 1494.

Notice of motion to strike cause from the calendar.⁶

[Title of court and cause.]

Take notice, that on the affidavit, of which a copy is herewith

¹ This qualification is allowed in counsel's affidavit for the purpose of obtaining extension of time to answer, by N. Y. Gen. Rules, No. 24, of 1888.

² Griel v. Buckius, (Pa., 1887) 4 Centr. Rep., 507; Miller v. Hooker, 2 How. Pr., 124.

³ N. Y. Code Civ. Pro., §§ 977, &c. See notes on p. 769, and see local rules.

⁴ Required by local rules in the supreme court in the counties of Monroe, Oneida, Onondaga, Saratoga.

⁵ N. Y. Code Civ. Pro., § 3163.

⁶ Motions to strike a cause from

served on you [and upon the pleadings—*and mention any other papers relied on*], the undersigned will move the court, at a special term thereof [*or, at a circuit*], to be held at [*&c.*], on the day of _____, or as soon thereafter as counsel can be heard, for an order that this cause be stricken from the [*state which*] calendar of this court, with costs of this motion [*if on the ground of irregularity specify it*].

[*Date.*] _____ [*Signature and office address of*],
 [Address] To _____ Attorney for _____
 Attorney for _____

Form No. 1495.

Affidavit to move to place on short cause calendar.

[*Title of court and cause.*]

[*Venue.*]

A. T., being duly sworn, says:

I. That he is the [attorney for the] plaintiff in this action,

II. That this action is upon contract, and is founded upon [*state briefly the cause of action*].

III. That the answer merely denies the allegations of the complaint.

[*Or, III. That the answer alleges—here state briefly the new matter alleged—and sets up no other new matter—may add, if so:*¹ and this deponent has reason to believe, and does believe, that the defense so made is made only for the purpose of delay, the reasons for which belief are as follows—*stating them.*]

IV. That this cause is now on the general calendar, and numbered _____, and has been duly noticed for trial by deponent.

V. That this deponent believes that the trial of this action, if placed upon the special circuit calendar, is not likely to

the calendar, or to correct the calendar, are usually made at the opening of court, and without requiring formal previous notice. Cases sometimes occur, however, in which a notice of motion is advisable. The affidavits to support and oppose these motions must, of necessity, vary so much with the facts relied upon as ground for striking the cause from the calendar,

or retaining it, that no forms of general usefulness can be given. The motion being made before the court on whose calendar the cause is, the affidavit need not state that the cause is on the calendar. *Herkimer Co. Bk. v. Devereux*, 5 *Hill*, 9.

¹ This clause is required by some local rules; in others it is an alternative ground for the motion.

occupy more than one hour [*indicating reason, as thus: as the production and proof of the note above mentioned, and proof of the amount of interest, is all the evidence requisite to be offered by the plaintiff to establish his case—or otherwise state nature of evidence, number of witnesses, &c., tending to show that the cause can be tried within an hour*].

[*Jurat.*]

[*Signature.*]

Form No. 1496.

Affidavit to oppose motion to place on short cause calendar.

[*Title of court and cause.*]

[*Venue.*]

Z. T., of , being duly sworn, says :

I. That he is the [attorney for the] defendant in this action.

II. That the answer alleges [*here state briefly any new matter alleged*].

III. That the defense interposed is not made for the purpose of delay, but is made in good faith, and deponent believes the same can and will be fully established on the trial.

IV. That this deponent believes that the trial of this action is likely to occupy more than one hour, for the reason that [*here state any facts tending to show that more than an hour may be consumed in the trial; as thus: the defendant disputes the genuineness of his alleged signature to the note on which the action is brought, and a large number of witnesses must be examined upon that question; and defendant expects to show by the testimony of the defendant himself, and of J. J., K. L. and M. N., that such signature is not in the handwriting of defendant, and by the testimony of S. T. and U. V., that it is an imitation of defendant's handwriting, and was affixed to said note by C. B., a son of the plaintiff*].

[*Jurat.*]

[*Signature.*]

Form No. 1497.

Notice of motion to put cause on short cause calendar.

[*Title of court and cause.*]

Please take notice, that upon the pleadings herein, and an affidavit, with a copy whereof you are herewith served, the

undersigned will move this court at chambers [*or*, at a special term—*or*, at the next circuit], to be held at the _____, in the _____ of _____, on the _____ day of _____, 18____, at the opening of the court on that day, that this cause be set down for trial as a short cause, upon the [special circuit] calendar, or for such other and further relief as may be just.

[*Date.*] _____ [*Signature and office address of*],
 [Address] To _____ Attorney for _____
 Attorney for _____.

Form No. 1498.

Affidavit to move for postponement.¹

[*Title of court and cause.*]

[*Venue.*]

A. B., of _____, being duly sworn, says :

I. That he is the plaintiff [*or*, defendant] in this action.

[II. *If the affidavit is by defendant:* That deponent has fully and fairly stated the case to T. Z., his counsel, who resides at No. _____, in _____ street, in the _____ of _____, and that he has a good and substantial defense on the merits to the action, as he is advised by his said counsel after said statement, and verily believes to be true.]

III. That M. N. is a material witness for deponent, without the benefit of whose testimony deponent cannot safely proceed to the trial of said action, as he is advised by his counsel, after fully and fairly stating to him what he expects to prove by said witness, and as deponent verily believes. [*If one postponement has been had, go on and state what facts it is expected to prove by the witness.*]

IV. [*State excuse for not having witness present; see next two Forms.*] _____ [*Signature.*]
 [Jurat.]

STATEMENTS SUITABLE TO BE INSERTED IN FOREGOING FORM.

1499. *Sickness.*—IV. That the said witness, who resides at _____, was, on the 10th day of March last past, duly subpoenaed to attend the trial of this action; but that since the service of the said subpoena he has become seriously ill, and is now wholly unable to attend this court, or be present at the trial of

¹ For the rules on this subject and authorities, see *Abb. Tr. Brief for Jury Cases*, c. I.

this action in its order on the calendar. But deponent has been informed by R. S., the physician attending the said witness, and verily believes, that the said witness will be able to attend this court by the time of the next circuit, appointed to be held at [&c.].

1500. *Absence from State.*—IV. That the said witness is not in attendance, and that, two weeks before the first day of the present circuit, deponent went to the residence of said witness, in the town of Berlin, in the county of Rensselaer, for the purpose of subpoenaing him to attend as a witness in said action, at said circuit; that he there learned that said witness had unexpectedly left home the day before, in order to go to the State of Ohio, and intended to remain there about two months; and deponent further says, he had no reason to believe said witness was going to be absent from home, until he learned it when he went to subpoena said witness, as aforesaid; and deponent further says, he expects to be able, and intends to procure the attendance of said M. N. as a witness in this action at the next circuit court, appointed to be held at [&c.].

1501. *Absence of party.—Affidavit will be by attorney, and state facts as thus:*—I. That the defendant is a resident of this State, and is master of the ship "Ocean Queen," and has been absent from this State since last, on a voyage to New Orleans, from which he will probably return about the day of next.

II. That in the opinion of this deponent, he cannot safely proceed with the trial of this action in the absence of said defendant, who is thoroughly acquainted with all the facts in controversy in this action, and without whose aid and assistance it will be impracticable for deponent to properly prepare for trial herein.

III. That before said defendant's departure from this State, as aforesaid, he had not time fully to apprise deponent of the facts of the case and the names and residence of his witnesses.

[Add oath to merits; see II in Form 1498.]

Form No. 1502.

Order postponing trial.

At a special term [&c.—or,
circuit—&c., as in Form
493, p. 4].

[Title of cause.]

On reading and filing the affidavit of Y. Z., verified the day of , 18 , and after hearing Z. T., of counsel for Y. Z., and A. T., of counsel for A. B. in opposition; now, on motion of Z. T., attorney for defendant:

ORDERED, that the trial of this action be postponed until the instant [or, to the circuit], on payment [this day] of ten dollars costs and the fees of plaintiff's witnesses and other taxable disbursements already made or incurred, and which are rendered ineffectual by the adjournment, which are hereby

adjusted at dollars besides said \$10 [*or, which are to be taxed by the clerk*]. [*Here state other terms, if any, imposed, such as:*] This order is made on condition that defendant consent that the testimony of M. N. be taken conditionally before R. F. as referee, on days' notice.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1503.

Stipulation, on putting cause over for the circuit, that it shall not abate by death, &c.¹

[*Title of court and cause.*]

It is hereby stipulated by and between the parties to the above-entitled action:

I. That at any time hereafter [*or, between the day of and of , 18*], on a notice of [*ten*] days to the [*defendant's*] attorney, the testimony of may be taken by the [*plaintiff*] before M. N., of , as a referee for such purpose, at his office in .

II. That in case of the death of the plaintiff herein, before final judgment and determination of this action, the alleged cause of action shall survive, and any verdict and judgment thereon shall be regarded as if rendered in plaintiff's lifetime.

III. That in case of the death of said plaintiff before the final determination of said action, the personal representatives of said plaintiff be substituted as a party plaintiff herein by order to be entered upon filing this stipulation.

[*Date.*]

[*Signatures of attorney.*]

Form No. 1504.

Notice of motion for a special jury.²

[*Title of court and cause.*]

Take notice, that an affidavit of which a copy is herewith served upon you, and upon the pleadings [*specify any other*

¹ This Form is sustained by *Cox v. The N. Y. Central, &c., R. R. Co.*, 63 N. Y., 414.

² A special or struck jury is ordered only in important cases, and upon special circumstances, and now

papers if relied on] in this action, the undersigned will move the court, at a special term to be held [at chambers¹] at the court house in _____, in the county of _____ [or, at the city hall in the city of _____], on the _____ day of _____, 18____, at _____ o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order that a special jury be struck for the trial of this action, and for such other or further relief as may be proper.

[Date.] _____ [Signature and office address of],
[Address] To _____ Attorney for _____
Attorney for _____

Form No. 1505.

Order for a special jury.²

[Title (court order) and recitals, according to the case; see Form 493, p. 4.]

ORDERED, 1. That a special jury be struck for the trial of this action [and that the parties hereto, for that purpose, attend before _____, at _____, on the _____ day of _____, 18____—*may add if officer is interested*: and that M. N. and N. O., hereby appointed as two disinterested persons, strike said jury].

2. That the jurors selected attend at the [next] circuit court in and for the county of _____, at the opening of the court on the _____ day of _____, 18____.⁴

Enter: [signature of judge by initials of name and title.]

very rarely even in such cases. For the grounds on which, in particular cases, special juries have been ordered or refused in this State, see *Spencer v. Sampson*, 1 *Cai.*, 498; *Hartshorn v. Gelston*, 3 *id.*, 84; s. c., *Col. & C. Cas.*, 484; *Livingston v. Cheetham*, 1 *Johns.*, 61; *Thomas v. Rumsey*, 4 *id.*, 482; *Genet v. Mitchell*, *id.*, 186; *New Windsor Turnpike Co. v. Ellison*, 1 *id.*, 141; *Patchin v. Sands*, 10 *Wend.*, 570; *Livingston v. Smith*, 1 *Johns.*, 141; *Anonymous, id.*, 314; *Wright v. Columbian Ins. Co.*, 2 *id.*, 211; *Poucher v. Livingston*, 2 *Wend.*, 296; *Nesmith v. Atlantic Ins. Co.*, 8 *Abb. Pr.*, 423; *Walsh v. Sun Mut. Ins. Co.*, 17 *id.*, 356; s. c., 2 *Robt.*, 646; *People v. McGuire*, 43 *How. Pr.*, 57; *People v. Tweed*, 50 *id.*, 262. See, also, for the statutory rules on the subject, *N. Y. Code Civ. Pro.*, § 1063, &c.

¹ If stay is asked for, move the term or justice upon whose calendar the cause is. *Walsh v. Sun Mut. Ins. Co.*, 17 *Abb. Pr.*, 356; s. c., 2 *Robt.*, 646.

Under *N. Y. Code Civ. Pro.*, § 1063, application for this order may be made in an action in the supreme, or a superior city court, and must be made to the court, and upon notice. As the order "must specify the term," and may specify the particular day in the term when the jurors must attend, it is evident that the application should be promptly made.

² *N. Y. Code Civ. Pro.*, § 1063, and see 139 *North. Am. Rev.*, 7, where the practice is disapproved.

³ This clause may be omitted; see next Form.

⁴ This may be first day of term or a later day.

Form No. 1506.

Notice of striking special jury, where order does not fix the time.

[*Title of court and cause.*]

Please take notice, that the undersigned, will attend before the [clerk] of the county of _____, at his office in the city [or, town] of _____, for the purpose of having the special jury struck for the trial of this action, on the _____ day of _____, 18____, at o'clock in the _____ noon of that day.

Date. _____ [*Signature and office address of*],
[*Address*] To _____, Attorney for _____.
Attorney for _____.

Form No. 1506a.

Motion for foreign jury.

[*Adapt from last Forms.*]

Form No. 1507.

Order at special term transferring cause to be tried before a jury.¹

At a special term [*dec., as in*
Form 493, p. 4].

[*Title of action.*]

This cause having been placed upon the calendar of this court for trial by the [plaintiff], and, upon reading the pleadings, it appearing to the court that it is of right triable by jury; Now, on motion of Z. T., Esq., attorney for defendant:

ORDERED, that it be struck from the calendar of this court [and that the clerk of this court be directed to place it on the circuit calendar].

Enter: [*signature of judge by initials of name and title.*]

¹ For motion for trial by jury, where part of the issues are so triable as matter of right, or where it is sought to have an equity cause or issues therein tried by jury, see TRIAL BY THE COURT.

Form No. 1508.

Stipulation that issues be tried by jury.¹

[*Title of court and action.*]

It is hereby stipulated between the parties to this action, * that the following stated questions of fact [*or, the questions of fact stated in the annexed order*], arising [*upon the pleadings*] in this action, shall be tried by a jury, and that an order [*or, the annexed order*] for the trial thereof at may be entered hereon by either party without further notice.

[*Date.*]

[*Signatures of*],

Attorney for plaintiffs.

Attorney for defendant.

Form No. 1509.

Order on consent for the trial of issues by a jury.

At a special term [*&c., as in*
[*Form 493, p. 4.*]

[*Title of action.*]

On reading and filing the annexed stipulation in this action, signed by the respective attorneys therein [*or otherwise reciting papers on which the order is made*], and on motion of :

ORDERED [*&c., as in Form 1508 from the *, or Form 1603*].

SECTION II.

VARIOUS PROCEEDINGS INCIDENTAL TO TRIAL.

FORMS.	
(1510.) Affidavit of service of subpoena.	(1513.) Order granting leave at trial to withdraw a juror and amend.
(1511.) The same—in case of several witnesses.	(1514.) Another Form—striking out parties.
(1512.) Order on the minutes allowing amendment on terms, and postponement.	(1515.) Undertaking in action upon lost negotiable paper.

¹ For proceeding by motion, see *Carr v. Carr*, 52 N. Y., 251. Forms under TRIAL BY COURT. The whole issues or a particular issue may be so tried by consent.

Form No. 1510.

Affidavit of service of subpoena.¹[*Title of court and cause.*][*Venue.*]

C. D., being duly sworn, says that on the day of , 18 , he served the within subpoena personally upon E. F., the person therein named as witness, by then and there exhibiting to him [*or, her*] the said original subpoena, and delivering to him [*or, her*] a copy thereof [*or, a subpoena ticket containing the substance thereof, a copy of which ticket is hereto annexed*²], and paying [*or, tendering*] to him [*or, her*], at the same time and place, dollars and cents, as and for his [*or, her*] fees for traveling from , which then was the residence of said E. F., to the place mentioned in said subpoena, and return therefrom, and for one day's attendance as such witness.

[*Signature.*][*Jurat.*]

Form No. 1511.

The same—in case of several witnesses.

[*Title of court and cause.*][*Venue.*]

C. D., being sworn, says that the witnesses hereafter named, at the times hereafter named, respectively, resided at the places where they were subpoenaed by deponent as hereafter stated [except G. H., who then resided at]. That deponent, at the times and places below set forth, served the annexed subpoena personally upon the witnesses below named, by exhibiting said original subpoena to each of such witnesses, and delivering to him or her a copy thereof [*or, a subpoena ticket containing the substance thereof, of which a copy is hereto annexed*],² and paying to each of them the sum set opposite [*or, next below*] his [*or her*] name, viz. :

On E. F., at No. street, in , N. Y., on the
day of , 18 , amount paid, \$,
[*and so on*]

as and for the traveling fees of such witnesses respectively, from

¹ *N. Y. Code Civ. Pro.*, §§ 852, 853.
For another Form, see No. 1203, p. 593. For subpoena, see Forms 1419–1421. For affidavit to attach, and attachment, see Forms 1203, 1204.

² This clause, annexing copy of the subpoena ticket delivered, is not necessary unless the affidavit is made for the purpose of obtaining an attachment.

the residence of each of said witnesses to the place mentioned in the subpoena, and return therefrom, and one day's attendance as such witnesses.

[Signature.]

[Jurat.]

Form No. 1512.

Order on the minutes allowing amendment on terms, and postponement.¹

At a circuit court [*or*, trial term
—&c., as in Form 493, p. 4].

[*Title of cause.*]

This cause having been brought on regularly for trial this day, and both sides having answered "ready," and a jury having been impaneled and the trial commenced, and the plaintiff having examined his first witness, and on cross-examination the defendant's attorney having discovered that his answer served did not admit of the defense sought to be interposed, and having moved in open court for leave to amend his answer,² and the court having granted the motion, upon payment of all costs and disbursements of the action to the present time, including trial fee and jury fee, amounting to \$142.50, as follows: [*stating items as thus:*] Before notice of trial, \$25 [*and so on*]. And disbursements, viz. [*stating items*]. *

And the said defendant's attorney having accepted said conditions, the cause was set down for trial on day, instant, the defendant's attorney to serve said amended answer and to pay said costs, &c., by or before the day of , 18 . Enter [*&c.*].

¹ *N. Y. Code Civ. Pro.*, §§ 539, 540. The court has power to allow amendments of the pleadings at the trial. *Woolsey v. Village of Rondout*, 4 *Abb. Ct. App. Dec.*, 639; *Knickerbocker Life Ins. Co. v. Nelson*, 7 *Abb. N. C.*, 170; less fully, 78 *N. Y.*, 137.

Amendments on the trial should be put in writing, and if not formally served (which may be done upon the spot, or within reasonable time), should be entered at length in the minutes. It is now usual to require service of the amended pleading, but if this is not required by the court, it is not necessary (*Lane v. Hayward*, 28

Hun, 583), and a certified copy of the order allowing the amendment is sufficient (*Jackson v. Belknap*, 7 *Johns.*, 300), unless it is to bring in a new party.

In case of mere variance, if the adverse party is not misled, application may be made after judgment for leave to amend. *Place v. Minster*, 65 *N. Y.*, 89.

² If the other party desires opportunity to answer or reply anew he should ask it at the trial. *Noonan v. Caledonia Gold Mining Co.*, 121 *U. S.*, 393.

Form No. 1513.

Order granting leave at trial to withdraw a juror and amend.

At a circuit [*or*, trial term—*as in*
Form 493, p. 4].

[*Title of action.*]

This cause coming on for trial, and the plaintiff desiring to amend his complaint by substituting in the place of the express contract sued on, an action to recover the reasonable value of his services [*or*, the defendant desiring to amend his answer by setting up an over-payment and demanding judgment for the amount thereof], and thereupon the defendant [*or*, plaintiff] refusing to go on with the trial, claiming to be surprised [*if affidavit of surprise was offered, recite it, as thus: as appears by the affidavit of A. T., verified this day*]:

ORDERED, that a juror be withdrawn and the plaintiff [*or*, defendant] be allowed to amend his complaint [*or*, answer] in the particulars above recited, and that the plaintiff [*or*, defendant] be allowed to serve such amended complaint [*or*, answer] upon the attorney of the said plaintiff [*or*, defendant] within [ten] days from the date of this order upon the payment by the plaintiff [*or*, defendant] to the said defendant [*or*, plaintiff] or his attorney, within said [ten] days, of the sum of dollars term fees, and dollars witness fees [*or as in last Form*], amounting in all to the sum of dollars, and that the said defendant [*or*, plaintiff] be allowed, within twenty days after the service of such amended complaint [*or*, answer], to serve his answer thereto [*or*, demur or reply thereto, if such reply be necessary or proper].

And it is further ordered that the date of issue herein stand as of the day of , 18 . Enter [*&c.*].

Form No. 1514.

Another Form—striking out parties.¹

This cause coming on for trial, and the plaintiff desiring to strike out of the complaint all charges in regard to a conspiracy and combination on the part of the defendants John Doe and Richard Roe, with the defendant Y. Z., as contained

¹ The court have power to strike out a superfluous defendant at the trial. *Bartholomae v. Kaufman*, 16 *Weekly Dig.*, 127. An order in this form was affirmed in *Woodruff v. Schneider*, 65 *How. Pr.*, 450.

in the complaint herein, and desiring to proceed against the said defendant Y. Z. alone for the fraud as alleged in said complaint, and a motion to that effect having been made by the plaintiff and granted,¹ and thereupon the defendant Y. Z. refusing to go on with the trial, claiming to be surprised :

ORDERED, that a juror be withdrawn and the plaintiff be allowed to amend his complaint by striking out the names of said John Doe and Richard Roe as defendants, and all allegations in regard to a conspiracy and combination on the part of the said defendants with the defendant Y. Z., and that the plaintiff be allowed to serve such amended complaint upon the attorney of the said defendant Y. Z. within ten days from the date of this order upon the payment by the plaintiff to the said defendant Y. Z., or his attorney, within said ten days, of the sum of dollars term fees and dollars witness fees, amounting in all to the sum of dollars, * and that the said defendant Y. Z. be allowed within twenty days of the service of such amended complaint to serve his answer thereto.

And it is further ordered, that the date of issue herein be as of the same date as formerly, viz., , 18 [and that upon the service of the amended answer of the said defendant Y. Z. this cause be restored to the day calendar of Part of this court for trial].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1515.

Undertaking in action upon lost negotiable paper.²

[*Title of the cause.*]

Whereas, this action is brought to recover the amount of [*or*, a counterclaim has been interposed by the defendant in this action, founded upon] a certain promissory note [*or*, bill of exchange—*describing same*], which said note [*or*, bill] was lost while it belonged to said plaintiff [*or* defendant], and the said plaintiff [*or*, defendant] desires, upon the trial of this action, to prove the contents thereof by parol or other secondary evidence :

Now, therefore, we [A. B., the plaintiff—*or*, defendant—and³], C. D., of , merchant, and E. F., of , broker,

¹ The motion may be made orally at the trial, and is entered with the decision in the minutes, and afterwards the order is settled upon notice.

² In an action on a note accidentally destroyed, a bond is not necessary. *Des Arts v. Leggett*, 16 N. Y., 582.

A bill or note beyond the jurisdiction is not within the statute. *Van Alstyne v. Natl. Commercial Bk.*, 4 Abb. Ct. App. Dec., 449. Compare *Shillito v. Robbins*, 7 Conn. Law Bul., 74.

³ In this case there must be two or more sureties (*N. Y. Code Civ. Pro.*,

do hereby jointly and severally¹ undertake and become bound to the defendant [*or, plaintiff*] in the sum of [*a sum to be fixed by the judge or referee, not less than twice the amount of the note or bill*]; that the plaintiff [*or, defendant*] will indemnify the defendant [*or, plaintiff*], his heirs and personal representatives, against any claim by any other person on account of said note [*or, bill*], and against all costs and expenses by reason of such a claim.

[*Signatures.*]

[*Date.*]

[*Acknowledgments and affidavits of sufficiency and approval, as in Forms 495, 496.*]

SECTION III.

VERDICT, AND MOTION FOR NEW TRIAL.

I. VERDICTS.

FORMS.

- (1516.) Entry of verdict upon a single issue in an action to recover money only.
- (1517.) — for defendant on a counter claim.
- (1518.) — subject to the opinion of the court.
- (1519.) Special verdict.
- (1520.) Direction by judge that jury answer special questions.
- (1521.) Entry of answers thereto.
- (1522.) Entry of stay with time to make case, &c.—motion for new trial—allowance.
- (1523.) Affidavit to obtain order of arrest after verdict.

II. MOTION FOR NEW TRIAL.

- (1524.) Affidavit to obtain order to show cause why a new trial should not be ordered on the minutes.
- (1525.) Order to show cause thereon.

- (1525a.) Order granting motion on the minutes for new trial.
- (1526.) Affidavit to move for new trial on the ground of misconduct of a juror.
- (1527.) — of improper communications.
- (1528.) — of surprise.
- (1529.) — of newly discovered evidence.
- (1530.) Affidavit in corroboration.
- (1531.) Notice of motion for new trial — on case, or affidavit, or both.
- (1532.) Order granting the motion.
- (1533.) — unless opposing party consents to reduce verdict.
- (1534.) Order denying the motion.
- (1535.) — that exceptions be heard at general term.
- (1536.) Notice of hearing of exceptions at general term.
- (1537.) Order on exceptions heard at general term granting new trial.
- (1538.) The same; denial.

I. VERDICTS.

Form No. 1516.

Entry of verdict on single issue in action to recover money only.

This action² being brought to trial before a jury, they find

§ 618), unless one is a fidelity or guaranty company. Vol. I, p. 468.

It is not essential that the party also sign. *N. Y. Code Civ. Pro.*, § 811; Vol. I, p. 469.

¹ See Vol. I, p. 461.

² In the clerk's minutes the entry of verdict is preceded by the names of the jurors and witnesses.

a verdict for the * plaintiff, and assess the amount of his recovery at dollars¹ [*if a case for double damages add: single damages*] [*or, find a verdict for the defendant*].

Form No. 1517.

Entry of verdict for defendant on a counter-claim.

This action being brought to trial before a jury, they find a verdict for the plaintiff upon the first issue, and for the defendant upon the second issue, and assess the amount of the defendant's counter-claim, beyond the plaintiff's claim, at dollars.

Form No. 1518.

Entry of verdict subject to the opinion of the court.²

This action being brought to trial before a jury, the jury, under direction of the judge, find [*stating the finding as in previous cases, adding:*] subject to the opinion of the court.

Form No. 1519.

Special verdict.³

We, the jury, having been required to find a special verdict in said cause, do find the facts in said cause to be as follows:

¹ If the law allows double or treble damages, the verdict should be for single damages, leaving it to the court to increase the sum, unless under a statute prescribing otherwise. *N. Y. Code Civ. Pro.*, § 1184.

² The qualification making the verdict subject to the opinion of the court is not part of the verdict, but follows the entry of the verdict. *Mumford v. Wardwell*, 6 *Wall.*, 423.

For the practice, see 13 *Abb. N. C.*, 376, 382.

Verdict subject to the opinion of the court not to be directed in county court. *Johnson v. N. Y., Ontario & W. R. R. Co.*, 30 *Hun*, 167.

³ Sustained in *Pittsburgh, &c., R. R. Co. v. Ruby*, 38 *Ind.*, 294. Special verdicts are drawn up by counsel on each side according to their views of

the case, and submitted to the jury for consideration and adoption of such findings as they agree upon. For the distinction between this and special questions, see *Abb. Tr. Ev. for Jury Cas.*, 147.

A special verdict which does not find a necessary fact is not sufficient, although it finds facts from which the jury might have found the omitted fact. *La Frombois v. Jackson*, 8 *Cowen*, 589; s. c., 18 *Am. Dec.*, 463; *Hill v. Covell*, 1 *N. Y.*, 522; *Sisson v. Barrett*, 2 *id.*, 406; *Langley v. Warner*, 3 *id.*, 327.

A fact not stated in a special verdict cannot be inferred by presumption from facts that are stated. *Lawrence v. Beaubien*, 2 *Bailey*, 623; s. c., 23 *Am. Dec.*, 155.

But it is not strictly necessary that

I. [*Here should follow statements of facts as in a well-drawn pleading, or in a judge's or referee's conclusions of fact.*]

If, upon these facts, the law is with the plaintiff, then we find for the plaintiff, and assess his damages at dollars. And if the law is with the defendant, then we find for the defendant.

[*Signature of*], Foreman.

Form No. 1520.

Direction by judge that jury answer special questions.

In case you elect to return a general verdict,¹ you will also answer the following questions: [*stating them in writing.*]

Form No. 1521.

Entry of answers by jury to special questions.

The following questions were submitted by the court to the jury, viz.:

What was the value of the premises specified in the complaint on the day of , 18 ?

The jury answer: Nine thousand dollars (\$9,000) [*and so on*].

it should contain facts admitted by the pleadings; the pleadings and the verdict, taken together, present the legal questions to the appellate court. *Barto v. Himrod*, 8 *N. Y.*, 483.

And facts admitted on the trial may be inserted in the verdict by way of amendment, or a venire *de novo* awarded to try such facts. *Sleght v. Hartshorne*, 1 *Johns.*, 149; *Watson v. Delafield*, *id.*, 150.

Plaintiff must furnish a copy of the special verdict for the court on the application for judgment, and must serve a copy on the adverse party at least eight days before the first day of term. *Rule 40 of 1888.*

¹ Where putting special questions is matter of right, it is not error to

refuse to allow them to be put without this condition. *Board of Comrs. v. Kromer*, 8 *Ind.*, 446, 449, and *cas. cit.* Compare *Morse v. Morse*, 25 *id.*, 156, 162.

Nor to refuse to allow them to be put for answer in case the jury find for specified party. *Wood v. Ostram*, 29 *Ind.*, 177, 185.

Each question should be single, calling only for a distinct fact.

They may be leading. *Rice v. Rice*, 6 *Ind.*, 100, and *cas. cit.*

But must not call for evidence nor for conclusions of law. *Hatfield v. Lockwood*, 18 *Iowa*, 296.

For the practice, see *Abbott's Trial Brief for Jury Cases*, 185, and *Murray v. N. Y. Life Ins. Co.*, 96 *N. Y.*, 614.

Form No. 1522.

Entry of stay with time to make case, &c.—of motion for new trial—
for allowance, &c.

On motion of the defendant's attorney, ordered that the defendant have [thirty] days to make and serve a case with exceptions [*if extra time is wanted add:* and that plaintiff have _____ days thereafter to prepare and serve proposed amendments]; and that in the meantime, and until the case shall be settled and filed, all proceedings on the part of plaintiff upon the verdict be stayed.

[*Motion for new trial.*] Motion for new trial made by defendant [*state grounds*] and denied. [*But see Form 1525a, n. 7.*]

[*Allowance.*] An allowance of [five] per cent. granted to plaintiff.

Form No. 1523.

Affidavit to obtain order of arrest after verdict.¹

[*Title and commencement, stating grounds of arrest, see p. 359, &c., of this Volume, continuing by stating the proceedings, as thus:*]

That this cause was regularly brought to trial at the Circuit, 18____, before Hon J. K. and a jury, and on said trial the defendant admitted that the plaintiffs were entitled to recover [upon the grounds above alleged] unless the defendant could establish the counter-claim set up in his answer; and a verdict was duly rendered for the plaintiffs for the whole amount claimed, extinguishing the counter-claim. That verdict is still in force. Judgment has not been entered.² An order of arrest is desired against the defendant. No previous application for an arrest herein has been made [except, &c.; see p. 2].

[*Jurat.*]

[*Signature.*]

II. MOTION FOR NEW TRIAL.

Form No. 1524.

Affidavit to obtain order to show cause why a new trial should not be ordered on the minutes.

[*Title of court and action.*]

[*Venue.*]

Z. T., being duly sworn, says: I. That he is attorney for the defendant herein.

¹ Order of arrest may be granted after verdict, or decision on a trial by the court, if it be done before final judgment. *Humphrey v. Hayes*, 94 *N. Y.*, 594; *Danenbaum v. Mandelbaum*, 16 *Weekly Dig.*, 502; *N. Y. Code Civ. Pro.*, § 558.

² The ordinary stay does not pre-

II. That this action was tried on the _____ day of _____ inst., before Mr. Justice J. K. and a jury.

III. [*State how cause was decided and ground of motion, as thus:*] At the close of the evidence the court, on the motion of the plaintiff and against defendant's objection, directed a verdict for the plaintiff, to which defendant thereupon duly excepted, claiming that the question at issue should be submitted to the jury.

IV. [*State reason for asking order to show cause, and as to previous application, see p. 2 of this Volume.*]

[*Jurat.*]

[*Signature.*]

Form No. 1525.

Order to show cause against motion on the minutes for a new trial.¹

[*Title of court and cause.*]

On the annexed affidavit let the plaintiff [*or, defendant*] show cause before me [*or, before Hon. J. K.*²], at the Circuit Court now in session in and for the [city and] county of _____, at the court house in _____, [*or, at the city hall in said city*], on the _____ day of _____, 18____, why, upon the judge's minutes, a new trial herein [*or if the order to show cause is made by another judge than he who tried the cause, say: why an application for a new trial herein on the judge's minutes should not be entertained, and if said application is so entertained, then why such new trial*] should not be granted³ on the ground

vent applying for arrest. *Lapeous v. Hart*, 9 *How. Pr.*, 541. Or attachment. *Seeman v. Reiche*, *N. Y. Daily Reg.*, June 23, 1882.

¹ *N. Y. Code Civ. Pro.*, §§ 998, 999; *Standard Oil Co. v. Amazon Ins. Co.*, 79 *N. Y.*, 506; *aff'g 14 Hun*, 619; *Metropolitan R. R. Co. v. Moore*, 121 *U. S.* 558; *Schmidt v. Cohn*, 12 *Daly*, 134; *Hynes v. McDermott*, 7 *Abb. N. C.*, 98; *Brown v. Brown*, (*Va.*, 1887) 3 *Southeastern Rep.*, 808.

The notice of motion on the minutes is given in the text in the form of an order to show cause, because in many instances, when formal notice of such a motion is to be given, the near approach of the close of the circuit, or the necessity of a stay of proceedings, will make it desirable to apply for an order to show cause in-

stead of giving full notice. Where this is not the case, an ordinary notice may be drawn. In practice, however, these motions are frequently heard without formal written notice of any kind. On the coming in of the verdict, the party desiring to review it applies orally, upon the spot, to the judge to hear a motion on the minutes, and the judge, if disposed to grant the request, designates a day for the hearing. *s. P.*, *Hansen v. Fish*, 27 *Wisc.*, 535.

² The motion must be heard before the judge who presided at the trial, or some one designated by him to hear it.

³ This is sufficient, for it implies the setting aside of the verdict, &c. *Heinlen v. Heilbron*, 71 *Cal.*, 557; 12 *Pacific Rep.*, 673. *s. P.*, Form 1555, note.

[*stating it*¹ *as thus*: of the exceptions²—*or*, because the verdict is for excessive damages³—*or*, because the verdict is for insufficient damages⁴—*or*, because the verdict is contrary to the evidence⁵—*or*, because the verdict is contrary to law]; [and let the stenographer's notes, as written out, be treated as the judge's minutes on which this motion is made⁶], and in the meantime, and until the determination of said motion, not exceeding twenty days, let all proceedings on the part of said be stayed.

Service of this order and the annexed affidavit, on or before the day of , shall be sufficient.

[*Date.*] [*Signature of judge and initials of title.*]

Form No. 1525a.

Order granting motion on the minutes for new trial.⁷

At a Circuit [*or*, Trial Term, &c., see Form 493, p. 4].

[*Title of action.*]

The plaintiff [*or*, defendant] having moved upon the minutes [to wit, the stenographer's notes as written out and adopted by the judge as his minutes] for a new trial, upon the ground[s] [*specify ground distinctly as in last Form*]: Now, on reading and filing [*proceed with recitals as in other cases, see Form 493, p. 5*].

ORDERED, 1. That the verdict herein [and judgment thereon] be set aside, and a new trial of this action [*or if of special questions, indicate what*] be and the same is hereby granted because said verdict is against evidence⁸ [*or*, excessive⁹], upon payment [within days] of costs of the trial [*or*, upon the exceptions—*or may specify error of law*—with ten dollars costs].

¹ A statement of the ground is necessary. *Cooke v. Leonard*, 17 *Weekly Dig.*, 575. Several of these grounds may be combined. *Giraudat v. Korn*, 8 *Daly*, 406.

² If desired, may, after stating the other grounds, ask in the alternative, "or why the exceptions taken at the trial should not be heard in the first instance at the General Term, and judgment be suspended in the meantime."

³ *Houghkirk v. Delaware & Hudson Canal Co.*, 92 *N. Y.*, 219; rev'g 23 *Hun*, 407.

⁴ *Platz v. City of Cohoes*, 8 *Abb. N. C.*, 392; *Phillip v. Southwestern*

R. R. Co., 40 *L. T. R.*, *N. S.*, 813; *Wavle v. Wavle*, 9 *Hun*, 125; *Chase v. Bassett*, 15 *Abb. Pr.*, *N. S.*, 293.

⁵ As to meaning of "contrary to evidence," or, "for insufficient evidence," see *Met. R. R. Co. v. Moore*, 121 *U. S.*, 558.

⁶ *N. Y. Code Civ. Pro.*, § 1007.

⁷ An order should be entered, to enable the unsuccessful party to review on appeal any question of fact. *Boos v. World Mut. Life Ins. Co.*, 64 *N. Y.*, 236, 242. If on the merits, it must, in all cases, be a court order.

⁸ *Kelly v. Frazier*, 27 *Hun*, 314.

⁹ *Langley v. Sixth Ave. R. R. Co.* 48 *Super. Ct. (J. & S.)*, 542.

That upon such payment [*may add*—unless an appeal from this order be taken within days] the cause is to be placed, by the clerk, on the day calendar for trial¹ [*or, restored to the calendar and set down for trial upon days' notice*²—*or, for trial upon the day of , 18*].

Form No. 1526.

Affidavit to move for new trial³ on the ground of misconduct of a juror.⁴

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says :

I. That he is [*stating relation to cause, if any, or residence, &c.*].

¹ Newman v. French, 45 Hun, 65.

² Watson v. Phyfe, 18 Abb. N. C.; 469; Hinman v. Hare, *id.*, 472.

³ Motions for new trial are entertained, chiefly, upon the following grounds: 1. Error committed on the trial. 2. That the verdict was against the evidence, or against law. 3. That the damages are excessive, or inadequate. 4. Some misconduct or irregularity on the part of the successful party, or some member of the jury. 5. Surprise. 6. Newly discovered evidence.

Several of these grounds may be combined in support of one motion. But in so far as either of the first three grounds are alleged, no affidavits or other papers additional to those prepared as the record of proceedings on the trial are requisite, or, indeed, admissible. The fact that error was committed—that the verdict was against evidence—or that the damages are improper, must be made to appear by the judge's minutes, or case, or exceptions. A record or other document which speaks for itself, and on the force and effect of which, as evidence, no question can arise, although erroneously omitted to be produced on the trial, will often be allowed to be read in *opposition* to a motion for a new trial, founded on the error in failing to require the original record. Bank of Charleston v. Emeric, 2 Sandf., 718; Ritchie v. Putnam, 13 Wend., 524; High v. Wilson, 2 Johns., 46; Armstrong v. Percy, 5 Wend., 535; Williams v. Wood,

14 *id.*, 126; Burt v. Place, 4 *id.*, 591; Dresser v. Brooks, 3 Barb., 429; Ritchie v. Putnam, 13 Wend., 524; Duncan v. Dubois, 3 Johns. Cas., 125; Duke of Cumberland v. Graves, 9 Barb., 595; Markoe v. Aldrich, 1 Abb. Pr., 55. But we know no case in which to support his allegation of error, the moving party can avail himself of any papers in addition to the judge's minutes, or exceptions or case containing exceptions, whichever may be the basis of his motion; nor any in which the position that the verdict was against evidence, or that the damages were excessive, can be strengthened by new papers. Nor will the court, in general, on a motion on the ground of insufficient evidence, receive evidence to supply the defect in proof. Watson v. Delafield, 2 Cal., 224.

In so far, however, as the motion rests upon either of the last three grounds above enumerated—misconduct or irregularity, surprise, or newly discovered evidence—the facts relied on to sustain the application will not appear by any record of the trial, but affidavits are necessary. An outline of appropriate affidavits is given in the text; but the particular averments proper in individual cases must vary altogether with the peculiar circumstances.

In all cases where the motion on affidavits for a new trial is made on behalf of the *defendant*, it is prudent to insert in, or annex to, the moving affidavit, an affidavit of merits.

⁴ This motion must be made on

II. [*State circumstances of misconduct, &c., as thus:*] That on the day of , 18 , the [second] day of the trial of this action, on the steps of the court house, this deponent heard a conversation between one L. M. and R. S., one of the jurors before whom said action was then on trial [*continuing with details*].

[*Jurat.*]

[*Signature.*]

Form No. 1527.

Affidavit to move for a new trial on the ground of improper communication by a party to a juror.¹

[*Title of court and action.*]

[*Venue.*]

M. N., being duly sworn, says:

I. [*State relation to the cause, if any, or residence, &c.*]

II. That on the morning of the [second] day of the trial of this cause, and after the plaintiff had rested his case, but before the opening of the court, three of the jurors who were empaneled to try the cause were in the bar-room of a public house in the village of , together with a number of other persons there assembled.

III. That while said jurors were there the plaintiff addressed them, and said in their presence and hearing that the defendants were [*stating the representations, with any other material circumstances*].

[*Jurat.*]

[*Signature.*]

affidavits, and may be made without making a case. *N. Y. Code Civ. Pro.*, § 998.

The affidavit to show misconduct or irregularity should state the facts relating to the irregularity or misconduct complained of so fully as to enable the court to see what injury or prejudice may probably have arisen; as, in general, if it appears on the whole that no injury has resulted, the court will not disturb the verdict. See *Hardenburgh v. Crary*, 15 *How. Pr.*, 307; *Smith v. Thompson*, 1 *Cow.*, 221; *Horton v. Horton*, 2 *id.*, 589; *Oliver v. First Presbyterian Church*, 5 *id.*, 283; *Wilson v. Abrahams*, 1 *Hill*, 207; *Cain v. Ingham*, 7 *Cow.*, 478; *Eastman v. Tuttle*, 1 *id.*, 248; *Exp. Hill*, 3 *id.*, 355; *Green v. Bliss*, 12 *How. Pr.*, 428; *Hackley v. Hastie*, 3 *Johns.*, 252; *Nesmith v. Clinton Fire Ins. Co.*, 8 *Abb. Pr.*, 141; *Anthony v. Smith*, 4

Bow., 503; *Fash v. Byrnes*, 14 *Abb. Pr.*, 12.

¹ This motion must be made on affidavit, and may be made without making a case. *N. Y. Code Civ. Pro.*, § 998.

This affidavit may be by a juror. Affidavits of jurors will not be received to show irregularity or misconduct on the part of themselves or their fellows, for the purpose of impeaching their verdict. *Clum v. Smith*, 5 *Hill*, 560; *Green v. Bliss*, 12 *How. Pr.*, 428; *Dana v. Tucker*, 4 *Johns.*, 487; *Brownell v. McEwen*, 5 *Den.*, 367; *Taylor v. Everett*, 2 *How. Pr.*, 23.

Otherwise, where the misconduct complained of is not by a juror; but by the successful party, or some one acting in his interest. In that class of cases the affidavit of a juror may be taken. *Reynolds v. Champlain Ins. Co.*, 9 *How. Pr.*, 7.

Form No. 1528.

Affidavit to move for a new trial on the ground of surprise.¹

[*Title of court and action.*]

[*Venue.*]

T. Z., being duly sworn, says:

I. That he is the attorney for the defendant herein.

II. That this action was brought to recover possession of a farm in the town of _____, in this State.

III. That from the commencement of this action until about [ten] days prior to its trial, plaintiff's attorney had in his possession a certain deed, executed by the father of the plaintiff, now deceased, conveying said real property in fee to one J. K.

IV. That plaintiff claims title to said real property by descent from his said father, and in no other way.

V. That deponent gave plaintiff's attorney reasonable notice to produce said deed on the trial, and further duly and seasonably subpoenaed the plaintiff's attorney to attend the trial, and bring with him the said deed.

VI. That prior to the service of said notice and subpoena, the plaintiff's attorney delivered said deed to the plaintiff, who thereupon deposited the same with L. M., the counsel of plaintiff, residing in _____.

VII. That at the trial of this action deponent learned for the first time that said plaintiff's attorney had parted with said deed.

VIII. That up to the time he was put upon the stand, the plaintiff's attorney entirely concealed from deponent the fact that said deed was out of his possession.

IX. That deponent was entirely taken by surprise by the failure of the plaintiff's attorney to produce said deed; and thereupon applied to the judge presiding for a postponement of the trial [*or, for leave to withdraw a juror for that cause*], which was denied.²

¹ See *Smith v. Clews*, 14 *Abb. N. C.*, 465, and note; *Delmas v. Margo*, 78 *Am. Dec.*, 516, and note.

This motion must be made on affidavits, and may be made without making a case. *N. Y. Code Civ. Pro.*, § 998.

Newly-discovered facts must be alleged positively. It is not enough to say that the deponent has learned, &c. *Axtell v. Warden*, 7 *Nebr.*, 186.

² *Glendening v. Canary*, 5 *Daly*, 489.

X. That on a new trial deponent can, as he believes, obtain the production of said deed, or if not, can prove the contents thereof by the testimony of J. K.

XI. That there has been no opportunity since the trial of this cause, to notice a motion for a new trial, until the special term to be held at _____, on the _____ day of _____, 18 ____.¹

[*Jurat.*]

[*Signature.*]

[*Annex affidavit of proposed witness if the production of testimony of witnesses is relied on.*]

Form No. 1529.

Affidavit to move for a new trial on the ground of newly-discovered evidence.²

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says :

I. That he is the [defendant] in this action.

¹ A party desiring a new trial on the ground of surprise must move promptly. *Rapelye v. Prince*, 4 *Hill*, 119; *Snowhill ads. Knapp*, 7 *N. Y. Leg. Obs.*, 15.

² This motion must be made on affidavits, and it is the better opinion that it may be entertained in the discretion of the judge, on his minutes and the affidavits, without making a case, although the contrary has been held. *Anon.*, 7 *Wend.*, 331; and see 1 *Lans.*, 71.

In respect to granting new trials on the grounds of newly-discovered evidence, the general rules are: 1. The testimony must have been discovered since the former trial. 2. It must be such as could not have been obtained, with reasonable diligence, on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the testimony of a former witness. 5. It must not be "cumulative," by which term is meant additional evidence to support a point controverted on the trial, and which is of the same character with evidence already produced. *People v. N. Y. Superior Ct.*, 10 *Wend.*, 285; *May v. Strauss*, 8 *Abb. N. C.*, 274; *Parsons v. Platt*, 37 *Conn.*, 563.

As to the application of these rules, see *Raphaelsky v. Lynch*, 12 *Abb. Pr.*, *N. S.*, 224; *s. c.*, 43 *How. Pr.*, 157; *Merrick v. Britton*, 26 *Ark.*, 496; *Wallace v. Tumlin*, 42 *Geo.*, 462; *Porter v. Talcott*, 1 *Cow.*, 359; *Hollingsworth v. Napier*, 3 *Cai.*, 182; *Williams v. Baldwin*, 18 *Johns.*, 489; *Vandervoort v. Smith*, 2 *Cai.*, 155; *Jackson v. Malin*, 15 *Johns.*, 293; *People v. Mack*, 2 *Park. Cr.*, 673; 10 *How. Pr.*, 261; *Leavy v. Roberts*, 8 *Abb. Pr.*, 310; *Fleming v. Hoilenback*, 7 *Barb.*, 271; *Palmer v. Mulligan*, 3 *Cai.*, 307; *De Fonclear v. Shotenkirck*, 3 *Johns.*, 170; *Guyot v. Butts*, 4 *Wend.*, 579; *Shumway v. Fowler*, 4 *Johns.*, 425; *Bunn v. Hoyt*, 3 *id.*, 255; *Harrington v. Bigelow*, 2 *Den.*, 109; *Meakim v. Anderson*, 11 *Barb.*, 215; *Beach v. Tooker*, 10 *How. Pr.*, 297; *Duryee v. Dennison*, 5 *Johns.*, 248; *Whitbeck v. Whitbeck*, 9 *Cow.*, 266; *Wheelwright v. Beers*, 2 *Hall*, 391; *Brisbane v. Adams*, 1 *Sandf.*, 195; *Nason v. Cockcroft*, 3 *Duer*, 366; *Steinbach v. Columbian Ins. Co.*, 2 *Cai.*, 129; *Col. & C. Cas.*, 374; *Smith v. Brush*, 8 *Johns.*, 84; *Pike v. Evans*, 15 *id.*, 210; *Halsey v. Watson*, 1 *Cai.*, 24; *Col. & C. Cas.*, 160; *Smith v. Masten*, 15 *Wend.*, 270; *Simmons v.*

II. That this action was tried on the day of
18 , at a [circuit court], held in and for the county of ,
at , in said county.

III. That said trial resulted in a verdict for the [plaintiff]
for dollars.

IV. That since the said trial, and on the day of
18 , deponent has discovered for the first time that he could
have proved by one J. K., who resides at , the following
facts: that at the time of the representations testified to by L.
M., upon the trial of this action, he was present; that the rep-
resentations actually made by the [defendant] at that interview
were that he believed that N. O. was good, but that he would
not be security for him; that the safety of the loan would
depend upon his business, and whether it continued good; that
he believed the business was profitable, and would pay well if
judiciously managed; that the [defendant] did not say that N.
O. was perfectly good, or that the money would certainly be
repaid, or that N. O. was doing a business second to none in
the world, nor anything to that effect.¹

[*Jurat.*]

[*Signature.*]

Form No. 1530.

Affidavit in corroboration.

[*Entitle, unless underwritten, on the foregoing.*]

[*Venue.*]

J. K., being duly sworn, says:

I. That he is, and was at the time of the conversation be-
tween L. M. and the defendant, a clerk in the store of the
defendant.

II. That at the said conversation so referred to the [defend-
ant] made the representations set forth in the foregoing affida-
vit, and no others.

Fay, 1 *E. D. Smith*, 107; Campbell
v. Genet, 2 *Hilt.*, 390; Burnett *v. Pha-*
lon, 4 *Bosw.*, 622; Best *v. Starks*, 24
How. Pr., 58; Platt *v. Munroe*, 34
Barb., 291.

As to the exceptional character of
cases turning upon questions of dis-
puted personal identity, see Jackson
v. Crosby, 12 *Johns.*, 354; Jackson *v.*
Kinney, 14 *id.*, 186; Jackson *v. Hook-*
er, 5 *Cow.*, 207.

¹ The affidavit to move on the
ground of newly-discovered evidence

must, in general, disclose the facts
newly discovered. Hollingsworth *v.*
Napier, 3 *Cal.*, 182.

And should be corroborated by
the positive affidavit of the witness
relied on to prove the facts alleged
on the new trial. Adams *v. Bush*, 1
Abb. Ct. App. Dec., 7; Phoenix *v.*
Baldwin, 14 *Wend.*, 62; Sully *v. Kuehl*,
30 *Iowa*, 275; Emory *v. Adams*, 71
Ill., 273; Denn *v. Morrell*, 1 *Hall*,
382; Shumway *v. Fowler*, 4 *Johns.*,
425.

III. That from the [defendant's] manner of speaking of the suit, deponent supposed there was no danger of a recovery against him, and he therefore did not communicate what he knew until after the verdict was rendered.

[*Jurat.*]

[*Signature.*]

Form No. 1531.

Notice of motion for new trial,—on case, or affidavit, or both.¹

[*Title of court and action.*]

Please take notice, that on the case herein, as settled, filed and served [and on the pleadings—*or if after judgment, say:* and on the judgment-roll thereto annexed—and on the affidavit of which a copy is hereto annexed²], the undersigned will move this court³ at a special term to be held [at chambers] at the county court house in the city and county of _____, on the _____ day of _____, 18____, at _____ o'clock A. M., or as soon thereafter as counsel can be heard, for a new trial of the action [*or, of the several questions settled for trial by jury*⁴—*or may specify part of such questions*], on the following grounds' [*specifying them as thus:*] 1. Upon the exceptions. 2. Because of newly-discovered evidence. 3. Because the verdict is contrary to the evidence. 4. For irregularity in that [*specifying what*]. 5. On the ground of misdirection in the charge [*stating what*], and that the same has resulted in injustice;⁵ and for such other relief⁶ as may be just, [with costs of this motion⁷].

[*Date, signature, addresses, &c., as in Form 1536.*]

Form No. 1532.

Order granting motion (other than upon the minutes) for new trial.

At a special term [*&c., as in Form 493, p. 4.*]

[*Title of action.*]

The plaintiff [*or, defendant*] having moved for a new trial

¹ *N. Y. Code Civ. Pro.*, § 1002.

² As to what grounds must be supported by affidavit, see Forms 1526–1529, and notes.

³ If the motion is not on the minutes, and is on the merits, the order can only be made by the court, even in the first district. *N. Y. Code Civ. Pro.*, § 770. As to what are "the merits," see *Metrop. R. R. Co. v. Moore*, 121 *U. S.*, 558. If the motion is made on a case in whole or in part, notice it for special term, not for chambers.

⁴ *N. Y. Gen. Rules*, No. 31, of 1888.

⁵ Sustainable even though no exception was taken. *Gossler v. Lissberger*, 19 *Weekly Dig.*, 429. Otherwise perhaps if this ground is not specified. *Callahan v. Bancroft*, 28 *Hun.*, 584.

⁶ If leave to amend is to be asked, it had better be specified (*Anderson v. Market Natl. Bk.*, 19 *Weekly Dig.*, 373, 375), and the proposed amended pleadings submitted.

⁷ See notes to next Form.

[*state ground, as thus:*] upon the exceptions taken during the trial [*if other grounds were relied upon, specify them distinctly*¹]; Now, on reading and filing [*proceed with the recitals as in other cases; see last Form and Form 493, p. 5*]:

ORDERED, 1. That the verdict herein [and judgment entered thereon] be set aside and a new trial of this action [*or if of special questions, indicate what*] be and the same hereby is granted * with costs, to be taxed² [*or if the motion was not made on a case, with \$10 costs of this motion*³—to abide event⁴—*or, is granted upon payment of the costs of the trial already had,*⁵ to be taxed, and \$10 costs of this motion].

2. That [upon such payment—and unless an appeal from this order be taken within the time allowed by law] the cause is to be restored to the calendar and set down for trial upon days' notice.

This order is made upon the following ground[s] [*specifying them, unless the motion was made upon exceptions solely*⁶].

Enter: [*signature of judge by initials of name and title.*]

[*Enter and serve certified copy.*]

Form No. 1533.

Order granting new trial, unless the opposing party will consent to reduce his verdict.

[*As in last Form to the *, continuing:*] unless the plaintiff within days stipulates to reduce the verdict and the judgment if it shall have been entered, to dollars [*or, unless the defendant within days stipulates to waive the sum awarded to him by the verdict rendered for his counter-claim herein*], in which case said motion is denied [without costs].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1534.

Order denying motion for a new trial.

[*Title, recitals, and authentication, as in last Form but one.*]

ORDERED, that the said motion be, and the same hereby is denied [with costs].

¹ *N. Y. Gen. Rules*, No. 31, of 1888. *Hawke v. Brear*, 52 *L. T. R.*, *N. S.*, 432.

² This carries costs as upon appeal, if the motion was made on a case. ⁵ *Bailey v. Park*, 5 *Hun*, 41; *North v. Sargeant*, 14 *Abb. Pr.*, 223.

³ Such costs are usually in the discretion of the court, but not costs of trial. *Naugatuck Cutlery Co. v. Rowe*, 5 *Abb. N. C.*, 142. ⁶ *N. Y. Gen. Rules*, No. 31, of 1888. *Hinman v. Stillwell*, 34 *Hun*, 178.

⁴ See note in 11 *Abb. N. C.*, 217; ⁷ See *Whitehead v. Kennedy*, 69 *N. Y.*, 462; *Carlisle v. Callahan*, (*Geo.*, 1887) 2 *Southeastern Rep.*, 751, and note.

Form No. 1535.

Order that exceptions be heard at general term.¹At a circuit [*&c.*, or, trial term—*&c.*, as in Form 493, p. 4].[*Title of action.*]

This action having been tried before the undersigned, a judge of this court, and a jury, at the present circuit [*or*, trial term], and the [defendant] having taken [the annexed] exceptions to the rulings at the trial, and a verdict for the [plaintiff] having been rendered [*if the direction was given at the trial, say:* and the undersigned having thereupon directed said exceptions to be heard at general term, with a stay until determination]; Now, on motion of Z. T., for the [defendant], [*and if order is entered, not on direction at the trial, but on motion on notice, add:*] and after hearing A. T. [*or*, on proof of due notice of this motion, and no one appearing] for the plaintiff in opposition:

ORDERED, that the said exceptions be heard in the first instance at general term, [and that defendant have days to make a bill of exceptions or case containing exceptions for that purpose], and that judgment on the verdict be suspended [*or*, and that all proceedings of the plaintiff be stayed] until determination of the exceptions.² [*May impose condition as thus:*] This order [*or*, said stay] is granted on condition that defendant serves his proposed exceptions within days from this date, and prints the papers for and argues the cause at the general term to be held in , 18 .

Enter: [*signature of judge by initials of name and title.*]

¹ This is in substance a motion for a new trial, but it enables the party to raise only questions of law, including the question whether there was such an absence of evidence that as matter of law an essential fact was unproved. *Metropolitan Natl. Bk. v. Sirrett*, 15 *Abb. N. C.*, 318; s. c., 97 *N. Y.*, 320. No question not presented by an exception can be considered. *Amy v. Stein*, 48 *Super. Ct. (J. & S.)*, 512.

A formal order is desirable. *Web-*

ster v. Cole, 17 *Hun.*, 507; *N. Y. Code Civ. Pro.*, § 1000.

This order may be made by the judge who presided, at any time during the same term. *Id.*

It may be made after nonsuit as well as where a verdict was had.

Not applicable in county court. *Johnson v. N. Y., Ontario, &c., R. Co.*, 30 *Hun.*, 166.

² A stay for the purpose of making a case, &c., is not enough. *Douglas v. Haberstro*, 10 *Abb. N. C.*, 6.

Form No. 1536.

Notice of hearing of exceptions at general term.¹[*Title of court and action.*]

Please take notice that the undersigned will bring the exceptions taken herein by plaintiff [*or*, defendant] to a hearing at the general term to be held at the county court house [*or*, city hall] in² , on the day of , 18 , at the opening of the court on that day or as soon thereafter as counsel can be heard.

[*Date.*] [Signature and office address of],
 [Address] To , Attorney for .
 Attorney for .

Form No. 1537.

Order on exceptions heard at general term granting new trial.

At a general term [*dec., as in*
Form 493, p. 4].

[*Title of action.*]

This action having been brought on for trial at a circuit [*or*, a trial term of this court] held at the city of , on the day of , 18 , before the Hon. J. K., justice, and a jury, and [*recite proceedings, as thus:*] the evidence on behalf of both parties having been heard, and the jury having rendered a verdict for the plaintiff by direction of said justice, and the said defendant having duly excepted to the said direction, and also having taken various other exceptions to the rulings on said trial, and the court having ordered said exceptions to be heard in the first instance at general term, and the said defendant having moved this court for a new trial upon such exceptions; * Now, after hearing T. Z., for said defendant, and A. T. [*or*, on proof of due notice of this motion, and no one appearing], for the plaintiff in opposition; Now, on motion of T. Z., attorney for defendant:

ORDERED, that said verdict [and judgment entered thereon]

¹ *N. Y. Code Civ. Pro.*, § 1000. This is an enumerated motion. Vol. I, p. 101. See also local rules. Notice may be given by either party; and the party opposing new trial may, on default of the other party to appear, take an order denying the motion for

new trial. *Staacke v. Preble*, 43 *Hun.* 441.

² Within the department where the cause was triable. *N. Y. Code Civ. Pro.*, §§ 231, 1344, 1345; *Lord v. Wilkinson*, 66 *Barb.* 607.

be set aside, and that a new trial be, and the same is hereby granted herein, costs to abide the event of suit.¹

Enter: [*signature of presiding judge by initials of name and title.*]

Form No. 1538.

The same; denial.²

[*Caption and recitals; see last Form, continuing:*]

ORDERED, that said exceptions be and the same hereby are overruled, and that the plaintiffs recover judgment on the verdict rendered herein on the day of , 18 , with costs of this action and of this application.

Enter: [*signature of presiding judge by initials of name and title.*]

SECTION IV.

CASE, AND EXCEPTIONS.

FORMS.

(1539.) Order for time to prepare a case or exceptions, with stay.

(1540.) Proposed case (with or without exceptions) after trial by jury.

(1541.) Notice of proposed case.

(1542.) Amendments proposed to proposed case.

(1543.) Notice of settlement of case, exceptions, &c.

(1544.) Order settling case (or exceptions) and directing it to be filed, &c.

(1545.) Proposed bill of exceptions.

Form No. 1539.

Order for time to prepare a case or exceptions, with stay.³

At a special term [*&c., as in Form 493, p. 4.*]
[*Title of action.*]

On reading and filing the affidavit of A. T., verified the day of , 18 , and on motion of A. T., and after hearing T. Z. [*or, on proof of due notice of this motion, and no one appearing*] for the in opposition:

ORDERED, that the have from the date of this order to make and serve a case or exceptions, and serve a notice of motion for a new trial herein, and that in the meantime, and until the settlement of such case or exceptions,

¹ Note in 11 *Abb. N. C.*, 217; Duff v. Wardell, 10 *Abb. Pr., N. S.*, 84.

² Serve copy with notice of entry. After the expiration of 4 full calendar days thereafter (*Marvin v. Marvin*, 75 *N. Y.*, 240) judgment may be entered as if no motion for new trial

had been made. *N. Y. Code Civ. Pro.*, § 1227.

³ *N. Y. Code Civ. Pro.*, § 1005. An order for time to prepare case, &c., does not extend the time to appeal. *Durant v. Abendroth*, 53 *Super. Ct. (J. & S.)*, 15; *aff'd*, it seems, without opinion, in 101 *N. Y.*, 641.

- if served, and until the determination of such motion, if made, the entry of judgment [*or*, the proceedings of the except entry of judgment] herein be stayed.¹

Enter: [*signature of judge by initials of name and title.*]

Form No. 1540.

Case as proposed (with or without exceptions²) after trial by jury.³

[*Title of court and action.*]

STATEMENT REQUIRED BY RULE 41.⁴

1 This action was commenced on the day of ,
2 18 , by [service of summons on the defendant].

¹ If an *ex parte* stay for this purpose is taken from a judge out of court, he must be a judge of the same court (Vol. I, pp. 131, 133, 437, 438); and—unless in the first district, or unless it is after judgment and for the purpose of appeal—such stay should be limited to 20 days. *N. Y. Code Civ. Pro.*, § 775.

² In this Form the paragraphs marked with a * at the beginning state exceptions and matter only necessary therefor, and their omission leaves a simple “case,” without exceptions.

³ *N. Y. Code Civ. Pro.*, §§ 997–1000. The Form here given illustrates a case containing exceptions, as proposed by defendant. It contains, therefore, none of plaintiff’s exceptions. See Form 1542. The party proposing it is not bound to insert what his adversary may desire. *Lum v. Hoag*, 30 *Wisc.*, 159.

The leading distinction between a “case” and “exceptions,” is that the case is understood to present for review the entire evidence and proceedings on the trial; while the exceptions are regarded as exhibiting only so much of the evidence, rulings, objections, &c., as is necessary to enable the court to understand the exceptions taken. This leads to some important consequences in the determination of motions made for new trial according as they are founded on a case, or on exceptions. For instance, a new trial cannot be granted, *on exceptions*, upon the ground that the verdict is against evidence; for the reason that the court cannot see from the bill of exceptions

that adequate evidence was not given, during the trial, to sustain the verdict. To raise the question whether the verdict is contrary to evidence, the motion should be upon a *case*. On the other hand, although a particular exception may appear to be well taken, and the court would feel bound to grant a new trial for the error if the motion were before them on *exceptions* merely; yet if it is made upon a *case*, they will sometimes exercise discretion to examine the whole case, and if it appears that other evidence was given which prevents any possibility of injury or injustice from the error committed, will deny the new trial, notwithstanding the error of law. Upon these and analogous points, consult *Dainese v. Allen*, 14 *Abb. Pr.*, *N. S.*, 363; *s. c.*, 36 *Super. Ct. (J. & S.)*, 98; *Tweed v. Davis*, 1 *Hun.*, 252; *s. c.*, 47 *How. Pr.*, 162; *Elsey v. Metcalf*, 1 *Den.*, 323; *Hastings v. McKinley*, 3 *Code R.*, 10; *Murray v. Smith*, 1 *Duer*, 412, 433; *Norman v. Wells*, 17 *Wend.*, 136; *Merritt v. Seaman*, 6 *Barb.*, 330; *Rich. ads. Penfield*, 1 *Wend.*, 380; *Archer v. Hubbell*, 4 *id.*, 514; *Lawrence v. Barker*, 5 *id.*, 301; *People v. Holmes*, *id.*, 193; *Cook v. Hill*, 3 *Sandf.*, 341; *Stoddard v. Long Island R. R. Co.*, 5 *id.*, 180; *Delaware & Hudson Canal Co. v. Dubois*, 15 *Wend.*, 87; *High v. Wilson*, 2 *Johns.*, 46; *Smith v. Kerr*, 1 *Barb.*, 155; *Farmers’ & Manufacturers’ Bank v. Whinfield*, 24 *Wend.*, 419; *Dresser v. Ainsworth*, 9 *Barb.*, 619; *Boyle v. Colman*, 13 *id.*, 42.

⁴ This rule in terms applies only to case on appeal.

1 The complaint was served on the day of , 18 .
 2 The answer was served on the day of , 18 .
 3 [The reply was served on the day of , 18 .]
 4 The names of the parties are given in full above, and
 5 there has been no change pending the suit [except—*stating*
 6 *what, if any, and date of change, as thus:* that M. N., not
 7 named above, was originally a defendant, but his name was
 8 struck out on the trial by the order of the court].

CASE.

10 The issues in this action came on for trial before Hon.
 11 J. K., a justice of this court, at a circuit [*or, at a trial term*]
 12 on the day of , 18 .

13 The plaintiff appeared by A. T., Esq., his attorney of
 14 record and [by B. T., his] counsel. The defendant appeared
 15 by T. Z., Esq., his attorney of record and [by T. W., his]
 16 counsel.

17 * The defendant asked a postponement of the trial on
 18 the following affidavit [*inserting it*]. The court refused to
 19 grant a postponement, and to such refusal defendant ex-
 20 cepted.¹

21 A jury was called and sworn.²

22 [*If the case is to be used before judgment, and the plead-*
 23 *ings are material, add:* The pleadings form a part of this
 24 case and are to be annexed.³]

25 The plaintiff by his counsel opened the case to the
 26 jury.⁴ †

27 The plaintiff then, to maintain the issues upon his part
 28 [*may state the facts proved in narrative form; or the testi-*
 29 *mony of each witness, and material contents of each docu-*
 30 *ment in narrative form, as thus: (under the N. Y. rules they*
 31 *are not to be given in haec verba in full except as directed by*
 32 *the judge)*⁵], called as a witness M. N., who testified that he

¹ Gallaudet v. Steinmetz, 6 Abb. N. C., 224.

² Exceptions to rulings on the trial of challenges may be inserted, with the facts and evidence material. N. Y. Code Civ. Pro., § 1180.

³ If such a clause be not inserted, the notice of motion for new trial should be expressed as made on the pleadings and the case. If the case is made to be used after judgment, the pleadings need not be inserted, for they will be annexed as part of the judgment-roll.

⁴ As to exceptions to refusal of the right to open and close, see Abb. Trial Br. for Jury Cas., 38.

⁵ Continue the numbering of the lines on each page throughout, so that each copy of the proposed case shall correspond to the others.

⁶ N. Y. Gen. Rules, No. 34, of 1888; Smith v. N. Y. Central, &c., R. Co., 30 Hun, 144, and cases cited.

Full statement is sometimes essential; see, for instance, Bissell v. Russell, 23 Hun, 659.

Instead of stating the evidence the parties may, with the approval of the judge, agree on the facts. N. Y. Gen. Rules, No. 32, of 1888. See p. 648 of this Volume.

was plaintiff's clerk and salesman during the year 18 , that defendant came to plaintiff's store and selected and ordered the goods mentioned in the account annexed to the complaint [*and so on*].

On cross-examination the witness testified [*stating in same manner*].

The plaintiff then gave in evidence a letter written by defendant to plaintiff under date of , admitting the debt and promising to pay it if plaintiff would "give him a little more time" [*or insert it in full if the judge so direct*].¹

The plaintiff here rested.

* Defendant then moved for a nonsuit on the grounds [*stating each ground distinctly*]. The court denied the motion, and defendant excepted.

The defendant, to maintain the issues on his part [*state the evidence in the same manner*].

* The defendant then asked the witness [*stating question objected to*], which the court on objection of plaintiff excluded, and defendant excepted. Defendant then offered to prove by the witness [*stating fact intended*], and asked to put the question again, but the court excluded it, and defendant excepted.²

* Plaintiff's counsel in summing up was allowed against defendant's objection to read to the jury the following passage from [*&c.*], and defendant excepted.³

The court charged the jury [*state the substance of the charge so far as necessary; and if the case is to state exceptions, indicate those taken to each successive portion, as thus:*] that the testimony of the defendant as a party to the action was

¹ *N. Y. Gen. Rules*, No. 34, of 1888. Apart from such a rule, an exhibit should be given in full or referred to by number or letter, and annexed at the end of the narrative of the case. Correspondence between such a document and the designation of a document in the case without positive identification is not enough. *Leftwich v. Lecanu*, 4 *Wall.*, 187; *s. p.*, *West v. Milwaukee, &c., Ry. Co.*, 56 *Wisc.*, 318; 14 *Northw. Rep.*, 292; *Russell v. Ely*, 2 *Black*, 575; *Baltimore, &c., R. R. Co. v. Sixth Presby. Ch.*, 91 *U. S.*, 127.

Otherwise of a paper certified by the clerk to have been accidentally lost. *Carroll v. Peake*, 1 *Pet.*, 18. As to compelling the adverse party to produce exhibits, see *Morris v. Josephs*, 1 *City Ct.*, 82.

Documentary proofs should be carefully examined before assenting to substitute a statement of their supposed substance in lieu of the instrument itself.

² The party has a right to have his offer stated. *Gleason v. Smith*, 34 *Hun*, 547.

As to the necessity of so doing, compare *Vance v. Campbell*, 1 *Black*, 427; *Hausknecht v. Claypool*, *id.*, 431; *Abb. Tr. Br. for Jury Cas.*, 50; *Johnson v. Day*, 78 *Me.*, 324; 4 *Eastern Rep.*, 945; *Rosenberg v. Block*, 102 *N. Y.*, 255; 4 *Eastern Rep.*, 920.

³ *Lyons v. Erie R. Co.*, 57 *N. Y.*, 489; *Klein v. Second Ave. R. R. Co.*, 53 *Super. Ct. (J. & S.)*, 531.

⁴ See *Hanna v. Maas*, 122 *U. S.*, 24.

liable to suspicion from his interest in the result, to which the defendant excepted [*and so on*].

[*If direction to render verdict for a party, or to answer special questions, or to render a special verdict, was given, the direction better be stated.*¹]

The jury rendered a verdict [*stating it*].

Form No. 1541.

Notice of proposed case.²

[*Entitle, unless indorsed on the case.*]

Please take notice, that within is a copy of the case [*or, exceptions—or, case containing exceptions*] proposed on behalf of the plaintiff [*or, defendant*] herein.

[*Date.*] [Signature and office address of],

[Address] To , Attorney for .
Attorney for .

Form No. 1542.

Amendments proposed to proposed case.³

[*Title of court and action.*]

Please take notice, that the [plaintiff] proposes the following amendments to the case [*or, exceptions—or, case containing exceptions*] proposed on behalf of the [defendant]:

1ST AMENDMENT. On page 1, line 7, strike out the words [*stating what*].

2D AMENDMENT. On page 2, strike out lines 2 and 3, and substitute as follows [*stating what*].

3D AMENDMENT. On page 3, between lines 4 and 5, insert, "The plaintiff objected to the reception of any evidence of

¹ In *Frank v. Grimes*, 105 *Ind.*, 346; 4 *Northeastern Rep.*, 414, a direction submitting special questions was assumed from the fact that the answers were on the record.

² Serve within ten days after trial, or if motion for new trial was then made and is not decided, within ten days after notice of decision, or if verdict was subject to opinion of the court, within ten days after notice of entry of judgment.

³ Serve within ten days after service of proposed case. *N. Y. Gen.*

Rules, No. 32, of 1888. Omission to do so is an assent to the case as proposed.

The party successful on the trial is not entitled to serve a proposed case made by himself as a substitute for that served on him. He must present his amendments as such, with references to the parts of the case served on him which he seeks to change, as indicated in this Form. *Stuart v. Binsse*, 4 *Bosw.*, 616; *Perkins v. Hill*, 56 *N. Y.*, 87.

payment on the ground that payment was not alleged in the answer" [dec.¹].

[If in any instance it is claimed that the case should be made to conform to the stenographer's minutes, refer at the end of the amendment to the page of the minutes.²]

[Date, signature, addresses, &c., as in last Form.]

Form No. 1543.

Notice of settlement of case, exceptions, &c.³

[Title of court and action.]

Please take notice, that the proposed case [or, exceptions—
or, case containing exceptions] in this action, together with the proposed amendments, will be presented for settlement to the Hon. J. K.⁴ [or, R. F., Esq., the referee], at chambers [or, at his

¹ It is generally supposed that no objection or exception on the part of the successful party should have a place in the appeal book.

This is true only so far as the reason goes, viz., that he asks no relief as respondent, and therefore need not assign errors. But there is a class of objections and exceptions which he should have incorporated, viz., such as show that there was no waiver on his part of objection to offers and requests on the adversary's part, the refusal of which is assigned as error by the adversary. For instance, if the plaintiff asked leave to amend a variance, and the defendant objected and interposed an affidavit of surprise and prejudice, and the court refused leave, and the plaintiff, consequently failing, appeals and relies on the refusal as error, the appellate court, if defendant's objection did not appear on the record, might assume that no objection was made. See, for an instance, *Cass v. Higenbotam*, 100 *N. Y.*, 248, 254.

It is true that the cases in which, if ever, an appellate court can justly proceed under such an assumption, are very rare, but it is so frequently done that caution requires attention to the point on the part of a respondent.

² *N. Y. Gen. Rules*, No. 32, of 1888.

³ Serve within four days from the service of proposed amendments;

omission to do so is an assent to the amendments. The time for settlement must be specified and may be not less than four, nor more than twenty days after service of the notice. *N. Y. Gen. Rules*, No. 32, of 1888.

Before submitting the case and amendments for settlement, the party proposing the case must mark upon the several amendments, "assented to," or, "objected to." This enables the judge, in settling the case, to distinguish readily those as to which question is made.

Produce on the settlement the stenographer's minutes, marked at the proper place with references to the number of each amendment applicable.

⁴ If the judge is gone out of office it is still to be settled before him. *Harris v. Morange*, 1 *City Ct.*, 221; *s. r.*, *People ex rel. Devlin v. Peabody*, 6 *Abb. Pr.*, 228. If he is deceased, or under disability, apply to the court. *Morse v. Evans*, 6 *How. Pr.*, 445 (death of judge); *Julian v. Grant*, 34 *How. Pr.*, 132 (death of referee); *N. Y. Code Civ. Pro.*, § 997 (and see *Leonard v. Mulry*, 93 *N. Y.*, 392, as to disability of referee). Otherwise in the absence of statute.

Settlement may be compelled by mandamus. *Ah Lep v. Gong Choy*, 13 *Oreg.*, 429; 9 *Pacific Rep.*, 483; *State ex rel. Keane v. Murphy*, (*Nev.*, 1885)

office at _____], on the _____ day of _____, 18____, at
o'clock _____ M.

[*Date, signatures and addresses, as in Form 1536.*]

Form No. 1544.

Order settling case (or exceptions) and directing it to be filed, &c.

[*Entitle, unless written at foot of the engrossed copy of the case.*]

The foregoing case contains all the evidence given upon the trial¹ [*if only upon particular questions, indicate them,*² *as thus: only the evidence bearing on defendant's counter-claim, but it does contain all such evidence given upon the trial.*] [*If testimony or exhibits are printed in full, say:*] And it appearing to me that a proper presentation of this cause for

6 *Pacific Rep.*, 840; *Hearst v. Dennison*, 72 *Cal.*, 227; 13 *Pacific Rep.*, 629; *People ex rel. Knapp v. Judges of Westchester*, 4 *Cow.*, 73; *People ex rel. Adams v. Baker*, 14 *Abb. Pr.*, 19; *State ex rel. Otenberger v. Hawes*, 18 *Weekly L. Bul.*, 500. But the mandamus cannot direct the particular mode of settlement, that is to say, the contents of the case. *Toner v. Mayor, &c.*, of N. Y., 1 *Abb. N. C.*, 308; *Canzi v. Conner*, 4 *Abb. N. C.*, 148; *Scott v. Morgan*, 94 *N. Y.*, 508; *Gleason v. Smith*, 34 *Hun.*, 547; s. p., *Ex parte Morgan*, 114 *U. S.*, 174. The remedy for a judge's refusal to settle correctly is to move on affidavits to the facts occurring at the trial, for re-settlement, and then appeal from the order, if necessary.

As to how far the stenographer's minutes control, see *Nelson v. N. Y. & New Haven R. R. Co.*, 1 *Month. L. Bul.*, 15; *St. Croix Lumber Co. v. Pennington*, 2 *Dak.*, 467; 11 *Northwestern Rep.*, 497; *Golden Terra Mining Co. v. Smith*, 2 *Dak.*, 377; 11 *Northwestern Rep.*, 98, and article in 28 *Alb. L. J.*, 187.

¹ Without such a statement as this, the case is unavailing to sustain any objection which requires all the evidence, such as that the verdict was against the weight of evidence, &c. *Porter v. Smith*, 35 *Hun.*, 118, and cases cited; *Cornish v. Graff*, 36 *Hun.*, 160; s. p., *Murray v. Marshall*, 94

N. Y., 611; *St. Paul Harvester Works v. Langin*, 23 *Minn.*, 462; *Citizens' Ins. Co. v. Harris*, 108 *Ind.*, 392; 6 *Western Rep.*, 879.

As to the right to have the statement inserted, see *Magnus v. Trischet*, 2 *Abb. Pr.*, N. S., 175.

The fact may be stated either in the body of the case or in the certificate of the judge. *Coleman v. Reier-son*, 36 *Minn.*, 222; 30 *Northwestern Rep.*, 811. *Contra*, *Lyon v. Davis*, 111 *Ind.*, 384; 12 *Northeastern Rep.*, 714 (holding that it must be in the certificate of the judge). And this statement is sufficient. *Stair v. Richardson*, 108 *Ind.*, 429; 9 *Northeastern Rep.*, 300.

A certificate that it contains the substance of all the evidence is of doubtful efficacy. *Rolfe v. Dudley*, 58 *Mich.*, 208; 24 *Northwestern Rep.*, 657. It is not enough to say, "all the testimony." *Central Un. Tel. Co. v. State*, (*Ind.*, 1887) 12 *Northeastern Rep.*, 136.

A regular certificate is unavailing if it appears from the body of the case that all the evidence is not there. *McNeely v. Holliday*, 105 *Ind.*, 324; 4 *Northeastern Rep.*, 894; *Louisville, &c., R. v. Grantham*, 104 *Ind.*, 353.

² If all the evidence bearing on a particular question is given, that question may be considered on the evidence. *Walker v. Braden*, 34 *Kans.*, 660; s. c., 9 *Pacif. Rep.*, 613, 616.

review so requires, I hereby direct the evidence and exhibits to be stated in full so far as is done in the foregoing; and the same, having been settled on notice [*or if settled by delay, say: by failure to serve amendment—or, to service notice of settlement after service of amendments*], is hereby signed by me,¹ and ordered to be filed [and annexed to the judgment-roll²].

[*Date.*]

[*Signature of judge in full by name and title.*]

[*Prefix an index to the case to be printed.*]

Form No. 1545.

Proposed bill of exceptions.

[*Adapt from Form 1540, following that Form to the †, thereafter inserting only what is necessary to present the questions of law on which the exceptions turn.*]

[*The mode of settlement is the same as in a Case.*]

SECTION V.

COSTS; AND JUDGMENT.

FORMS.

- | | |
|--|--|
| (1546.) Order for judgment, after direction at trial that cause be reserved for further consideration. | (1558.) — — — to be charged upon him personally. |
| (1547.) — after trial by jury, and application on verdict for equitable relief (in nuisance). | (1559.) Order allowing taxation of stenographer's fees or disbursements. |
| (1548.) — compelling entry of judgment. | (1560.) Statement of costs and disbursements — for entering judgment. |
| (1549.) Certificate by judge, of fact necessary to give costs. | (1561.) Affidavit to disbursements; written under bill of costs. |
| (1550–1554.) Statements suitable to insert in foregoing Form. | (1562.) Affidavit to witness fees. |
| (1555.) Notice of motion (or order to show cause) for costs, allowance, retaxation, &c. | (1563.) Notice of taxation of costs. |
| (1556.) Order for allowance in addition to costs. | (1564.) Objections to taxation. |
| (1557.) — allowing costs in judgment against executor, &c., to be paid out of the estate. | (1565.) Order on motion for retaxation. |
| | (1566.) Judgment on inquest. |
| | (1567.) — by defendant's default when cause is reached on the calendar. |
| | (1568.) — on dismissal of complaint for plaintiff's failure to appear. |

¹ *McNish v. Bowers*, 30 *Hun*, 214.

² *Cornish v. Graff*, 36 *Hun*, 160.

- (1568a.) — on nonsuit or dismissal of complaint at trial.
- (1569.) — on verdict — common Form.
- (1570–1586.) Recitals suitable to insert in foregoing Form.
- (1587.) Judgment for double or treble damages.
- (1588.) — in favor of plaintiff against a part of the defendants.
- (1589.) — of part of the plaintiffs against all the defendants.
- (1590.) — against a part of the defendants.
- (1591.) — awarding money previously paid into court.
- (1592.) — against a joint debtor not served in a previous action.
- (1593.) — where plaintiff's recovery entitled defendant to costs.
- (1594.) — where defendant is entitled to costs by reason of offer not accepted.

Form No 1546.

Order for judgment, after direction at trial that cause be reserved for further consideration.¹

At a circuit [or, trial term—
&c., as in *Form* 493, p. 4].

[*Title of action.*]

[*Recitals as in Form 1569 to the ¶, continuing as thus:*] and the cause having been reserved by the court for further consideration, which has been had, after hearing A. T., of counsel for plaintiff, and T. Z., of counsel for defendant; and due deliberation having been had thereon: Now, on motion of [*&c.*]:

ORDERED [that the sum found by direction of the court be reduced to dollars, and], that the plaintiff have judgment for the sum of dollars damages, with costs to be taxed [*may add direction for allowance, and for stay, &c., as in other Forms*].

Form No. 1547.

Order for judgment after trial by jury, and application on verdict for equitable relief (in nuisance).²

[*Title (court order) and recitals, commencing according to circumstances; see other Forms:*] and the jury having found

¹ Sustained by *Shellington v. Howland*, 53 *N. Y.*, 371; *aff'd* 67 *Barb.*, 14. That was under *Code Pro.*, § 264, which provided that on a verdict the clerk should enter in the minutes, * * * "either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration."

Code Civ. Pro., § 1189, substituting the following provision: that the clerk is to enter in the minutes * * * "the direction, if any, which the

court gives, with respect to the subsequent proceedings. Upon the application of the party in whose favor a general verdict is rendered, the clerk must enter judgment, in conformity to the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law."

Whether the former practice is regular now, see *Develin v. Cooper*, 84 *N. Y.*, 410.

² Trial by jury is of right in an action for a nuisance (*N. Y. Code Civ.*

a general verdict for the plaintiff for damages [and having further found the following facts in answer to special questions duly put by the court, to wit—*copy questions and answers, and may recite adjustment of costs, &c.*]; Now, on motion of L. W. R., Attorney-General of the State of New York, after hearing L. E. C. and De L. N. for the motion, and B. N. H. for the defendant in opposition thereto, the said justice exercising as well the powers of a justice of this court at special term as at the circuit, and the said motion having regularly come before the term in which said justice is sitting:

IT IS ORDERED AND ADJUDGED, 1. That the said verdict be accepted and recorded; that plaintiffs recover of the defendant the sum of damages found by the jury, together with the sum of costs, amounting in all to the sum of dollars.

2. That the several poles referred to in the complaint in this action, erected by the defendant in street, between and avenues, in , are hereby adjudged and declared to be a public nuisance in said street.

3. That the said defendant do forthwith, upon the service upon said defendant or its attorney of a certified copy of this order, remove the said several poles, and within thirty days after such service fully complete such removal, so that the said poles shall be entirely taken away and the nuisance created thereby wholly abated, and so that the said street shall be and remain as it was before said poles were erected.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1548.

Order compelling entry of judgment.¹

[*Title (court order) and recitals—see Form 493, p. 4—and may state relief thus:*] that unless judgment be entered by the [plaintiff] within [ten] days after the service of this order upon his attorney, the [defendant] have leave to enter judgment in conformity to [the aforesaid order of the general term of , 18 ¹—without costs²].

Pro., § 968), but final judgment may award the removal of the nuisance as well as damages (§ 1662); the verdict, must find the facts necessary to sustain the special relief (*People v. Metropol. Teleph. Co.*, 31 *Hun*, 596, modifying 11 *Abb. N. C.*, 304); unless the action is in equity. *Garwood v. N. Y. Centr. R. R. Co.*, 83 *N. Y.*, 401.

¹ Sustained in *Wilson v. Simpson*, 84 *N. Y.*, 674. Or the order may be absolute that the party moved against enter judgment, as thus: "that plaintiff forthwith perfect and enter judgment herein upon the verdict."

² *Ballou v. Chicago & Northw. R. R. Co.*, 53 *Wis.*, 150; *abst. s. c.*, 12 *Reporter*, 736.

Form No. 1549.

Certificate by judge, of fact necessary to give costs.¹At a circuit court² [*or*, trial term—&c., as in Form 493, p. 4].[*Title of action.*]I, the undersigned J. K., the justice [*or*, referee] before whom this cause was tried, hereby certify [*state fact as in Forms 1550 to 1554 (below)*].[*Date.*][*Signature and title of justice.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1550. *Title to real property was in question*³—that the title to real property came in question on said trial.1551. *That causes of action separate in form were substantially the same*⁴—that upon the issues raised by the answer to the [first and second] alleged causes of action stated in the complaint, the substantial cause of action upon the trial was the same upon each issue.1552. *Executor or administrator unreasonably resisted or refused to refer*⁵—that the demand on which the plaintiff recovered herein⁶ was duly presented to the defendant as executor [*or*, administrator] before the expiration of the time limited⁷ by a notice, published as prescribed by law, requiring creditors to present their claims [*or*, although no notice to present claims was published as prescribed by law⁸], and that the payment thereof was unreason-¹ Sustained in *Clarke v. Tunnichliff*, 38 *N. Y.*, 58; s. c., 4 *Abb. Pr.*, *N. S.*, 451 (school trustee case).The certificate may be made before or after verdict. *Abb. Tr. Br. Jury Cas.*, 193; *N. Y. Code Civ. Pro.*, § 3248.² If made by a referee, it will be entitled in the court and cause.³ *N. Y. Code Civ. Pro.*, § 3235.⁴ Necessary (if defendant recovers as to one and plaintiff as to the other), in order to entitle defendant to costs, to set off against plaintiff. *N. Y. Code Civ. Pro.*, § 3234. Compare *Barlow v. Barlow*, 35 *Hun*, 50; *Ackerman v. De Lude*, 36 *id.*, 44; *Blashfield v. Blashfield*, 41 *id.*, 249; *Fisher v. Dougherty*, 42 *id.*, 167; *Law v. McDonald*, 9 *id.*, 23; *Watson v. Gardiner*, 50 *N. Y.*, 671.⁵ *N. Y. Code Civ. Pro.*, § 1836. It is not the practice to submit thisquestion to the jury. Facts not in evidence on the trial may be shown to the judge by affidavits. It is not necessary to certify the evidence. *Ely v. Taylor*, 42 *Hun*, 205; appeal dismissed, it seems, in 106 *N. Y.*, 666.⁶ *Beecher v. Duel*, 14 *Weekly Dig.*, 109. Compare *Darling v. Halsey*, 2 *Abb. N. C.*, 105.⁷ *Clarkson v. Root*, 18 *Abb. N. C.*, 462.⁸ *Field v. Field*, 77 *N. Y.*, 294; *Horton v. Brown*, 29 *Hun*, 654; *Brinker v. Loomis*, 43 *id.*, 247. Compare *Daggett v. Mead*, 11 *Abb. N. C.*, 116; *Sutton v. Newton*, 15 *id.*, 452, as to reduction being evidence of good faith, &c.; s. p., *Harrison v. Ayers*, 18 *Hun*, 336. As to allowing disbursements, see *Pursell v. Fry*, 19 *Hun*, 595; *Marryatt v. Riley*, 2 *Abb. N. C.*, 119; *Daggett v. Mead* (above cited).

ably resisted or neglected [*or*, and that the defendant refused to refer¹ the claim as prescribed by law].

1553. *School officer or supervisor's acts, in good faith, where questions might have been settled by State Superintendent*²—that it appeared on the trial of this cause, that the defendant acted in good faith in his proceedings as trustee of School District No. , in [*or*, as supervisor of] the town of , for which this action was brought.

1554. *Official act,*³ &c., as a ground for increased costs—[that it appeared on the said trial that the defendant was a public officer, appointed under the authority of the State, and this action was brought by reason of an act done by him by virtue of his office [*or*, an alleged omission by him to do an act which it was his official duty to perform].

Form No. 1555.

Notice of motion (or order to show cause) for costs,⁴ for allowances, for retaxation, &c.

[*As in Form 488, p. 1, mentioning the pleadings, minutes or other record of the proceedings, &c., and any affidavits served; and moving before the court, and stating relief, as thus:*]

For a separate bill of costs:] for an order [*or*, why an order should not be made] directing the clerk to tax a separate bill of costs herein for the defendant W. X. against the plaintiff.

*For an allowance:*⁵] for an order [*or*, why an order should not be made] granting the plaintiff [*or*, defendant] an extra

¹ *Horton v. Brown*, 29 *Hun*, 654; *Snyder v. Snyder*, 26 *id.*, 324.

² Sustained in *Clark v. Tunnichliff*, 38 *N. Y.*, 58; s. c., 4 *Abb. Pr., N. S.*, 451; *N. Y. Code Civ. Pro.*, § 3244.

³ *N. Y. Code Civ. Pro.*, § 3258. These facts, however, usually appear by the record, and if so, a certificate is unnecessary. *Smith v. Cooper*, 30 *Hun*, 395.

⁴ Costs are not allowed, of course, to a defendant succeeding on a plea of infancy (*Yamato Trading Co. v. Hoexter*, 44 *Hun*, 491), nor to a plaintiff succeeding in some actions against savings banks, but are in the discretion of the court. *L.* 1882, p. 679, §§ 409, 259.

⁵ If the application is made at the trial, in the presence of the adverse party, previous notice is not necessary. Otherwise on an inquest or default.

If a pecuniary value upon which to compute the allowance did not

appear on the trial, it may be shown by affidavits; but when affidavits are thus necessary, it is usually better to leave the applicant to move on notice. The clerk cannot take proof of the value. *Newton v. Reid*, 24 *Weekly Dig.*, 472.

If the motion is made before a judge who did not hear the cause, the affidavit should state the nature of action; and of the defense; and the number of sessions and length of trial, as well as the proceedings rendering the cause difficult and extraordinary and the difficulty of the questions of law.

Notice for hearing at a court held by the judge who tried the cause (*Lot-timer v. Livermore*, 6 *Daly*, 501), unless he is not within the district, &c. *Hun v. Salter*, 92 *N. Y.*, 651. Subject to this rule the motion may, in the first district, be made at chambers. *Main v. Pope*, 16 *How. Pr.*, 271.

allowance of [five] per cent.¹ [*if the motion is not founded on a money verdict, may add: upon the value of the subject-matter involved in this action—or indicate it more closely*].

*For retaxation:*² for an order [*or, why an order should not be made*] granting plaintiff a new taxation of the said bill of costs, so as to allow [*or, disallow*] the items specified in the said affidavit, objected to before said clerk and disallowed [*or, allowed*] by him.

Form No. 1556.

Order for allowance in addition to costs.

[*Title (court order) and recitals; see Form 493, p. 4.*]

[*May add if so: it appearing that the case was difficult and extraordinary,³ and a defense has been interposed⁴:*]

ORDERED, that an extra allowance of dollars, in addition to costs, be, and the same hereby is granted to the

Enter: [*signature of judge by initials of name and title.*]

Form No. 1557.

Order allowing costs in judgment against executor or administrator to be paid out of the estate.⁵

[*As in next Form, omitting the clause in the recitals between*

¹ It is not necessary to indicate rate, &c.

² *Cohu v. Husson*, 13 *Daly*, 334; *Adolph v. De Ceu*, 45 *Hun*, 130.

The motion must be made before final adjustment of the general costs. *Moulton v. Beecher*, 1 *Abb. N. C.*, 245; *Jones v. Wakefield*, 21 *Weekly Dig.*, 287; *N. Y. Gen. Rules*, No. 56, of 1888. But retaxation may be ordered to enable the application to be made. *Dietz v. Farish*, 43 *Super. Ct. (J. & S.)*, 87.

The clerk's decision on an application to tax costs exhausts his power. If he disallows it for defects in the papers, the remedy is not to apply again on fresh papers, unless the other party consents, but to move the court for a new taxation. *Larkin v. Steele*, 25 *Hun*, 254.

The affidavit should show how the bill was taxed, what took place on the taxation, and what are the items sought to be corrected, and, as to objectionable items wrongfully allowed, it should show that those which were absolutely unauthorized in any event

were objected to; as to those that might be authorized or unauthorized according to circumstances, it should show the grounds of the objection.

The moving party is not bound, however, to produce papers presented by the other party to the taxing officer if they were not left with him. *Webb v. Crosby*, 11 *Paige*, 193.

The order, if made after entry of costs in the judgment, should amend the judgment. *McLean v. Hoyt*, 56 *How. Pr.*, 351.

³ As to what is within the rule, see *Adams v. Stern*, 29 *Hun*, 280; *Duncan v. De Witt*, 7 *id.*, 84; s. p., *Colton v. Morrissy*, 6 *Weekly Dig.*, 165; *Howell v. Van Siclen*, 4 *Abb. N. C.*, 1; s. c., 70 *N. Y.*, 595, without opinion; aff'g 8 *Hun*, 524.

⁴ It is not usual or necessary thus to state the ground. *Tolman v. Syracuse R. R. Co.*, 31 *Hun*, 397.

It appears by the record or affidavits, or both.

⁵ *N. Y. Code Civ. Pro.*, §§ 1835, 1836.

the * and the †, and at the end substituting for the words between the † and the §, "out of the property of the decedent."]

Form No. 1558.

Order allowing costs, against executor, administrator, trustee of express trust, or statutory plaintiff, &c., to be charged upon him personally.¹

At a circuit court [*or*, trial term
—&c., as in Form 493, p. 4].

[*Title of action.*]

The issues herein having been tried before Mr. Justice J. K. and a jury, and a verdict duly rendered for the plaintiff, and a motion having been made by the plaintiff at the close of the trial for costs to the plaintiff, and for a further sum as an additional allowance, * to be awarded against the defendant Y. Z., to be collected out of his individual property for having [unreasonably resisted the payment of said claims]; † and on reading the pleadings, and on reading and filing the affidavit of A. T., verified the day of , 18 , and after hearing A. T. for the plaintiffs in support of the motion, and on reading and filing the affidavit of T. Z., verified the day of , 18 , in opposition thereto, and hearing T. Z., for the defendant in opposition thereto, and considering the proceedings appearing on the trial, and it appearing to the court that [the said claims were duly presented to the defendant as executor of the last will and testament of M. N., deceased, pursuant to the statute, and an offer to refer duly made was rejected—*or*, * and that the payment thereof was by said defendant unreasonably resisted—and that the defense was unreasonably conducted]†; Now, on motion of A. T., attorney for the plaintiff:

ORDERED, that the said plaintiff be allowed and recover the costs of this action to be taxed [*add allowance if so*], to be collected out of ‡ the individual property of said Y. Z. §

Enter: [*signature of judge by initials of name and title.*]

¹ An order is not needed, if he did not necessarily sue in such capacity but might have sued in his individual name. *Buckland v. Gallup*, 105 *N. Y.*, 453; *Bedell v. Barnes*, 29 *Hun*, 589, and cases cited. In other cases it is necessary. *Morgan v. Skidmore*, 3 *Abb. N. C.*, 92; *N. Y. Code Civ. Pro.*, § 3246. Such an order cannot be made

as to a part, on the ground that the recovery was as to a part for the personal benefit of the representative. *Hone v. De Peyster*, 106 *N. Y.*, 645; rev'g 44 *Hun*, 487. As to one acting after expiration of trust, see *Am. Life Ins. Co. v. Van Epps*, 14 *Abb. Pr.*, 253. As to discretion in equitable actions, see *Dill v. Wisner*, 88 *N. Y.*, 153.

Form No. 1559.

Order allowing taxation of stenographer's fees as disbursements.¹

[Title as in last Form.]

The minutes of the testimony herein, having been duly written out by direction of the court, because necessary to enable the court to duly hear and determine the same:

ORDERED, that the expense of attending and taking the minutes of the said testimony, and furnishing the same to the court [which was paid and incurred by said plaintiff herein], be paid as follows [apportioning it—and that the sum paid by the prevailing party may be taxed as a disbursement herein by the clerk of this court].

Enter: [signature of judge by initials of name and title.]

Form No. 1560.

Statement of costs and disbursements for entering judgment.

[Title of court and action.]

Costs.	
Costs before notice of trial ² [§ 3251, sub. 1, 2]..... \$	Trial fee, issue of law [id.].... \$
Costs after notice and before trial ³ [§ 3251, sub. 3].....	Allowance, percentage by statute [§ 3252].....
Additional defendants served ³ [§ 3251, sub. 1].....	— by court [§ 3253].....
Trial fee, ⁴ issue of fact [§ 3252, sub. 3].....	Motion[s] for [§ 3251, sub. 3]
Trial fee, issue of fact occupying more than two ⁵ days [id.]....	Reference, for [id., and § 3236].....
	Appointment of guardian for in- fant defendant [§ 3251, sub. 1]
	Procuring injunction [or in city court, arrest, § 3251, sub. 1]...
	Examination of party before trial ⁶ [§ 3251, sub. 3].....

¹ But see note in 20 *Abb. N. C.*, 182; Pfandler Barm Extracting, &c., Co. v. Pfandler, 39 *Hun*, 191; Abendroth v. Manhattan R. R. Co., 9 *Civ. Pro. R. (Browne)*, 406.

² In the N. Y. Superior Court this item has been allowed to be duplicated in case of a second trial. In the Supreme Court, First District, not. See last paragraph but one of subd. 3 of § 3251.

³ Voluntary appearance held equivalent to service. Schwinger v. Hickox, 46 *How. Pr.*, 114; s. c., 1 *Buff. Super. Ct. (Sheldon)*, 377.

⁴ Allowed only for actual trial (Studwell v. Baxter, 33 *Hun*, 331); but for each trial, if there is a new trial. Lafond v. Jetzkowitz, 17 *Abb. N. C.*, 87; Hamilton v. Butler, 19 *Abb. Pr.*, 446.

Disagreement, or trial begun and juror withdrawn by the adverse party (Mott v. Consumer's Ice Co., 8 *Daly*, 245; 19 *Abb. Pr.*, 446), or dismissal of complaint for insufficiency of evidence (Gates v. Canfield, 28 *Hun*, 12), counts as a trial. Mere commencement of trial, followed by sending the cause elsewhere for trial (Third Nat. Bk. v. McKinstry, 2 *Hun*, 443), or by discontinuance (Studwell v. Baxter, *above*; Sutphen v. Lash, 10 *Hun*, 120), does not.

⁵ Additional time to submit briefs is not counted.

⁶ Not allowed for deposition taken in this State by consent. McADAM, J.

Not duplicated because of reading the deposition again on a second trial, nor because taken by stipulation to be

COSTS—continued.

Taking deposition of witness ¹ [id.]	as §
Drawing interrogatories to annex to commission ² [<i>or</i> , to letters rogatory] [id.]	
Making and serving "case" ³ [§ 3251, sub. 3]	
Additional for case of more than fifty folios [id.]	
Making and serving amendments to case [id.]	
Term fees, ⁴ for [<i>specifying the terms</i>] [id.]	
Motion for new trial on a case ⁵ [§ 3251, sub. 3], before argument [id., sub. 4]	
— — — — — for argument [id.]	
Proceedings after granting new trial and before new trial [§ 3251, sub. 3]	
Motion for judgment on special verdict, before argument [§ 3251, sub. 3, 4]	
— — — — — argument [id.]	
Application to general term for new trial, before argument [§ 3251, sub. 4]	
— — — — — for argument [id.]	
— — — — — judgment on ver-	

dict subject to opinion of court, before argument [id.]	§
— — — — — for argument [id.]	
— on exceptions heard first at general term, before argument [id.]	
— — — — — for argument [id.]	
Appeal to general term, ⁶ before argument [§ 3251, sub. 4]	
— — — — — for argument	
.... Term fees, at general terms [<i>specifying terms</i>] [id.] ..	
Appeal to court of appeals, before argument [§ 3251, sub. 5]	
— — — — — for argument	
.... Term fees, term, court of appeals [<i>specifying terms</i>] [id.]	
Preparing case on appeal to court of appeals [§ 3251, sub. 3]	
Damages in court of appeals for delay [§ 3251, sub. 5]	
In a case for increased costs, one-half additional ⁷ [§ 3258]	

DISBURSEMENTS.

Witness fees ⁸ stated in detail below [§ 3256]	§
Referee's fees [id., and § 3296] ..	

used in two causes. *Am. Diamond, &c., Co. v. Sheldon*, 28 *Fed. Rep.*, 217.

¹ Allowed for deposition taken without the State, by consent, under the statute.

Not duplicated because of reading the deposition again on a second trial, or in another cause.

A separate charge is allowable for each of several witnesses for whom separate sets of interrogatories are drawn, although under the same commission. *Marston v. Hebert*, BARRETT, J., 60 *How. Pr.*, 490; followed and approved by ARNOUX, J., in *Faber v. Tassell*, *N. Y. Daily Reg.*, Feb. 24, 1882.

² Only one charge is allowed for each commission, though it be for several witnesses and with several sets of interrogatories. *O'Brien v. Commercial Fire Ins. Co.*, 38 *Super. Ct. (J. & S.)*, 4; *Johnson v. Chappell*, 7 *Daly*, 43, 44.

³ This is construed to mean the technical "case" stating the proceed-

ings on the trial of an issue of fact; it does not include other appeal books.

⁴ It is not necessary that the party should have noticed the cause on his own part for trial. *Andrews v. Schnitzler*, 48 *Super. Ct. (J. & S.)*, 173.

⁵ Full costs of appeal are allowed. *Pilgrim v. Donnelly*, 15 *Abb. N. C.*, 240.

⁶ As to when full costs are allowed upon each of separate appeals from judgment, and from order as to new trial respectively,—compare *id.*, and *Keeler v. Barrett's, &c., Dyeing Estab.*, 18 *Abb. N. C.*, 459, with *Syms v. Mayor, &c.*, of N. Y., 105 *N. Y.*, 153.

⁷ The increase formerly was computed on disbursements also. *Klinck v. Kelly*, 15 *Abb. Pr., N. S.*, 135. Otherwise under *N. Y. Code Civ. Pro.*, § 3259.

⁸ Expenses of serving subpoenas upon witnesses, not taxable (*Town of Pierrepont v. Lovelass*, 4 *Hun.*, 681); nor extra compensation of experts (*Mark v. City of Buffalo*, 87 *N. Y.*,

DISBURSEMENTS—continued.

Commissioner's fees¹ [§ 3256]... \$
 Survey [§§ 1682, 1611 (dower),
 3299].....
 Publication of summons and no-
 tice therewith pursuant to law
 [id.]
 Clerk's trial fee [id., and § 3301].
 Clerk's fee for entering judgment
 [id., and id.].....
 ——— the following orders
 [specifying them] [id., and id.]
 Paid for searches [id., and § 3304]
 — — affidavits and acknowl-
 edgments² [specifying them]
 [§ 3298].....
 Recording mortgage² [in fore-
 closure rule].....
 Serving summons and complaint³
 [§ 3307, sub. 1].....
 Paid referee settling case.
 Certified copies of following or-
 ders [naming them] [§§ 3301
 and 3304].....
 — — deposition of M. N. [or
 other paper] for trial [§ 3256].

Clerk filing execution and enter-
 ing satisfaction [§ 3304]..... \$
 Transcript and filing [§§ 3301,
 3304]
 Copy judgment for roll.....
 Postage² incurred, \$, to be
 incurred, \$
 Juror's fees.....
 Stenographer's fees under stipu-
 lation⁴.....
 Stenographer's fees, copy min-
 utes⁵
 Clerk court of appeals specifying
 items [§ 3300].....
 Sheriff's fees on execution
 [§§ 3256, 3307, sub. 6-9].....
 — — attachment [§ 3307, sub.
 2]
 — — terms [§ 3307, sub. 4]..
 Copy minutes.....
 For printing papers [id.] on ap-
 peal or enumerated motion
 [§ 3256]⁶.....
 — — points [id.].....
 — — copies following papers
 [§§ 3301, 3304].....

Total costs and disbursements... \$

184; Tuck v. Olds, 29 Fed. Rep., 883);
 nor expenses of preparing maps and
 plans to be used on the trial. *Rothery*
v. N. Y. Rubber Co., 90 N. Y., 30;
 aff'g 24 Hun, 172; *New Hampshire*
Land Co., 29 Fed. Rep., 764; *Mark v.*
City of Buffalo (above cited).

¹ Not allowed where the only wit-
 ness examined was the taxing party in
 his own behalf. *Delcomyn v. Cham-*
berlain, 39 Super. Ct. (J. & S.), 359.

Allowed, notwithstanding the par-
 ty was examined, where other witness-
 es were also examined. *Simpson v.*
Brown, TRUAX, J., Dec., 1887.

As to rate, see *Dunham v. Sherman*,
 11 Abb. Pr., 152.

² Fees of acknowledgment, oath,
 and record, and expense of transmis-
 sion, when required in the course of a
 duty imposed by law on an officer or
 other person, he may tax. *N. Y. Code*
Civ. Pro., § 3291.

³ Extra compensation paid for ex-
 tra trouble, in excess of legal fee, not
 taxable. *Brown v. Mapleson*, McAD-
 AM, J., May, 1887.

Disbursements in serving out of the
 State under order for publication al-
 lowed *HAWES, J.*, in *Ferris v. Day*,
N. Y. Daily Reg., Oct. 23, 1883.

⁴ See note in 20 Abb. N. C., 183;
Newhall v. Appleton, 4 Month. L.
Bul., 5; s. p., *Byrne v. Groot*, 5 id.,
 56; *Mark v. City of Buffalo*, 87 N. Y.,
 184; *Colton v. Simmons*, 14 Hun, 75;
Pfaudler Co. v. Sargent, 43 id., 154.

⁵ As to minutes for use in prepar-
 ing "case," &c., on appeal, *Pfeiffer v.*
Ringler, N. Y. Daily Reg., April 28,
 1883; *Thurston v. Luce*, 28 North-
 western Rep., 679. As to minutes for
 use on second trial, *Flood v. Moore*, 2
 Abb. N. C., 91.

⁶ Allowed only when printing is
 required by law or rule of court.
Veeder v. Judson, 91 N. Y., 374; aff'g
Veeder v. Mudgett, 27 Hun, 519. As
 to rate, see *Salter v. Utica, &c.*, R. R.
 Co., 86 N. Y., 401; *Dickinson v.*
Rogers, 7 Northwestern Rep., 434;
Consalus v. Brotherson, 54 How. Pr.,
 62; *Potter v. Carpenter*, 56 id., 89.

SCHEDULE A.—WITNESSES.

Witness fees at circuit [*or*, special term—*or*, hearing], commenced the day of , 18 .

NAMES. ¹	RESIDENCE.	MILES FROM COURT HOUSE.	MILES TRAVELED.	NUMBER OF DAYS ATTENDED.

Form No. 1561.

Affidavit to disbursements; written under the bill of costs.

[*Venue.*]

C. D., being duly sworn, says, that he is [managing clerk of A. T.] the attorney for [plaintiff] herein; * that the foregoing disbursements have been actually made and incurred herein on the part of said [plaintiff], except those hereafter to be incurred, and those deponent believes to be correctly stated; and that the services for which fees are charged as incurred were necessarily performed.² That the cause was necessarily on the calendar the terms above named, and was not tried, or was postponed thereat by order of the court; that no charges for a copy of a document or paper is made therein, except for a copy of a document or paper actually and necessarily used or necessarily obtained for use.³ [*If oath to witness fees is not in a separate affidavit, add:* That this action was—*continuing as in next Form from the beginning.*]

[*Jurat.*]

[*Signature.*]

Form No. 1562.

Affidavit to witness fees.⁴

[*As in Form 1561 to the *, or add the following to that Form:*]

That this action was at issue and necessarily upon the

¹ A party and his attorney or counsel not allowed fees as witness in behalf of such party or one united in interest or pleading jointly with same. § 3288. Compare *Tuck v. Olds*, 29 *Fed. Rep.*, 883.

² *N. Y. Code Civ. Pro.*, § 3266.

³ *Id.*, § 3267.

⁴ For this Form we are indebted to N. C. Moak, Esq., of Albany. It is supported by *Hicks v. Brennan*, 10 *Abb. Pr.*, 304. To much the same ef-

[day¹] calendar for trial at a circuit [or, a trial term of this] court [saying where and when, or, if fees on several trials are included, state them as thus: the several circuits held in and for the county of _____, at the court house, in the _____ of _____; viz.: one commenced on the _____ day of _____, 18 ____; one commenced—&c., or if referred, say: That this action was at issue, and was referred to R. F., Esq., of _____]. That the cause was brought to trial before said court [or, referee], at _____, on _____. That each of the persons² named in Schedule A, hereto annexed, which is made a part hereof, attended the several circuits [or, hearings] therein named pursuant to a subpoena, or upon special request³ of this deponent, as a witness for the plaintiff [or, defendant], the number of days set opposite their respective names therein. That the residence of said witnesses respectively, the distance therefrom, according to the usually traveled route, to the said court house [or, place of hearing], and the number of miles they severally traveled as such witnesses, according to the usually traveled route, for the purpose of going to the place of trial and returning therefrom, at said circuit court [or, place of hearing] respectively, are correctly stated and set forth in said Schedule A, opposite their respective names. That each and every of said persons named in said Schedule A was a necessary and material witness on the part of the plaintiff [or, defendant] on the trial of this action.

[Jurat.]

[Signature.]

[Add schedule, if not inserted in statement, Form 1560.]

Form No. 1563.

Notice of taxation of costs.⁴

Please take notice, that the within bill of costs will be pre-

fect is *Jeffrey v. Hursh*, 58 *Mich.*, 246; 27 *Northwestern Rep.*, 7.

If there is a foreign witness, may insert here, "within this State."

For the Form where a witness absent at a distance comes home solely to testify, and returns, see *Sargent v. Warren*, 41 *Hun*, 103, and cas. cit.

¹ *Allen v. Mahon*, 1 *Abb. N. C.*, 468. If the adverse party produces an affidavit that a witness was not sworn, the party claiming to tax fees must produce an affidavit to the re-

ason, and what was intended to be proved by them. See *Gilbert v. Kennedy*, 22 *Mich.*, 5, 19.

² Party not entitled to fee in his own case. *Rhoades v. Bank*, 12 *Phila.*, 391.

As to attorney, compare *Abbot v. Johnson*, 47 *Wisc.* 239; *Pearman v. Gould*, 42 *N. J. Eq.*, 4; 6 *Cent. Rep.*, 541.

³ *Cahn v. Monroe*, 29 *Fed. Rep.*, 675, and cas. cit.

⁴ As to time for serving, see page 747; note 2.

sented to the clerk of this court [or, of the county of _____] for adjustment [if after judgment, add: and to have the amount inserted in the judgment entered herein], at his office, in the city of _____, on the _____ day of _____ inst., at _____ o'clock in the _____ noon.

[Date.] [Signature and office address of],
[Address] To _____ Attorney for _____
Attorney for _____

Form No. 1564.

Objections to taxation.¹

[Title of court and cause.]

Upon the taxation of costs herein the [defendant] files the following objections with the clerk of this court: [stating them in detail.]

[Date.] [Signature and office address of],
Attorney for [defendant].

Form No. 1565.

Order on motion for retaxation.²

[Title (court order) and recitals; see Form 493, p. 4.]

ORDERED, that the taxation of costs herein be modified by striking out the item of \$ _____ for _____; and by inserting \$ _____ for [stating corrections].

[Or if a question of fact remains to be determined, may say:] Ordered, that the taxation of costs herein be set aside, and a retaxation be had on [two] days' notice, upon which the clerk shall [here state the grounds or proofs on which item in controversy shall be determined].

Enter: [signature of judge by initials of name and title.]

Form No. 1566.

Judgment on inquest.³

[Title of court and action.]

This cause having been regularly brought on for trial upon

¹ Or the objections may be noted by the clerk opposite the respective items in the bill presented. The objections may be supported by affidavits to the facts on which they are founded. *Crosley v. Cobb*, 37 Hun, 271.

² *N. Y. Code Civ. Pro.*, §§ 2264-5. *Crosley v. Cobb*, 37 Hun, 271. For notice of motion, see Form 1555.

³ For affidavit to prevent, see Form No. 1491.

the issues of fact, this [*or*, the] day of , 18 , at a circuit [*or*, trial term of this] court, before Mr. Justice J. K. and a jury; after due notice given to the [attorney for the] defendant Z. T., who has heretofore appeared herein, and an inquest having been duly taken¹ at the opening of the court, on this [*or*, that] day, no affidavit of merits having been filed or served, and the answer being verified, and said defendant not appearing; and a verdict for plaintiff having been thereupon duly rendered for the sum of dollars, and plaintiff's costs having been duly adjusted at the sum of dollars. Now, on motion of A. T., attorney for the plaintiff:

IT IS ADJUDGED [*continue as in other Forms, below*].

Form No. 1567.

Judgment by defendant's default when cause is reached on the calendar.²

[*Title of court and action.*]

This cause having been duly reached on the calendar³ in its regular order at a circuit [*or*, trial term of this] court, before Mr. Justice J. K. and a jury, on this [*or*, the] day of , 18 , after due notice of trial thereof to the attorney for the defendant who has [*or*, the respective attorneys for all the defendants who have] heretofore appeared herein; and no one appearing on behalf of said defendant[s],⁴ and the plaintiff having made his allegations and proof, and the [jury, under the direction of the] court⁵ having duly assessed the plaintiff's damages at the sum of dollars, and the defendant's costs

¹ Defendant, if he wishes to contest the grounds of the judgment on evidence, must appear at the inquest. *Greenleaf v. Brooklyn, Flatbush, &c.*, R. R. Co., 102 *N. Y.*, 96, dismissing appeal from 37 *Hun*, 435.

As to the practice on assessment of damages, see *Thompson v. Lumley*, 7 *Daly*, 74.

² For the practice, see *Patten v. Hazewell*, 34 *Barb.*, 421; *Connors v. Weir*, 2 *E. D. Smith*, 314; *Giberton v. Fleischel*, 5 *Duer*, 652; *Thompson v. Finn*, 9 *Daly*, 379; *Goodyear v. Baird*, 11 *How. Pr.*, 377.

³ See *Potter v. Davison*, 8 *Abb.*

Pr., 43; *Browning v. Paige*, 7 *How. Pr.*, 487.

⁴ Defendant has a right to appear and defend fully, when the cause is called in its order, although by reason of not filing an affidavit of merits he could not have objected to an inquest being taken at the opening of the court. *Starkweather v. Carswell*, 1 *Wend.*, 77.

⁵ It may be better, where plaintiff treats defendant's default as a waiver of jury trial and takes an assessment of damages by the court, to submit findings to be signed by the judge and filed, as in the case of a trial by the court without jury.

having been duly adjusted at the sum of dollars: Now,
on motion of A. T., attorney for the plaintiff,

IT IS ADJUDGED [*continue as in other Forms, below*].

Form No. 1568.

Judgment on dismissal of complaint for plaintiff's failure to appear.

[*Title of court and action.*]

This cause having been duly reached on the calendar in its regular order, at a circuit [*or, trial term of this*] court, before Mr. Justice J. K. and a jury, on this [*or, the*] day of , 18 , and due notice of the trial thereof having been given to plaintiff's attorney, and no one appearing for plaintiff, and judgment by default having been ordered [*if affirmative relief was asked by defendant, add: and defendant Y. Z. having made his allegations and proof in support of the affirmative relief demanded in his answer, and state assessment of damages, if any*], and the defendant's costs¹ having been duly adjusted at the sum of : Now, on motion of Z. T., attorney for defendant,

IT IS ADJUDGED, that the plaintiff's complaint be and the same hereby is dismissed [*if affirmative relief be asked, state it; see Forms below*], and that the defendant recover of the plaintiff his costs, amounting to the sum of dollars.

[*Date and authentication as in Form 1569.*]

Form No. 1568a.

Judgment on nonsuit or dismissal of complaint at the trial.²

[*As in Form 1569 to the *, continuing:*] and the allegations and proofs on the part of the plaintiff having been heard and considered, and said judge having directed the complaint to be dismissed, and judgment rendered for defendant, and defendant's costs having been duly adjusted at \$: Now, on motion of T. Z., for said defendant,

¹ Allowance may be moved for. *Mills v. Watson*, 45 *Super. Ct. (J. & S.)*, 591.

² A judgment that the action be dismissed without qualification, at common law, is not an adjudication which will bar a fresh action. *Wheeler v. Ruckman*, 51 *N. Y.*, 391; aff'g 7 *Rob.*, 547.

A decree in equity in such terms

without qualification is generally a bar; see p. 858.

Under *N. Y. Code Civ. Pro.*, § 1209, the common law rule prevails in all actions, and if the dismissal is upon the merits, the words "upon the merits" should be inserted, or the grounds of the judgment stated.

As to granting allowance, see *Morrison v. Agate*, 20 *Hun*, 23.

ADJUDGED, that this action be and the same hereby is dismissed [upon the merits], and that defendant recover of the plaintiff dollars, his costs of this action.

[*Authentication as in Form 1569.*]

Form No. 1569.

Judgment on verdict—common Form.¹

[*Title of court and action.*]

The issues in this action having been brought on for trial before Mr. Justice J. K. and a jury, at a circuit [or, trial term of this] court, held on the day of , 18 , at the county court house [or, city hall], in the city of , and county of , and the defendant [or, all of the defendants] appearing² by counsel * [or, *if an inquest or default is taken as to any, say:* all the defendants appearing by counsel, except W. X., and *recite inquest or default as in Form 1566 or 1567*], and the issues having been tried, † and a verdict for the plaintiff [or, defendant] having been duly rendered [*if so, say:* by direction of the court] on the [said] day of , 18 , § for [the sum of \$] ¶ [and the costs of the said plaintiff having been duly adjusted at dollars—*for other recitals see Forms 1570 to 1586 (below)*]: Now, on motion of A. T., attorney for said plaintiff,

¹ Whether an interlocutory judgment can be entered on a verdict, establishing the fact of liability, when further proceedings are necessary to determine the amount, is generally regarded as unsettled,—compare dictum in *Peck v. Vandemark*, 99 *N. Y.*, 29, aff'g 33 *Hun*, 214, in affirmative; abstr. s. c., with note, 18 *Abb. N. C.*, 158, in affirmative, and dictum in *Cornell v. Cornell*, 96 *N. Y.*, 108, in negative, and other cases in *Abb. Tr. Brief Jury Cas.*, 132 (28).

The general provisions of the Code as to pleading expressly allowing the complaint to demand an interlocutory judgment in terms, refer only to actions triable by the court without a jury. § 482.

An additional provision that in jury cases he must demand final judgment only, was contained in the Code of 1876, but was struck out in 1877, when the definition of interlocutory

judgment (§ 1201) was also struck out. But provisions in chap. 14, subsequently adopted, expressly allow interlocutory judgment in partition. *N. Y. Code Civ. Pro.*, § 1546, which is triable by jury, and in an action for dower (*id.*, §§ 1607, 1619–22), an action to determine an adverse claim of dower (§ 1648), and an action for waste (§ 1657), in which actions jury trial is matter of right (§ 968); and the better opinion is that which favors this convenient procedure.

² This clause is desirable, for it may preclude objections to defects of proof of service in the judgment-roll. Page 750, note 2; *Eaton v. Harris*, 42 *Ala.*, 491; *Triplett v. Gillen*, 6 *J. J. Marsh. (Ky.)*, 464; *Mitchell v. Robson*, 52 *Wisc.*, 155; 8 *Northwestern Rep.*, 886; *Smith v. Wood*, 37 *Tex.*, 616; s. p., *Miller v. Handy*, 40 *Ill.*, 448, approved in *Harris v. Lester*, 80 *id.*, 307.

IT IS ADJUDGED, that $\frac{1}{2}$ said plaintiff do recover of said defendant the [sum of dollars], found by the jury, § with dollars costs, amounting in all to dollars¹ [or, if for defendant: that the defendants have judgment against the plaintiff upon the issues in this action [dismissing the complaint upon the merits²—or state special relief as in Forms 1711 to 1742], and for the sum of dollars costs.³

Judgment signed and entered this day of , 18 .⁴

[Signature of], Clerk.

(1570-1586.) RECITALS SUITABLE TO INSERT IN FOREGOING FORM.

1570. *Change of parties.*] This action having been originally commenced against the defendants above named, together with W. X. and V. W., and the action having been, by an order of court, duly entered on the day of , 18 , discontinued as to the defendant W. X., and the death of the defendant V. W. having been suggested on the record by the attorney for the defendant Y. Z., in open court, upon the trial hereafter mentioned [if substitution has been made, recite it], and the issues [continuing as in Form 1569 from the beginning].

1571. *The same—by order of interpleader.*⁵] This action having been originally commenced against Y. Z., and the court having by an order duly granted on the application of said Y. Z., and entered the day of , 18 , substituted W. X. as defendant in the place of said Y. Z., and said W. X. having thereupon appeared as defendant herein, and the issues [continuing as in Form 1569 from the beginning].

1572. *New trial*⁶—insert after title.]. A new trial having been heretofore ordered in this action [the former judgment being allowed to stand as security only], and the issues accordingly [continuing as in Form 1569 from the beginning].

1573. *Motion, at General Term, for new trial denied*⁷—insert after recital

¹ If directed to be paid out of a particular fund, indicate it as thus: to be paid out of the estate of M. N. by the defendant, as his executor. *Hei v. Heller*, 53 *Wisc.*, 415; 10 *North-western Rep.* 620.

² This renders the dismissal *res judicata*. *Mining Co. v. Bullion Min. Co.*, 3 *Sanc.*, 634; and see p. 857, n. 4, and 858, n. 2.

³ As to the right of several defendants appearing separately, and succeeding, to separate bills of costs, see *Delaware & L. R. R. Co. v. Burkard*, 40 *Hun.*, 625; *Lane v. Van Orden*, 11 *Abb. N. C.*, 228; *Zeisler v. Steinmann*, 53 *Super. Ct. (J. & S.)*, 184; *N. Y. Code Civ. Pro.*, § 3229.

As to the right of one attorney to additional items for a separate defense for one of several defendants. *Lindsay v. Deafendorf*, 43 *How. Pr.*, 90.

⁴ *N. Y. Code Civ. Pro.*, § 1236.

⁵ For additional clauses, where money was paid into court, see Form 1591.

⁶ Such a recital is common, but unnecessary where the former trial did not result in judgment, or the judgment was absolutely vacated. For the practice where the judgment was allowed to stand as security, compare *Dows v. Boughton*, 3 *Hill*, 452.

⁷ *N. Y. Code Civ. Pro.*, § 1227.

of verdict:] and the plaintiff [or, defendant] having moved in the first instance at General Term for a new trial, and the motion having been denied, and an order denying the same having been more than four days heretofore duly entered, and a copy thereof served on the attorney for the defendant [or, plaintiff], with notice of entry.

1574. *Consolidation of several actions: Recite their having been brought, and the bringing on of the trials together, &c., adding as thus:*] and all the parties to the said actions having consented in open court¹ that the said actions should be consolidated, heard and determined as one action, and that if judgment be rendered for the plaintiffs, a single judgment be rendered for a joint recovery [continuing with the other recitals].

1575. *Sealed verdict, insert:*] and the court having directed the jury to render a sealed verdict, and they having after due deliberation duly brought into court and rendered such verdict on the day of , 18 , for the plaintiff, which has been duly recorded [continuing with the other recitals].

1576. *Special verdict, insert:*] and a special verdict having been duly found by the jury on the [said] day of , 18 , and duly recorded [or may set it forth], and the court having directed judgment to be entered thereon to the effect hereinafter stated [continuing with the other recitals].

1577. *Verdict, with answers to special questions, insert:*] and the court having directed the jury to render a general verdict, and to find upon the following special questions: First. Was [and so on]. And the said jury having duly rendered a general verdict for the sum of dollars, and answered to the first question, Yes [and so on: and continuing with other recitals].

1577a. *Verdict subject to opinion of the court:*] and a verdict having been duly rendered for the [plaintiff], subject to the opinion of the court at General Term, on a case to be made by the [plaintiff], and the case having been heard at said term, and decided as follows:

1578. *Verdict on penal bond:*] and the jury having duly rendered a verdict declaring the bond executed and delivered by the defendants to , on the day of , 18 , in the penal sum of \$, to be forfeited, and assessing plaintiff's damages at \$: [continuing with other recitals].

1579. *Interest on verdict; after recital of verdict add:*] and the interest thereon from the day of , 18 , the day of said verdict [or, in case of action for causing death,² the day of the death of said M. N.] to this date, having been duly computed by the clerk at the rate of six per cent. per annum; which interest amounts to the sum of dollars, and together with the sum awarded by said verdict, amounts in all to the sum of dollars.

1580. *Liability to body execution:*³] and it appearing from the pleadings [and said verdict] that this is an action in which the plaintiff is entitled to satisfy said judgment by execution against the body of the defendant:

1581. *Verdict severing damages; and plaintiff's remitter of the smaller sum:*⁴] and the jury having duly rendered a verdict for plaintiff for the sum

Such is the motion when exceptions are ordered to General Term in the first instance.

¹ For other modes of consolidation, see pages 579, 645.

² If the date is not fixed by the verdict, the clerk will determine it on affidavits. *N. Y. Code Civ. Pro.*, § 1904.

³ From a precedent in the Superior Court. Such clause was required in the New York District Courts by *L. 1857, c. 344, § 50. Carpentier v. Willet*, 1 *Abb. Ct. App. Dec.*, 312.

Award of execution was usual in judgments at common law. Compare *N. Y. Code Civ. Pro.*, §§ 1200, 1487.

⁴ *O'Shea v. Kirker*, 8 *Abb. Pr.*, 69.

of \$1,000, against the defendant Y. Z., and for the sum of \$100 against the defendant W. X., and the plaintiff having elected to remit the said \$100, and to take judgment against both defendants for the sum of \$1,000:

1582. *Reducing verdict;*¹ *insert after recital of verdict:*] and the plaintiff having [by stipulation, duly filed, pursuant to an order entered herein the day of _____, 18 __,]² consented to deduct from the said verdict the sum of _____ dollars:

1583. *Certificate of judge to entitle to costs; insert between recitals of verdict and of costs:*] and said justice having duly certified that [*&c.*, *as in certificate*].

1584. *Where part of the costs have been paid; insert after recital of amount of costs*] of which \$ _____ has been paid by defendant,³ leaving a balance due on said costs of _____:

1585. *Allowance by order of court; insert after recital of amount of costs:*] including an allowance which the court at the trial [*or*, by order entered the day of _____, 18 __], duly granted to the plaintiff, of _____ per cent. on said verdict [*or*, to said defendant of _____ per cent. on the sum claimed in the complaint—*or*, on the value of the property in controversy].

1586. — *by reason of attachment; recital as to costs and allowance may be thus:*] and a warrant of attachment having been issued herein on plaintiff's application on the day of _____, 18 __, under which the sheriff of the [city and] county of _____, attached defendant's property to the value of \$ _____, and plaintiff's costs, including allowance, having been duly adjusted at the sum of \$ _____:⁴

Form No. 1587.

Judgment for double or treble damages.⁵

[*Recitals as in Form 1569, &c., inserting after sum named in recital of verdict:*] single damages,⁶ and the court having upon the [election⁷ and] application of the plaintiff, directed judgment to be entered thereon for [treble] damages [*&c.*]:

It is ADJUDGED, that the plaintiff recover of said defendant

¹ Under *N. Y. Code Civ. Pro.*, § 3176, a part may be remitted voluntarily in any case. The same principle applies to a verdict for possession of specific property, as in ejectment. *Keen v. Schnedler*, 6 *Western Rep.*, 851.

² *Alabama Gold Life Ins. Co. v. Nichols*, 109 *U. S.*, 232 (allowing deduction to preclude jurisdiction to review); *Jencks v. Van Brunt*, 19 *Weekly Dig.*, 278 (deduction to conform to amount claimed in complaint).

In *Rothgerber v. Wonderly*, 66 *Ill.*, 390, judgment was entered for the full amount, adding that it was subject to the deduction specified;

and it was said that execution could issue for the full amount.

³ But compare as to the right to deduct, *Lennon v. MacIntosh*, 19 *Abb. N. C.*, 175; *Andrews v. Cross*, 17 *id.*, 92; *Cohu v. Husson*, 13 *Daly*, 334; *aff'g* 3 *How. Pr.*, *N. S.*, 130.

⁴ *N. Y. Code Civ. Pro.*, § 3552.

⁵ This is literally double or treble (*King v. Havens*, 25 *Wend.*, 420; *Warren v. Doolittle*, 5 *Cow.*, 678); not as in case of costs, a fraction in addition.

⁶ *Kulp v. Bird*, (*Pa.*, 1887) 8 *Atk. Rep.*, 618; *Abb. Tr. Brief Jury Cas.*, 157 (40), and cases cited.

⁷ *Waste. N. Y. Code Civ. Pro.*, § 1656. In other cases trebling, where allowed, is of course. §§ 1668, 1669.

[treble] the amount of the damages so as aforesaid found by said jurors [or, assessed by said sheriff's jury], together with his said costs, amounting in the whole to dollars.

[*Authentication as in Form 1569.*]

Form No. 1588.

Judgment in favor of plaintiff, against a part of the defendants.'

[*As in Form 1569 to the †, continuing:*] and a verdict having been duly rendered in favor of the plaintiff against the defendants [*naming those unsuccessful*], and in favor of the defendants [*naming those successful*], against the plaintiff, and the costs of the plaintiff having been duly adjusted at the sum of dollars; Now, on motion of A. T., attorney for the plaintiff:

It is ADJUDGED, that the plaintiff recover of the defendants [*naming those unsuccessful*] dollars, found by the jury, with dollars cost of action, making together dollars [*or state special relief as in other Forms (below)*].

And the court having on motion of the defendants [*names of those successful*], and on due notice to plaintiff, directed that said last named defendants recover costs against the plaintiff, and such costs having been duly adjusted at dollars; Now, on motion of T. W., attorney-for said last-named defendants:

IT IS FURTHER ADJUDGED, that the complaint be dismissed [on the merits of the action] as against the defendants [*names*], and that they recover of the plaintiff dollars costs of the action.

[*Authentication as in Form 1569.*]

Form No. 1589.

Judgment in favor of a part of the plaintiffs, against all the defendants.

[*As in Form 1569 to the †, continuing:*] and a verdict having been rendered, in favor of the plaintiffs [*naming those successful*], against all the defendants, and in favor of the said

¹ N. Y. Code Civ. Pro., § 3229; v. Wilson, 3 How. Pr., N. S., 18; s. c., Allis v. Wheeler, 56 N. Y., 50; Krafft 8 Civ. Pro. R. (Browne), 359.

defendants against the plaintiff [*naming the unsuccessful plaintiff*]; Now, on motion of A. T., attorney for the plaintiffs:

It is ADJUDGED, that the said plaintiffs [*naming which*], recover of all the defendants dollars, found by the jury, with dollars costs of the action, making together dollars [*or state special relief as in Forms (below)*].

And on motion of T. Z., attorney for the defendants, IT IS FURTHER ADJUDGED, that as to the plaintiff¹ [*naming him*], the complaint be dismissed [upon the merits of the action], and that the defendants recover of the said plaintiff dollars, costs of the action.

[*Authentication as in Form 1569.*]

Form No. 1590.

Judgment in favor of a part of the plaintiffs, against a part of the defendants.

[*As in Form 1569 to the †, continuing:*] and a verdict having been rendered in favor of the plaintiffs [*naming those successful*], against the defendants [*naming which*], and in favor of all the defendants, against the plaintiff [*naming the unsuccessful plaintiff*], and in favor of the defendant [*naming which*], against all the plaintiffs, and the costs of said [*names of successful plaintiffs*] having been duly adjusted at dollars:

Now, on motion of A. T., attorney for the plaintiffs [*names*], it is ADJUDGED, that the plaintiffs [*naming them*], recover of the defendants [*naming them*], dollars, found by the jury, with dollars costs of the action, making together dollars [*or state special relief as in Forms (below)*].

AND IT IS FURTHER ADJUDGED, that as to the said plaintiff [*naming him*], the complaint be dismissed [upon the merits of the action], as against all the defendants, and that they recover of the said [*naming him*], dollars costs of the action.

AND IT IS FURTHER ADJUDGED, that the complaint be dismissed [on the merits of the action], as against the defendant [*naming him*], and that he recover of all the plaintiffs dollars, costs of the action.

[*Authentication as in Form 1569.*]

¹ See *Knowlton v. Pierce*, 41 *How. Pr.*, 361.

Form No. 1591.

Judgment awarding money previously paid into court.¹

[Title of court and action.]

WHEREAS, by an order duly entered herein on the day of , 18 , it was ordered that the defendant Y. Z. might, within days after the service of a copy of said order on his attorneys, deposit in court, to the credit of this action, subject to the judgment or order of this court, the sum of dollars, with interest from the day of , 18 ; and whereas the said defendant did, within the time so limited, deposit in court, in the hands of the clerk [of county], the said sum and interest, to wit, dollars, in pursuance of said order [which has been paid to the county treasurer of county, pursuant to law]; and the issues [*proceed as in Form 1569 from the beginning to the †, continuing as thus:*] the was at and before the commencement of this action, the lawful owner of the promissory note described in the complaint herein, and is, and on said day of , 18 , was, entitled to the proceeds thereof, to wit, the sum then as aforesaid deposited in court.

II. That said clerk [*or, the county treasurer aforesaid*] pay to the said the said sum of dollars, so paid into court [with the interest accumulated thereon], after deducting the lawful fees of said clerk.

III. That the said do recover of the the sum of dollars costs herein.

[Authentication as in Form 1569.]

[*Certified copy to be countersigned by the judge,² and file certified copy with depositary.³*]

Form No. 1592.

Judgment against a joint debtor not served in a previous action.⁴

[As in Form 1569 to the §, continuing:] which is hereby

¹ Monroe v. Chaldeck, 78 Ill., 429.² N. Y. Code Civ. Pro., § 751.³ N. Y. Gen. Rules, No. 68, of 1888.⁴ N. Y. Code Civ. Pro., § 1937. I

assume that this is still to be deemed a judgment for a sum of money only, and triable by jury, notwithstanding the phraseology of that section.

determined to be the sum now remaining unpaid upon the original judgment recovered in a former action by the plaintiff against joint debtors, of which the defendant Y. Z. was one, but not served in said former action, as alleged in the complaint herein, and that said plaintiff also recover his said costs of this action, amounting in all to dollars.

[*Authentication as in Form 1569.*]

Form No. 1593.

Judgment where plaintiff's recovery entitled defendant to costs.¹

[*Recitals of proceedings and verdict, decision, or report, as in other Forms, &c., continuing:*] and it appearing that this action being one of which a court of justice of the peace has jurisdiction, the plaintiff is not entitled to costs [*or, that the plaintiff, recovering less than \$50 in this action, he is not entitled to costs*], and the defendant is entitled to costs against the plaintiff, and defendant's costs having been duly adjusted at the sum of dollars; Now, on motion of T. Z., attorney for defendant:

IT IS ADJUDGED, that the plaintiff recover of the defendant dollars, his damages so found, and that the defendant be allowed his costs of this action, amounting to dollars, and that the defendant after deducting said sum of [*damages*] from said sum of [*costs*], do recover of the plaintiff, and have execution for the sum of dollars, the residue of said costs.

[*Authentication as in Form 1569.*]

Form No. 1594.

Judgment where defendant is entitled to costs by reason of offer not accepted.²

[*As in Form 1569, to the ¶, continuing:*] and the

¹ *N. Y. Code Civ. Pro.*, § 3228; *Whitney v. Daggett*, 6 *Abb. N. C.*, 434; *Johnson v. Farrell*, 10 *Abb. Pr.*, 384; *Warden v. Frost*, 35 *Hun*, 141; *Hudson v. Guttenberg*, 9 *Abb. N. C.*, 415; s. p., note to next Form.

Application to the court is not necessary unless there are several defendants, all of whom are not entitled to costs. *Lultgor v. Walters*, 64 *Barb.*, 417.

As to granting allowance, see *Commissioners of Pilots v. Spofford*, 3 *Hun*, 57; s. c., 5 *Supm. Ct. (T. & C.)*, 353.

² *Dingee v. Shears*, 29 *Hun*, 210; *N. Y. Code Civ. Pro.*, § 737; s. p., note to last Form. As to granting allowance, see *Coates v. Goddard*, 34 *Super. Ct. (J. & S.)*, 118; *Magnin v. Dinsmore*, 47 *How. Pr.*, 11.

defendant having before [notice of] trial duly offered in writing to allow plaintiff to take judgment against him herein for the sum of dollars, which offer was not accepted by plaintiff, and plaintiff's costs up to the time of said offer having been duly adjusted at dollars, and defendant's costs from the time of said offer having been duly adjusted at dollars;

Now, on motion of Z. T., attorney for said defendant:

IT IS ADJUDGED, that defendant recover of plaintiff dollars for his said costs.

And on motion of A. T., attorney for plaintiff:

IT IS ADJUDGED, that plaintiff recover of defendant dollars, his damages so found, and dollars, his said costs, amounting together to the sum of dollars, less the sum of dollars to be deducted for said costs of defendant, and that said plaintiff have execution for dollars, the residue of said recovery.

[*Authentication as in Form 1569.*]

ARTICLE V.

PROCEEDINGS IN CASE OF TRIAL BY THE COURT.

[Forms more commonly used in connection with trial by jury are not repeated here, although such as may be used on trial by the court.]

SECTION I.—DETERMINING MODE OF TRIAL.

II.—BRINGING ON AND INCIDENTAL PROCEEDINGS.

III.—TRIAL BY THE COURT WITHOUT AID OF JURY OR REFERENCE.

IV.—TRIAL OF ALL THE ISSUES OF FACT BY JURY AND JUDGMENT THEREON BY THE COURT.

V.—TRIAL BY THE COURT WITH THE AID OF JURY TRIAL OF SPECIFIC QUESTIONS.

VI.—TRIAL BY THE COURT WITH THE AID OF A REFERENCE.

SECTION I.

DETERMINING MODE OF TRIAL.

FORMS.

(1595.) Stipulation for trial by the court without jury.

(1595a.) Order at circuit transferring cause to be tried at special term.

(1596.) Affidavit to move for trial of issues by a jury.

(1597.) Notice of motion (or order to show cause) to settle issues for trial by jury.

(1598.) Issues proposed for trial by jury under foregoing notice.

(1599.) Order refusing to strike cause

from calendar, but directing that issues be settled for trial by jury.

(1600.) Notice of proposed issues where order for trial by jury has been made without stating the questions.

(1601.) Amendments proposed to the proposed issues.

(1602.) Notice of settlement of issues and amendments.

(1603.) Order settling issues, and directing their trial by jury.

(1604.) Order of reference to settle issues.

Form No. 1595.

Stipulation for trial by the court without jury.

[*Title of court and action.*]

The parties hereto by their respective attorneys hereby stipulate that * this action [*or, the issues heretofore joined in this action*¹] shall be tried by the court, without a jury.² †

[*Date.*]

[*Signatures of attorneys.*]

¹ In *Bamberger v. Terry*, 103 U. S., 40, it was held that in the absence of such a qualification as this clause the stipulation covered new issues

brought in by amendment at the close of the trial. For an express restriction to present trial, see Form 1606.

² Express waiver was required by

Form No. 1595a.

Order at circuit transferring cause to be tried at special term.¹

[*May be readily adapted from Form 1507, p. 784.*]

Form No. 1596.

Affidavit to move for trial of issues by a jury.²

[*Title of court and action.*]

[*Venue.*]

A. T., being duly sworn, says:

I. That he is the attorney for the plaintiff herein.

the court in *Kelly v. Milan*, 21 *Fed. Rep.*, 842.

Omission to enter in writing does not avoid the judgment. *Maxwell v. Stewart*, 22 *Wall.*, 77.

As to sufficiency to secure review in U. S. Supreme Court, see *Bond v. Dustin*, 112 *U. S.*, 604; *Fleitas v. Cockrem*, 101 *id.*, 301; *Boogher v. N. Y. Life Ins. Co.*, 103 *id.*, 90; *Roberts v. Benjamin*, 124 *id.*, 64.

As to implied waiver see *N. Y. Code Civ. Pro.*, § 1009; *Wheelock v. Lee*, 5 *Abb. N. C.*, 72; s. c., 74 *N. Y.*, 495; *Hand v. Kennedy*, 83 *N. Y.*, 149; *aff'g* 45 *Super. Ct. (J. & S.)*, 385; *Tower v. Moore*, 52 *Mo.*, 118.

For a stricter rule see *Odell v. Reynolds*, 40 *Mich.*, 21; *Biggs v. Lloyd*, 70 *Cal.*, 447; *Morrell v. Morrell*, 17 *Hun.*, 324.

Whether the decision of a cause thus tried has the effect of the verdict of a jury or not, as compared with the decision of a judge in a cause triable by the court, see *Murtha v. Curley*, 90 *N. Y.*, 372; s. c., 12 *Abb. N. C.*, 12; *Mayor v. Mode*, 14 *Hun.*, 155; *Kelsey v. Forsyth*, 21 *How. U. S.*, 85; *Travers v. Wormer*, 13 *Ill. App. (Bradwell)*, 39; s. c., 15 *Chicago Legal News*, 365; *Richmond v. Dubuque, &c., R. Co.*, 33 *Iowa*, 422.

The better opinion appears to be that if the case be an equity cause, the fact that that express waiver of jury trial was taken, and the cause tried at a jury term without jury, does

not alter the function of the judge; and conversely, if the cause was one in which a trial by jury was matter of right, a mere waiver of the right without anything to indicate an intention to treat the cause as an equity cause—as for instance by sending it to the special or equity term for trial—does not alter his function.

The mode of making findings in such a case will be the same as on the trial of an equity cause, except that costs are not thereby rendered discretionary.

¹ *Watson v. Manhattan Ry. Co.*, 17 *Abb. N. C.*, 289; s. c., 53 *Super. Ct. (J. & S.)*, 137; *Meach v. Chappell*, 8 *Paige*, 135.

Or the court may postpone the cause to enable a party to move for the settlement of questions for trial by jury. *Mackellar v. Rogers*, 52 *Super. Ct. (J. & S.)*, 468; *Hewlett v. Wood*, 62 *N. Y.*, 75.

The action should not be dismissed. *Warner v. Swanton*, 15 *Weekly Dig.*, 256. If his complaint makes a case for equitable relief, the plaintiff has a right to try the question of his right to such relief.

And on failing to make out claim for equitable relief, he has a right to have the action tried as a legal action for damages, if the facts are alleged which make such a case. *Sternberger v. McGovern*, 15 *Abb. Pr., N. S.*, 257.

² The court have power to order such a trial of all or any part of the

II. That this action is brought to procure a limited divorce or judgment of separation between the parties, upon the ground that the defendant has abandoned the plaintiff, and neglected and refused to provide for her.

III. That said action was commenced on the _____ day of _____, 18____, and is now at issue, and upon the special term calendar of this court for trial; and that copies of the complaint and answer therein are hereto annexed, and marked "A" and "B" respectively.

IV. That among the issues raised by the pleadings in said action are: the residence in this State of the plaintiff; the marriage of the parties; and the abandonment of the plaintiff by the defendant; the plaintiff having the affirmative of all those issues, and the defendant the negative.

V. [*State the condition of the cause, so as to show that the application is seasonably made, and any circumstances relied on as requiring jury trial.*]

VI. That in the judgment of deponent, the said issues of fact in this action should be tried by a jury, and the plaintiff desires that the same should be so tried, and that an order may be accordingly made by this court, directing that the issues, a statement of which is annexed, be so tried. [Signature.]

[*Jurat.*]

Form No. 1597.

Notice of motion (or order to show cause) to settle issues for trial by jury.¹

[*Commencement as in Form 488, p. 1, or 491, p. 3, substituting for the italic clause between the ¶ and the ¶:] settling the*

issues, in any action, though jury trial be not matter of right, and though neither party ask for it. But complicated issues should not be so tried. *Rutter v. Person*, 12 *Abb. N. C.*, 352; s. c., 42 *Super. Ct. (J. & S.)*, 55. The court have not power to order a compulsory reference, unless a long account is involved. *Streat v. Rothschild*, 12 *Abb. N. C.*, 383; s. c., 12 *Daly*, 95. See also Form 1507 and note; *Dorr v. Tremont Natl. Bank*, 128 *Mass.*, 349; *N. Y. Code Civ. Pro.*, §§ 823, 970, and as to divorce, § 1757.

This Form is from *Brinkley v. Brinkley*, 56 *N. Y.*, 192.

¹ Under *N. Y. Gen. Rules*, No. 31, of 1888, if jury trial does not appear upon the *complaint* to be matter of right, move within 10 days after final joinder of issues. *Rutty v. Person*, 12 *Abb. N. C.*, 352; s. c., 49 *Super. Ct. (J. & S.)*, 55. The motion may be denied (when jury trial is not of right) with or without leave to renew before the special term when the cause shall be called.

issues [or if part only are sought to be so tried, indicate what] in this action for trial by a jury, or for such other relief as may be just. Herewith is served upon you a copy of the questions of fact proposed to be submitted to the jury for trial.

[Date.] [Signature and office address of],
[Address] To , Attorney for
Attorney for

Form No. 1598.

Issues proposed for trial by jury under foregoing notice.

[Title of court and action.]

QUESTIONS OF FACT TO BE SUBMITTED TO THE JURY FOR TRIAL.

FIRST.—Was [dec., stating it,¹ and so on].

[Amendments or a substitute may be proposed by the adverse party, as in Form 1601.]

Form No. 1599.

Order refusing to strike cause from calendar, but directing that issues be settled for trial by jury.²

At a special term [dec., as in Form 493, p. 4].

[Title of action.]

This action being called on for trial in its order on the calendar of this court, and the plaintiff, by his counsel A. T., Esq., moving to strike the same from said calendar [on the ground that—specifying it], and on reading the pleadings, and after hearing T. Z., Esq., of counsel for the defendants in opposition:

ORDERED, 1. That said motion be and the same is hereby denied.

2. That the issues, to be settled as hereinafter provided, be sent to the circuit for trial by a jury, pursuant to law.

3. That for that purpose plaintiff, within days, serve upon the defendants' attorneys a copy of his proposed issues, and the defendants, within days thereafter, may serve such amendments thereto as they desire, and thereupon the issues may be settled by this court upon a notice of days.

Enter: [signature of judge by initials of name and title.]

¹ State only questions of fact, and make the statement complete without inserting references to the pleadings.

² This Form is sustained by Hewlett v. Wood, 3 Hun, 736; 62 N. Y., 75.

Form No. 1600.

Notice of proposed issues where order for trial by jury has been made without stating the questions.¹

[Title of court and action.]

QUESTIONS OF FACT PROPOSED BY [PLAINTIFF], TO BE SUBMITTED
TO A JURY FOR TRIAL.

[Here state questions.]

[Signature of],

Attorney for plaintiff.

Please take notice, that the foregoing is a copy of the issues proposed to be framed and settled, for trial by a jury in this action.

[Date, signature and addresses, as in Form 1597.]

Form No. 1601.

Amendments proposed to the proposed issues.

[Title of court and action.]

Amendments proposed by [defendant] to the issues of fact proposed by [plaintiff], to be settled for trial by a jury in this action.

I. Strike out each of the seven questions proposed by the [plaintiff], and in their place substitute the following: *[or otherwise indicate distinctly each amendment proposed.]*

[Signature of],

Attorney for [defendant].

Please take notice, that the foregoing is a copy of the amendments proposed by the [defendant] to the issues proposed by the [plaintiff], for trial by a jury in this action.

[Date, signature and addresses, as in Form 1597.]

Form No. 1602.

Notice of settlement of issues and amendments.

[Title of court and action.]

Please take notice, that the issues proposed by the [plaintiff]

¹ These must be drafted in proper form to be incorporated in the order, and served with the notice of motion. *N. Y. Gen. Rules*, No. 31, of 1888..

in this action, to be submitted to a jury for trial [pursuant to the order of this court, dated the day of , 18], and the amendments thereto proposed by the [defendants], a copy of which issues [or, amendments] has been heretofore served upon you, will be presented to the Hon. J. K., one of the justices of this court, for settlement, at a special term to be held at the court house [or, the city hall], in the city of , on the day of , 18 , at o'clock in the noon.

[Date, signature and addresses, as in Form 1597.]

Form No. 1603.

Order settling issues, and directing their trial by jury.¹

At a special term [&c., as in Form 493, p. 4].

[Title of action.]

On reading the pleadings in this action [*if the motion is made on special notice, after proposal of issues and amendments, add*], and the issues of fact arising thereon, proposed on the part of the plaintiff to be submitted to a jury for trial, and the amended issues [*or, the amendments thereto*] proposed on the part of the defendants [*if the order is taken by default on motion to settle, add*: and on proof of due notice of settlement thereof]; and on hearing A. T., of counsel for [plaintiff], and T. Z., of counsel for defendant [*or, and no one appearing*] in opposition; Now, on motion of A. T., attorney for [plaintiff]:

ORDERED, 1. That the following questions of fact involved in the issues arising upon the pleadings herein, be tried by a jury.

2. That such trial be had at a circuit court [*or, at a trial term of this court*], to be held in the county court house [*or, in the city hall*] in the city of , on the day of , 18 , or as soon thereafter as the same may be tried [on notice of trial given by either party—*or, and the clerk of this court*

¹ It was formerly usual to add: "And it is further ordered, that the clerk of the said circuit before which the said trial shall be had, forthwith upon the findings and verdict of the said jury, certify and return said findings and verdict to the then pending term of this court, or to the next such succeeding term thereof, to the end that such further proceedings,

trial and judgment thereon, may be had as shall be proper."

Under the present practice the successful party takes a certified extract from the minutes, and moves for judgment, or brings on the cause by notice of trial, to determine the remaining issues, or the whole issues with the aid of the verdict.

is hereby directed to put the cause on the day calendar for that day].

[*If necessary, add:*]

3. That the plaintiff have the affirmative upon the first question, and the defendant have the affirmative upon the second question [*or otherwise, according to the case*].

FIRST.—Was [*&c., stating it, and so on*].

Enter: [*signature of judge by initials of name and title*].

Form No. 1604.

Order of reference to settle issues.

[*Title (court order) and recitals according to the case; see Forms 1599, 1603, and 493, p. 4.*]

ORDERED, that the issues of fact joined by the pleadings in this action be settled pursuant to law and the practice of this court, for trial by a jury, and for that purpose it is hereby referred to R. F., Esq., of _____, as referee, to ascertain and settle the said issues, and state distinctly and plainly the several questions of fact to be passed upon [*if various issues affecting different parties, add: the names of the parties to each issue—and if necessary, add: and which party is to hold the affirmative on each question*], and that upon the filing and confirmation of his report, either party may bring the issues on for trial at the circuit.

Enter: [*signature of judge by initials of name and title*].

SECTION II.

BRINGING ON, AND INCIDENTAL PROCEEDINGS.

FORMS.

(1605.) Notice of trial.

(1606.) Waiver of trial by jury.

(1607.) Order that certain issues be tried before others.

(1607a.) Proof of service of subpoena.

(1607b.) Order allowing amendment on terms, and postponement.

(1608.) — reopening cause after submission, &c.

(1609.) — after trial, granting leave to amend complaint.

Form No. 1605.

Notice of trial.

[As in Form 1490, p. 774, omitting (line 2) the words, "and an inquest taken therein;" and if judgment is to be at the same time asked against defendants who have appeared, but failed to plead, substitute for the words, "and an assessment of damages," in the last line, the words, "for the relief demanded in the complaint."]

[Note of issue, as in Form 1493; notice of motion to strike from calendar, 1494; affidavit and stipulations as to postponement, 1498–1503.]

Form No. 1606.

Waiver of trial by jury.

[Title of court and action.]

The [defendant] above named hereby waives [or, the parties hereto hereby respectively waive] trial by jury [upon the trial now about to be brought on¹] herein.

[Date.]

[Signature and address of],

Attorney for [plaintiff].

[Under N. Y. Code Civ. Pro., § 1009, file with the clerk.]

Form No. 1607.

Order that certain issues be tried before others.²

ORDERED, that the issues raised by the first alleged defense, stated in the answer herein, be tried before the issues raised by

¹ This clause, perhaps, is implied. Compare *Carthage v. Buckner*, 8 Ill. App. (Bradwell), 152, and page 881 of this Volume.

² This practice approved where it will facilitate a conclusion, in *Morris v. Merritt*, 52 Iowa, 496; 3 *Northwestern Rep.*, 94.

The direction may be by entry in

the minutes by the judge holding the court where the cause is brought on (*Owen v. Weston*, 63 N. H., 599; s. c., 2 *New Eng. Rep.*, 717; *N. Y. Code Civ. Pro.*, § 967), in which case the entry of an order is not essential; or it may be made on notice (*Id.*, § 967), in which case prefix caption (court order) and appropriate recitals.

the other defenses. [*Or thus*: the issues raised by the answer of the defendant W. X. be tried without awaiting the readiness of the cause for trial as to the other defendants.¹]

[*Directions as to mode of trial may be added, as thus*.] And that the trial of said issues be had at the special term of this court without a jury, and that defendant have leave thereafter, if so advised to move, to settle the other issues raised by his answer, as questions to be tried by a jury.

Form No. 1607a.

Proof of service of subpoena.

(See p. 786.)

Form No. 1607b.

Order allowing amendment on terms,² and postponement.

[*Adapt from Forms 1512-1514, p. 787, &c., by entitling, At a Special Term; omitting recital of, "a jury having been empaneled," and substituting for the direction that "a juror be withdrawn," a direction, "that the trial of this action be postponed"—or, "that the cause be struck from the calendar."*]

Form No. 1608.

Order reopening cause after submission, so as to take further testimony.

At a special term [*&c., as in Form 493, p. 4*].

[*Title of action.*]

A motion having been made herein by _____ to open this cause and to take testimony, now, after reading and filing the affidavit of A. T., Esq., verified the _____ day of _____, 18 ____; and after hearing A. T., Esq., in support of said motion, and T. Z. in opposition:

ORDERED, that the trial of this cause be reopened, and that it proceed before me on the _____ day of _____ next, at

¹ *Gurnee v. Hoxie*, 29 *Barb.*, 547; proofs should be before decision. *Sid- denberg v. Ely*, 90 *N. Y.*, 257; s. c., *Palmer v. Smedley*, 13 *Abb. Pr.*, 185.

² Order to amend to conform the 11 *Abb. N. C.*, 354.

o'clock, at _____, for the taking of such further testimony as may be offered by either party [*or may restrict as directed*].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1609.

Order after trial, granting leave to amend complaint to conform to the proofs.¹

[*Title (court order) and recitals; see Form 493, p. 4.*]

ORDERED, that the plaintiff have leave to amend his complaint so as to conform the same to the copy served on the defendant's attorney [with the proposed case in this cause made on the part of the plaintiff]; and that the complaint so amended be filed [and be included in the case], upon payment by the plaintiff to the defendant of _____ dollars, costs of opposing this motion [and on filing with the clerk of the county of _____ a bond in the penalty of _____ dollars, conditioned that in case the defendant shall finally recover costs against the plaintiff, such costs, so far as they have already accrued, shall be paid; and until such bond be filed, the proceedings on the part of the plaintiff are stayed].

Enter: [*signature of judge by initials of name and title.*]

SECTION III.

TRIAL WITHOUT AID OF JURY OR REFEREE.

I. FINDINGS.

FORMS.

- (1610.) Requests to find.
- (1611.) Decision (*i. e.*, findings of fact and of law), with direction or order for judgment.
- (1612.) Notice of decision or report, and judgment thereon, to limit time to file exceptions to the findings or refusals; and time to make case, and to appeal.

ings and refusals to find, of court (or referee), upon a trial.

- (1614.) Notice of the filing of the exceptions to findings, &c.
- (1615.) Affidavit to move for leave to file and serve exceptions, and make case, *nunc pro tunc*.
- (1616.) Order giving leave to file and serve exceptions, and make case, *nunc pro tunc*.
- (1617.) Notice of motion at general term for new trial after interlocutory judgment.

II. EXCEPTIONS; CASE; AND NEW TRIAL.

- (1613.) Notice of exceptions to find-

¹ If the cause is put over to allow amendment, to be afterward brought on upon the amended pleading, an order should be entered; and to re-

view it on appeal, better be specially mentioned in the notice of appeal. See 1607b.

(1618.) Case as proposed (with or without exceptions), after trial by court or referee.

III. COSTS; AND JUDGMENT.

(1619.) Affidavit to proceedings.

(1620.) Notice of settlement or resettlement of judgment.

(1621.) Judgment.

(1622-1638.) Statements suitable to insert in foregoing Form.

(1639.) Judgment dismissing complaint upon the merits.

(1640-1641a.) Statements suitable to insert in foregoing Form.

(1642.) Interlocutory judgment.

[*Notice of Trial*, Form 1605, p. 843; *Note of Issue*, Form 1493, p. 777; *Directions Incidental to Trial*, Forms 1607-09.]

I. FINDINGS.

Form No. 1610.

Requests to find.¹

[*Title of court and action.*]

The plaintiff [*or*, defendant Y. Z.] submits the annexed statement of the facts which he deems established by the evidence herein, and of the rulings upon questions of law which he desires made.

[*Date.*]

[*Signature and office address of*,
Attorney for

[*Annex a draft of findings such as desired, in the form of distinct propositions of fact and law respectively, separately stated² and numbered; see next Form.*]

¹ Under *N. Y. Code Civ. Pro.*, § 1023, should be submitted at or before submission of the action for decision, or (by consent) before actual decision or report rendered. Gormley v. McGlynn, 84 *N. Y.*, 284. The court or referee must not allow postponement until settling the case. But as to waiver of this limit of time, see *Matter of Chauncey*, 32 *Hun*, 429; *Welch v. Preston*, 30 *Hun*, 303. It is the practice, where an opinion is to be rendered, to postpone submission of findings, with the approval of the judge or referee, until the opinion has been handed down, so as to facilitate the framing of appropriate findings.

See that all your own requests are answered, or the appellate court may disregard them. *Harris v. Van Wart*, 96 *N. Y.*, 642. And see that there is no inconsistency between the findings and the refusals and granted requests on either side.

² The propositions embraced in requests to find facts must be in the

form of facts established, and not in the form of evidence tending to establish them. *Friedman v. Bierman*, 43 *Hun*, 387.

Both as to facts and as to law each proposition should be stated in the most concise and direct manner, without repetition, evidence, argument or comment. *Glacius v. Black*, 50 *N. Y.*, 145; s. c., 10 *Am. R.*, 449.

But under the California statute, the requests should be not to find in a particular way, but only on a specified point, leaving it to the court to frame the finding. *Edgar v. Stevenson*, 70 *Cal.*, 286; 11 *Pac. Rep.*, 704.

Each proposition must be single, for a refusal is not error if either branch of the request ought to be denied. *Heilbrun v. Hammond*, 13 *Hun*, 474; *Davis v. Leopold*, 87 *N. Y.*, 620; rev'g 10 *Weekly Dig.*, 266.

The statement of incidental facts which are but evidence of the material facts (*Merchants' Mut. Ins. Co. v. Allen*, 121 *U. S.*, 67; *Union Pac. R.*

Form No. 1611.

Decision (i. e., findings, with direction for judgment) by judge, upon a trial.¹

At a special term² [*&c.*; see Form 493, p. 4].

[*Title of action.*]

The issues of fact [*if only part of them, indicate what, as thus:* raised by the answer of the defendant Y. Z.] coming on to be tried by the court at a special term held by the undersigned without a jury,* and having been tried on the day of , 18 , and the allegations and evidence of the parties having been heard; † now, after hearing A. T. for the plaintiff, and Z. T. for the defendant, and due deliberation having been had, I decide and find as follows:

FINDINGS OF FACT.³

I. [*State each proposition found, separately, and number them.*]

B. C. v. United States, 116 *id.*, 154; *Friedman v. Bierman*, 43 *Hun*, 387; *Conlan v. Grace*, 36 *Minn.*, 276; 30 *Northwestern Rep.*, 880, or of mere details (*Sidenberg v. Ely*, 90 *N. Y.*, 257; s. c., 11 *Abb. N. C.*, 354), is out of place. A request to find whether a particular item of damage or charge is included, and if so to what amount, is proper, but the elements by which it was calculated cannot be required. *United States v. Smith*, 94 *U. S.*, 214.

Admissions in the pleadings are not to be reiterated in the findings. *Dunham v. Cudlipp*, 94 *N. Y.*, 129. In complex cases, while careful to cover every material point separately, do not multiply the number of requests beyond what is necessary. See *Quincey v. Young*, 53 *N. Y.*, 504, where an unreasonable number was held to justify the failure to notice the materiality of some.

¹ *Code Civ. Pro.*, § 1022; *Pollock v. Pollock*, 71 *N. Y.*, 137. On settlement of findings, the successful party should see that there are none inconsistent.

Schwinger v. Raymond, 83 *N. Y.*, 193. For this purpose examine the adversary's requests to find; and if any have been granted which are not consistent with the findings, ask re-

settlement; otherwise they may control if in his favor. *Sisson v. Cummings*, 35 *Hun*, 25, and cases cited; *Bonnell v. Griswold*, 89 *N. Y.*, 122.

The judge or referee should determine all the material facts, not merely those which may suffice to lead to judgment. *Sixth Ave. R. R. Co. v. Gilbert Elev. Ry. Co.*, 3 *Abb. N. C.*, 372.

² See Vol. I, p. 246, n. 1.

³ No special form is essential to constitute a finding of fact. *Crawford v. Halsey*, 124 *U. S.*, 648, holding that the words, "considering that an assignment was made by A. to B. . . it is adjudged," &c., was a finding of fact.

So finding a party guilty of the adultery as charged in the answer, is sufficiently formal. *Pollock v. Pollock*, 71 *N. Y.*, 137. But a finding that all the material allegations are true is not sufficient.

A finding contrary to an admission in the pleadings is error unless the admission has been waived. *Dunham v. Cudlipp*, 94 *N. Y.*, 130. A finding founded on an admission in the pleadings, without evidence, should not deviate from the admitted allegations, either affirmatively or negatively. *Bonn v. Steiger*, 21 *Hun*, 219.

CONCLUSIONS OF LAW.¹

I. [State each conclusion separately,² and number them.]

I accordingly direct judgment for [plaintiff] against [defendant] for [stating sum or special relief, or may say: for the relief as demanded in the complaint:—for direction of interlocutory judgment or leave to apply further, see Forms 1662 and 1674], with costs,³ which are hereby awarded to the [plaintiff] against the [defendant] to be taxed.

[Signature of judge in full,⁴ with title.]

Form No. 1612.

Notice of decision or report, and judgment thereon, to limit time to file exceptions to the findings or refusals; to make case; and to appeal.⁵

[Entitle, unless indorsed on copy.]

Please take notice, that the within [or, the foregoing] is a

¹ Direction for judgment, or a conclusion of law equivalent thereto, is essential. *Benjamin v. Allen*, 35 *Hun*, 115.

A direction for judgment may avail as a sufficient conclusion of law. *Murphy v. Snyder* (*Cal.*, 1885), 8 *Pac. Rep.*, 2. So a conclusion of law may avail as a direction for judgment. *Hathaway v. Russell*, 46 *Super. Ct. (J. & S.)*, 103.

For the test of the distinction between findings of fact and of law, compare *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 *U. S.*, 485, 506; s. c., 12 *Ins. L. J.*, 194; *Sohn v. Freiberg*, 9 *Cincinnati L. Bul.*, 290; *Hotchkiss v. Mosher*, 48 *N. Y.*, 478.

But compare *Briggs v. Briggs*, 46 *Vt.*, 571.

As to difference in effect between a finding of fraud as matter of fact and as a conclusion of law, see 38 *Hun*, 482. It will not do to state findings of fact as if they were findings of law, or conversely. *Eilers v. Boatman*, 111 *U. S. (Davis)*, 356; *Sun Mut. Ins. Co. v. Ocean Ins. Co.* 107 *U. S.*, 485, 501; *Hays v. Miller*, 70 *N. Y.*, 112; *Bath v. Valdez*, *San Francisco Bulletin*, Aug. 17, 1886; *Jarvis v. Jarvis*, 66 *Barb.*, 331.

² *Harris v. Hey*, (*Pa.*, 1886) 2 *Cent. Rep.*, 530.

³ Costs in equity cases do not depend on any statute, nor do they ab-

solutely depend on the determination of the cause. *Belmont v. Ponvert*, 38 *Super. Ct. (J. & S.)*, 425; compare *Biddle v. Tomlinson*, 6 *Central Rep.*, 903; *Couch v. Millard*, 41 *Hun*, 212; rev'g 8 *Civ. Pro. R. (Browne)*, 431; s. c., 3 *How. Pr., N. S.*, 22; *Daniel's Chancery Pr.*, p. 1394.

And this rule was not altered by the new Code. *Black v. O'Brien*, 23 *Hun*, 82; *Law v. McDonald*, 9 *Hun*, 23 (compare *N. Y. Code Civ. Pro.*, § 3230); *Dill v. Wisner*, 88 *N. Y.*, 153; s. c., 2 *Am. Prob.*, 509; aff'g 23 *Hun*, 123.

The remedy for error in the exercise of discretion in the direction as to costs, in findings, is to except and appeal (*Rosa v. Jenkins*, 31 *Hun*, 384; and see *Adams v. Sullivan*, 42 *id.*, 278); not by motion (*Woodford v. Bucklin*, 14 *Hun*, 444). But where the costs are not discretionary, a disregard of the statute rule should be corrected on motion. *Boardway v. Scott*, 31 *Hun*, 378.

⁴ Signature is necessary. *Benjamin v. Allen*, 35 *Hun*, 115; *Smith v. Davidson*, 45 *Ind.*, 396; *Service v. Gambrel*, (*Ind.*, April, 1887) 9 *West. Rep.*, 94; but see *Bietman v. Hopkins*, 7 *West. Rep.*, 264; *McNaughton v. Chave*, 5 *Abb. N. C.*, 225.

As to signing *nunc pro tunc*, see *Fulton v. Fulton*, 8 *Abb. N. C.*, 210.

⁵ By *N. Y. Code Civ. Pro.*, § 994,

copy of the decision of Mr. Justice J. K. [*or*, the report of the referee] herein, which was duly filed in the office of the clerk of _____, on this [*or*, the] _____ day of _____, 18 [*and if desired to limit time to appeal, add:* and of the [interlocutory] judgment which was duly entered thereon on this [*or*, the] _____ day of _____, 18 ____].

[*Date, signature, and addresses, as in Form 1536.*]

II. EXCEPTIONS; CASE; AND NEW TRIAL.

Form No. 1613.

Notice of exceptions to findings and refusals to find of court (or referee), upon a trial.

[*Title of court and cause.*¹]

The plaintiff [*or*, the defendant Y. Z.] excepts to the

service of a copy of the *decision* or *report* of the referee, with written notice of the entry of judgment, is necessary to limit the time to except; and the limit is ten days.

By *Gen. Rules*, No. 32, of 1888, the like notice and copy is necessary to limit time to make a case, or a case and exceptions, or case containing exceptions, and the limit is the same.

By *Code Civ. Pro.*, § 1351, service of a copy of the *judgment*, with written notice of its entry, is necessary to limit the time to appeal; and the limit is thirty days. Service of the judgment and notice for this latter purpose does not avail for the former, without a copy of the decision or report. *Schwartz v. Weber*, 18 *Abb. N. C.*, 60; s. c., 103 *N. Y.*, 658.

The unsuccessful party may make a case and exceptions without waiting for the entry of judgment and notice thereof. 18 *Abb. N. C.*, 63, note.

¹The "notice of exceptions," or, as it is often called, the exceptions, referring to exceptions taken *after trial*, by way of objections to the conclusions of law, is to be distinguished from the paper known as "exceptions," and formerly called bill of exceptions, referring to exceptions taken *at the trial* to rulings made in its progress.

For the purpose of reviewing objections to *rulings at the trial*, the party must have an exception noted at the time in the minutes, and if he subsequently makes a case containing exceptions or a bill of exceptions, those trial exceptions will then appear in their place in the narrative of the proceedings on the trial. But for the purpose of interposing exceptions to the conclusions of the judge or referee embodied in the decision or report as filed, and to the refusal of the judge or referee to find as requested, the party must, after the decision or report has been filed, serve a notice of exceptions, as in the above Form.

The exceptions interposed by this notice may afterward be incorporated with any exceptions taken on the trial and noted in the minutes, when the "bill of exceptions," or "case containing exceptions," comes to be made and settled.

A finding of fact is not the subject of exception, either for purpose of motion for new trial or of appeal (*Roe v. Roe*, 14 *Hun.*, 612), unless, perhaps, where the contrary was incontrovertibly proved (*Stevens v. Mayor, &c.*, of *N. Y.*, 84 *N. Y.*, 296), and in this case the exception to the refusal to find the contrary is enough.

An exception must be as specific

decision of Mr. Justice J. K. at special term [*or*, the report of R. F., Esq., the referee] herein, filed with the clerk on the day of _____, 18____, in the following particulars [*may add*: said exceptions to be annexed to the case herein].

I. To the first finding of fact, on the ground that there is no evidence to support it.¹

II. To so much of the report embraced in the second finding, called a finding of fact, as decides as a matter of law that [*&c.*].

III. To the conclusion of law numbered 1.

IV. To so much of² the conclusion of law numbered 2 as finds and decides that [*stating the part*].

V. To the refusal of the court to find as requested in paragraph numbered 1 of the requests submitted by this defendant [and to his refusal to find at all thereon].

[*Date, signature, and addresses, as in Form 1536.*]

Form No. 1614.

Notice of the filing of the exceptions to findings, &c.

[*Entitle, unless indorsed or underwritten on the exceptions.*]

Please take notice, that the within notice of exceptions to

as the error which is to sustain it, so that the opponent may be advised of what concession is necessary (*Graham v. Chrystal*, 2 *Abb. Ct. App. Dec.*, 263; *aff'g* 1 *Abb. Pr.*, *N. S.*, 121); hence an exception "to each and every of several rulings or findings separately," without making a separate statement of an exception as to each, amounts to nothing (*Moyer v. N. Y. Central, &c., R. R. Co.*, 88 *N. Y.*, 351; *rev'g* 12 *Weekly Dig.*, 188; *Newell v. Doty*, 33 *N. Y.*, 83), unless every one of the findings or rulings is erroneous. It is not necessary, however, to use the same language as the findings. Language which points with certainty to the intended finding is enough (*Spaulding v. Strang*, 38 *N. Y.*, 9), and the court, at least the general term in the same court, have power to correct error in a clear case, notwithstanding too great generality in an exception (*Mandeville v. Marvin*, 30 *Hun*, 282).

Under *N. Y. Code Civ. Pro.*, § 994, file in clerk's office, and serve copy on the attorney for each adverse party (and this includes co-defendants adversely affected), with notice of filing indorsed, within ten days after written notice and copy of decision or report filed, and of entry of judgment thereon. But it is not necessary to await judgment. On exceptions thus taken to conclusions of law, the exceptant may appeal from judgment, to review those conclusions without making a case. *Schwartz v. Weber*, 18 *Abb. N. C.*, 60; *s. c.*, 103 *N. Y.*, 658.

¹ A finding of fact, unless without any evidence to support it, is not the subject of exception. *Mead v. Smith*, 28 *Hun*, 639.

² *Hepburn v. Montgomery*, 97 *N. Y.*, 617; *Cornell v. Barney*, 26 *Hun*, 134; *Graham v. Chrystal*, 2 *Abb. Ct. App. Dec.*, 263; *aff'g* 1 *Abb. Pr.*, *N. S.*, 121.

the decision [*or*, report] and findings, and refusals of the court [*or*, of the referee] herein, has been filed in the office of the clerk of _____, this _____ day of _____, 18 ____.

[*Date, signature, and addresses, as in Form 1536.*]

Form No. 1615.

Affidavit to move for leave to file and serve exceptions, and make case, *nunc pro tunc*.¹

[*Title of court and action.*]

[*Venue.*]

T. Z., being duly sworn, says:

I. That he is managing clerk in the office of defendant's attorney herein.

II. That on the _____ day of _____, 18 ____, a notice of the filing of the decision of the court [*or*, the report of the referee] herein, was served on defendant's said attorney, by delivering the same to this deponent, and that deponent thereupon informed said attorney of the service, and was instructed by him to prepare, file and serve said exceptions on behalf of said defendant to said decision [*or*, report], and make and serve a case [*stating circumstances, and excuse for failure to file and serve in time*].

III. That said exceptions were prepared and served in good faith; and that it is owing to the inadvertence and mistake of deponent, under the circumstances aforesaid, that they were not filed and served in time, and that defendant desires to be allowed to file and serve them *nunc pro tunc*, with the same force and effect as if they had been filed and served in season; and that defendants may have an extension of time in which to serve said case [and that _____ days is necessary therefor].

[*If order to show cause is asked, state reason and condition of cause, and as to previous application; see p. 2.*]

[*Jurat.*]

[*Signature.*]

[*Notice of motion or order to show cause; see Forms 488 and 491, pp. 1, 3.*]

¹ For a motion to enlarge time in advance, see Form 1539.

Form No. 1616.

Order giving leave to file and serve exceptions, and make case, *nunc pro tunc*.¹

[*Title (court order) and recitals according to circumstances; see Form 493, p. 4.*]

On reading the annexed affidavit of C. D. [managing clerk in the office of defendant's attorney herein], verified the day of , 18 , and on motion of Q. R., defendant's attorney herein, and on proof of due service of notice of this motion:

ORDERED, 1. That the defendant Y. Z. have leave to file and serve exceptions to the findings and refusals to find, of the court [*or, referee*] herein, on or before next, *nunc pro tunc*, as of the day of , 18 , with the same effect as if seasonably filed and served.

2. That said defendant have days from the date of this order in which to make and serve his proposed case and exceptions² herein.

[*If terms are imposed:*] 3. This order is on condition that [*&c.*].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1617.

Notice of motion at general term for new trial after interlocutory judgment.

[*Title of court and action.*]

Please take notice, that upon the pleadings, the decision [*or, report*] and exceptions to the findings and refusals to find, filed herein, and upon the case also filed [*or, to be made, settled and filed*] herein; and upon the interlocutory judgment entered on the day of , 18 , the undersigned will move this

¹ Gade v. Gade, 14 Abb. N. C., 510; s. p., Douglas v. Douglas, 7 Hun, 272.

² County of Milwaukee v. Pabst, (Wisc., 1885) 25 Northwestern Rep., 11.

³ Serve within ten days after receiving copy of decision or report, and notice of entry of interlocutory judgment thereon. N. Y. Code Civ. Pro., § 1001.

This motion may be made without

appealing from the judgment. Kelsey v. Sargent, 104 N. Y., 663; Bennett v. Austin, 10 Hun, 451.

The latter case, so far as it holds the proceeding inapplicable after trial by referee, is superseded by N. Y. Code Civ. Pro., § 1001.

Motion for new trial because of delay; may adapt from Form 1699. See 43 Hun, 443.

court at a general term to be held at the court house [*or*, city hall] at _____, on the _____ day of _____, 18____, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a new trial on said exceptions and for such other or further relief as may be just.

[*Date, signature, and addresses, as in Form 1536.*]

[*Order may readily be adapted from Form No. 1537.*]

Form No. 1618.

Case as proposed (with or without exceptions), after trial by court or referee.

[*As in Form 1540 from the beginning, inserting in the statement required by rule 41, mention of the opinion of the court below, as annexed, and inserting in line 11 the words: without a jury; or substitute the words: before R. F., Esq., the referee herein; omit reference to jury in lines 21 and 26, and substitute statement of proceedings after close of evidence, as thus:*] After counsel for the respective parties had been heard and due deliberation had, the court duly made and filed the following decision [*or*, the referee thereafter duly made and filed the following report—*take in copy*].

Before finally submitting the cause for decision¹ [*or*, Before decision—*or*, report, was rendered, and within a time fixed therefor by the judge—*or*, referee], the attorney for the defendant [*or*, plaintiff] submitted in writing the following statement and requests, and at or before rendering the decision [*or*, report], the judge [*or*, referee] noted in the margin thereof as appears below, the manner in which such proposition was disposed of, and duly filed [*or*, returned to said attorney²] the said requests.

Thereafter the defendant [*or*, plaintiff] duly filed and served the following exceptions to said decision [*or*, report—and to said refusal—*take in copy*³].

[*Notice; Amendments; Notice of settlement and Order settling, as in Forms 1541–1544.*]

¹ Additional requests presented on the settlement of the bill were treated as if in season because no objection was made, in *Ward v. Craig*, 87 *N. Y.*, 550.

² Delay of the judge or referee to do so will not prejudice the party. *Friedman v. Bierman*, 43 *Hun*, 387.

³ According to the case of *Pettit v.*

Pettit, 20 *Weekly Dig.*, 154, these exceptions to findings and to refusals are not essential to be taken before making a case, but if made afterward seasonably will be annexed by the clerk, notwithstanding the contrary view expressed in *French v. Powers*, 80 *N. Y.*, 146.

III. COSTS; AND JUDGMENT.

Form No. 1619.

[*Affidavit to proceedings as to parties in default, infants, &c., see Forms 1454, 1458, 1467, 1472.*]

[*Proceedings as to costs, see Forms 1494-1565.*]

Form No. 1620.

[*Notice of settlement, or resettlement of judgment. When necessary, adapt from Forms in Volume I, p. 303, No. 112; p. 305, Nos. 117-119.*]

Form No. 1621.

Judgment on decision after trial by the court.

[*Title of court and action.*]

The issues in this action having been regularly brought on for trial before Mr. Justice J. K., at a special [*or, trial*] term of this court [*or, at a circuit court*] held on the day of , 18 , at the county court house [*or, city hall*] in the of , and [*here recite concisely the readiness of the cause for trial, as thus:*¹] the summons in this action [*with—here mention any required notice or indorsement, also the complaint if also served*] having been personally served on all the defendants herein, except W. Z., who voluntarily appeared, and except Y. Z., a non-resident of this State [*or specify other ground justifying service by publication*], and said Y. Z. having been duly served with said summons [*and notice*] by the due publication and mailing thereof directed to him pursuant to an order of publication duly made herein [*and by personal delivery thereunder without the State*], and the time of the defendants [*names*] to appear and plead having fully expired, and said [*names*] not having appeared or pleaded, and the defendant U. V. having appeared, but made default in pleading herein, and due notice of application for judgment having been given him, and the infant defendant X. Y. having duly appeared and an-

¹ Recitals showing that the cause was ready for hearing are useful (*McCahill v. Equitable Life Asso.*, 26 *N. J. Eq.*, 531) but not essential. *Riggs v. Lockwood*, 12 *West Va.*, 133. This recital is held *prima facie* evidence of the jurisdictional fact stated to be es-

tablished, even if the affidavits of service annexed in the judgment-roll do not bear it out. *Maples v. Mackey*, 89 *N. Y.*, 146; s. p., *Brawley v. Ranney*, 67 *Mo.*, 280; *Sweeley v. Van Steenburg*, 69 *Iowa*, 696; 26 *Northwestern Rep.*, 78.

swered the complaint by G. L., his guardian *ad litem* duly appointed in this action,¹ and the summons and complaint in this action [together with a proper notice of the pendency of this action] having been filed in the office of the clerk of the county of _____, on the _____ day of _____, 18____, and the court having heard the allegations and proofs of the parties and the argument of counsel, and, after due deliberation, having duly made and filed, on the _____ day of _____, 18____, a decision in favor of the [plaintiff] against the [defendant], containing a statement of the facts found and the conclusions of law thereon,² directing judgment as hereinafter stated;³ and the [plaintiff's] costs having been duly adjusted at _____ dollars [for other recitals see *Forms immediately following, and others therein referred to*]: Now, on motion of A. T., attorney for [plaintiff],

IT IS ADJUDGED, that [stating relief according to directions in the decision].

Judgment signed and entered this _____ day of _____, 18____.
[Signature of], Clerk.⁴

¹ See Volume I, pp. 825, 826; *Colt v. Colt*, 111 U. S., 566; *Mutual Life Ins. Co. v. Schwaner*, 36 Hun, 373; *Tibbs v. Allen*, 27 Ill., 119.

² It is not necessary to recite the contents of the findings. *Bunten v. Orient Mut. Ins. Co.*, 8 Bosw., 448; *aff'd in 1 Abb. Ct. App. Dec.*, 257.

Where controverted questions of fact have been determined in actions affecting title to real property or similar matters of future importance, it is the practice of some attorneys to recite in the judgment the findings of fact so far as favorable to the successful party, or to state the facts as adjudged, after the words "it is adjudged." It is equally effectual to make the recitals of the judgment refer to the findings, and see that they are annexed to the judgment-roll, and take a certified copy of them with the judgment. But if the findings of fact contain, as they sometimes do, matter favorable to the unsuccessful party, but wholly unavailing in this action because avoided or immaterial by reason of other facts being found against him, it is better for plaintiff to state or recite in the judgment such of the findings of fact as support the judgment and leave those which favor his adversary to remain as they ought to, simply as findings; for these are not properly an adjudication, although

there are some authorities which have treated such findings as if they were. See *Whiting v. United States Bk.*, 13 Pet., 6; Rule lxxxvi of U. S. Ct. Eq. Pr.; *Jones' Fed. R.*, 144; *Rice v. Rice*, 53 Mich., 432; 19 *Northwestern Rep.*, 132; *Jackson v. St. Paul Fire, &c., Co.*, 33 Hun, 60; *Judge v. Booge*, 47 Mo., 544; *Seton on Decrees*, 1 Am. Ed., 7.

³ The judgment must follow implicitly the decision. *Loeschigk v. Addison*, 3 Robt., 331; s. c., 19 Abb. Pr., 169. A remedy for an error in the judgment in departing from the decision in respect to the award of costs, may be had either by motion to conform it to the decision, or especially where the decision is also wrong and is excepted to, by appeal. *Rosa v. Jenkins*, 31 Hun, 384.

⁴ If the judge has signed findings or an order for judgment directing specifically what provisions it shall contain, he need not sign the judgment itself (*Clapp v. Hawley*, 97 N. Y., 610; *De Laney v. Blizard*, 7 Hun, 66; *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal., 59; 7 *Pacific Rep.*, 123), except where it is settled by him pursuant to direction in an interlocutory judgment. The practice is, wheresoever the form of the judgment is settled by the judge, to take his signature to an engrossed copy,

STATEMENTS SUITABLE TO BE INSERTED IN FOREGOING FORM.

[For various recitals applicable to a judgment after trial by the court, see also Forms 1456 to 1459, and for others, some of which are appropriate to trial either by the court or by jury, see 1570 to 1586.]

1622. *Voluntary submission of one who could not be sued:*] and the defendant [name and addition as thus:] W. X., as assignee in bankruptcy of said Y. Z., having voluntarily appeared and duly submitted himself to the jurisdiction of this court [and consented to the entry of the following judgment];

1623. *Infant coming of age pending the cause:*] and the said [infant], pending the action, having became of full age, and having elected and stipulated that [the answer of the defendant W. X. stand, as for her answer] in the place and stead of the answer of her guardian *ad litem*, on her behalf;

1624. *Withdrawal of answer:*¹] and the defendant [name] having withdrawn his answer herein [and complied with the prayer of the complaint so far as relief was sought against him];

1625. *Another Form:*] This action having been duly brought to trial upon the issues arising on [indicate which, as thus:] the first defense in the answer to the first cause of action in the complaint, the second cause of action and all other defenses in the answer having been duly withdrawn;

1626. *Continuance on death of original party:*] and this action having, on the decease of the defendant Y. Z., been continued in the name of W. X., as his executor, by an order of this court duly entered on the day of , 18 ;

1627. *Amendment of complaint:*] and the said summons and complaint having been duly amended by order of this court duly made and entered the day of , 18 , after due notice to all parties, making the said successors of Y. Z. parties defendant, and also joining as parties defendant the following persons, whose names or residences or both were not known, namely [names].

1628. *Supplementary summons:*] and M. N., mentioned in the complaint herein, having heretofore died, and a supplemental summons having been duly issued pending this action, bringing in as defendant therein [names and description, as thus:] O. N. and P. N., the heirs of said M. N., in his place and stead [and recite service or appearance and default, &c., as above].

1629. *Abatement as to one defendant:*] and the defendant Q. R. having died pending this action, his interest in the subject of the action surviving to the defendant W. X., and no other representative of said Q. R. being a necessary party,

Or thus:] and it duly appearing by the proofs and admissions on the trial that the defendant Q. R., copartner of the defendants W. X. and Y. Z., is deceased;

1630. *Filing lis pendens:*] and a proper notice of the pendency of this action having been duly filed in the office of the clerk of the county of , on the day of , 18 , at or after the filing of the complaint herein;²

leaving a blank only for the costs, to be taxed, and inserted by the clerk.

¹ Withdrawal should appear on the record, in order to protect the party from a subsequent claim that the issue

was adjudicated. *Schmidt v. Zahensdorf*, 30 Iowa, 498.

² *N. Y. Gen. Rules*, No. 59, of 1888.

1631. *Waiver of jury trial:*¹] and a trial by jury having been duly waived by consent of all parties who have appeared, duly given in open court, and entered in the minutes [or, by written consent of all the parties who have appeared, duly filed];

1632. *Previous order for judgment on a frivolous pleading:*] and judgment on the answer of the defendant W. X., as frivolous, having been duly ordered, by order entered herein the day of , 18];

1633. *Waiver of notice of judgment:*] and the defendant X. Y. having in writing duly waived notice for application for judgment herein;

1634. *Injunction:*] and this court having by an order made [or, entered] on the day of , 18 , granted an injunction pending this action, forbidding the defendants [briefly indicating what];

1635. *Receivership:*] and this court having by order entered the day of , 18 , duly appointed R. C., Esq., receiver pending this action of [concisely indicate fund], and he having duly qualified and acted as such;

1636. *Accounting of trustee:*] and the said W. X., as trustee of , having rendered a full account of his trust, and having been examined thereon under oath in open court;

1637. *Submission of stipulation as to facts:*] and the said cause having been submitted to the court for its decision upon the stipulation to the parties attached to and made part of the findings of the court on file herein;

1638. *Consent to judgment:*] and the defendant [name] consenting² [by his counsel³] to the following judgment;

Form No. 1639.

Judgment dismissing the complaint upon the merits.

[*Caption and recitals according to the case; see previous Forms, continuing:*] and the court having duly directed judgment in favor of the defendant, dismissing the complaint [upon the merits],⁴ with costs [and an allowance of dollars] to

¹ Maxwell v. Stewart, 21 Wall., 71; King v. Burdett, 12 W. Va., 688; N. Y. Code Civ. Pro., § 1009.

² Partridge v. Shepard, 71 Cal., 470; 12 Pacif. Rep., 481; Bryan v. Kennett, 113 U. S., 179.

³ Pacific R. R. Co. v. Ketchum, 101 U. S., 289.

⁴ In the absence of statute unqualified dismissal in an equity suit is a bar to a further suit (Lyon v. Perrin, &c., Mfg. Co., U. S., April, 1888; Durrant v. Essex Co., 7 Wall., 107; Edgar v. Buck, (Mich., 1887) 32 Northwest-ern Rep., 644; s. p., Burton v. Burton, 58 Vt., 414; 2 New Engl. Rep., 607), if the grounds appear to be the same. Steam-Gauge, &c., Co. v. Meyrose, 27 Fed. Rep., 213, and cases cited; U. S.

v. Lane, 8 Wall., 185. See Abb. Tr. Ev., 831, and cases cited. As to which rule applies where a judge tries a common-law cause without jury, compare Coit v. Beard, 33 Barb., 357; s. c., 12 Abb. Pr., 462; People v. Smith, 51 Barb., 360.

It is the better opinion that defendant has a right to have the adjudicating part of the judgment expressed to be without prejudice, or merely as abating the action, if such be the legal effect of the adjudication. See for an instance of reversal for refusal of this right, Coubrough v. Adams. 70 Cal., 374; 11 Pacif. Rep., 634, 636. Contra, Squire v. Hewlett, (N. H., 1886) 2 New Engl. Rep., 230.

But the qualification must be al-

the defendant [*or, to each of the several defendants or classes of defendants, appearing by different attorneys*], and the costs¹ of the defendant having been duly adjusted at the sum of dollars [*if several bills were allowed name each party and the sum allowed him or them*]:

Now, on motion of T. Z., attorney for the defendant [*if several appearing separately, name each*]:

IT IS ADJUDGED, that the plaintiff's complaint be, and the same is, hereby dismissed, upon the merits [*or, without prejudice*²—*or may specify particular question, as thus: without prejudice to an action to redeem*], and that defendant do recover of the said plaintiff the said sum of dollars.

[*Authentication as in Form No. 1621.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1640. *Disposing of injunction.*³—*Insert:*] that plaintiff was not entitled to the injunction granted herein on the day of , 18 [*and if the in-*

lowed by the court. The clerk cannot originate it, for it is a judicial act. As to adding it *nunc pro tunc*, see *Burton v. Burton* (*above cited*).

The dismissal should be without prejudice, if it be for want of jurisdiction (*Van Norden v. Morton*, 99 *U. S.*, 378), or for defect of pleading or parties (*Hughes v. U. S.*, 4 *Wall.*, 232), or excess of parties plaintiff (*House v. Mullen*, 22 *id.*, 42), or for failure to appear (*Miller v. McGuckin*, 15 *Abb. N. C.*, 204), or for unreadiness to go on (*Ramsay v. Erie R. Co.*, 9 *Abb. Pr.*, *N. S.*, 242).

Where it is for failure to establish a case by adequate proof, it should be on the merits—*Gale v. Gould*, 40 *Mich.*, 515; 8 *Reporter*, 655—unless in the discretion of the court plaintiff ought to have another opportunity.

There may be dismissal on the merits as to part or one aspect of the claim without prejudice as to another.

¹ An appellate court, on dismissing for want of jurisdiction on the part of the court of first instance, may give costs. *Bradstreet Co. v. Higgins*, 114 *U. S.*, 262, and cases cited.

Whether either court can do so where the dismissal is for want of its own jurisdiction, compare *Harriott v. N. J. R. R. & Transportation Co.*, 1

Daly, 377, rev'g 8 *Abb. Pr.*, 284; *King v. Poole*, 36 *Barb.*, 242; *Donnelly v. Libby*, 1 *Sweeny*, 259, 287; *Humiston v. Ballard*, 40 *How. Pr.*, 40; *Sullivan v. Frazee*, 4 *Robt.*, 616; *Humiston v. Ballard*, 63 *Barb.*, 9.

The better opinion is that every court has jurisdiction as against a plaintiff to determine its own jurisdiction of the action brought before it, and consequently power to charge a plaintiff with the costs of a judgment determining that question against him. In other words, it has jurisdiction to dismiss the action, though it would have none to award the desired relief. See *State v. Thompson*, *Mo.*, 1884. But the contrary is settled in many courts. Compare *Mansfield, &c., Ry. Co. v. Swan*, 111 *U. S.*, 379; overruling in effect *Mead v. Platt*, 17 *Fed. Rep.*, 836.

² In most jurisdictions the words "without prejudice" suffice to show that nothing more is done by the judgment than to terminate the particular action.

Contra, *Porter v. Morère*, 30 *La. Ann.*, 230, where an injunction was dissolved.

³ Defendant has a right to a decision on this point. *Kelley v. McMahon*, 37 *Hun*, 212.

*junction does not fall by judgment,*¹ *add:* and said injunction is hereby vacated, and—*may add:* it is hereby referred to R. F., Esq., as referee—*proceed as to damages as in Form 648, p. 112*].

1640a. *Receiver.*—[*For directions as to discharge, see p. 245.*²]

1641. *Surrender of instrument to be cancelled.*³—That [*describe instrument, as thus:*] the bond given by plaintiff herein as a condition of granting a stay of a former action between the parties, and filed on the day of , 18 , be surrendered to be cancelled, and the clerk is hereby directed to cancel the same and deliver it to A. B. or his attorney.

1641a. *Lis pendens notice cancelled.*—[*Insert direction from Form 503, p. 29.*]

Form No. 1642.

Interlocutory judgment (or order therefor) denying equitable relief and retaining action as to damages.⁴

[*Caption and recitals, &c.; see Form 1621.*]

IT IS ADJUDGED, that the prayer for judgment [for specific performance of the contract mentioned] in the complaint be denied.

That the action stand continued to enable plaintiff to try his right to damages if any he has sustained.

That unless within [thirty] days the plaintiff so elects and proceeds with the action, defendant may move on the usual notice for final judgment dismissing the complaint [upon the merits].

SECTION IV.

TRIAL OF ALL THE ISSUES OF FACT BY JURY, AND JUDGMENT THEREON BY THE COURT.

FORMS.

(1643.) Order for judgment on motion, on verdict determining all the issues.

(1644.) Judgment thereon.

(1645.) Order for judgment after motion for new trial on case and counter motion.

¹ See Volume I, p. 261.

² Directions as to fund in the hands of receiver may be embodied, or may be added by subsequent amendment. *Hovey v. McDonald*, 109 U. S., 150.

³ It is proper to insert such a clause in the decree instead of taking

a separate or after order. *Carpenter v. Acby*, 1 Hoff. Ch., 310.

⁴ Sustained by *Fitzpatrick v. Dorland*, 27 Hun, 291; s. p., N. Y. Code Civ. Pro., § 1230.

Or may direct what the final judgment in such case shall be. See Form 1662.

Form No. 1643.

Order for judgment on motion, on verdict determining all the issues.¹

At a circuit court and special term
[&c., see Form 493, p. 4].

[*Title of action.*]

This action having been regularly brought on for trial before Mr. Justice J. K., both parties appearing this [or, the] day of , 18 , upon the issues raised by the pleadings [*for other recitals see Forms 1569, &c., and 1621, &c.*], the court having ordered the questions of fact hereinafter stated, being all the questions raised by said issues to be tried by a jury [*if directed to be tried at a separate branch of the court, add: at a circuit court—&c., or, at a term for the trial of causes by a jury*], and said questions having been thereupon so tried, and the verdict of the jury having been duly found and recorded as follows:

First: Was [&c.].

To this question the jury answer Yes [*and so on*].

[*And if tried at another branch of the court, recite the bringing on of the cause again:*] and the court having adopted said verdict; * Now, upon the pleadings, and said verdict, and after hearing A. T., of counsel for plaintiff, and T. Z., of counsel for defendant in opposition, and on motion of A. T., attorney for plaintiff:

It is ORDERED AND ADJUDGED, that [*may state facts established, and continue with relief thereon, and direction as to costs as in other cases; see other Forms*].

Form No. 1644.

Judgment thereon.

[*Title of action.*]

[*Recitals as in last Form to the *, continuing:*] and having upon motion of A. T. for the plaintiff duly made and rendered its decision and directed judgment as hereinafter stated, and 's costs having been duly adjusted at dollars:

IT IS ADJUDGED, that [&c.]. [*Authentication as in Form 1569.*]

¹ If there is any doubt whether to find which will cover whatever is every fact necessary has been determined, present to the judge requests omitted. See *Hammond v. Morgan*, 101 N. Y., 179; and Form 1547, p. 814.

Form No. 1645.

Motion for new trial on case, and counter motion for judgment.¹

[The proceedings will be stated as in a case and exceptions; the case indicating the proceedings after verdict, as thus:] The plaintiffs thereupon moved, upon the minutes of the judge and upon a case and exceptions, for a new trial² on the ground *[stating it]*, which motion was denied by an order, a copy whereof is annexed to and forms a part hereof. And because the evidence and proceedings aforesaid do not appear upon the record, the justice who presided has settled and signed this case and exceptions and ordered the same to be filed. *[Signature of judge and initials of title.]*

[Notice of motion for new trial on the case, &c., and Notice of motion for judgment; adapt from Forms 1531 and 1668.]

SECTION V.

TRIAL BY THE COURT WITH THE AID OF JURY TRIAL ON SPECIFIC QUESTIONS.

FORMS.

(1646.) Decision by court after jury trial of part of the issues.

(1647.) Order setting aside issues already tried, &c.

Form No. 1646. .

Decision by court after jury trial of part of the issues.*

*[As in Form 1611, inserting at the * the words: upon the*

¹ Acker v. Leland, 96 N. Y., 383; Hammond v. Morgan, 101 id., 179.

² N. Y. Code Civ. Pro., § 1003, and see Forms 1525a, 1532.

³ See page 812.

⁴ Requests to find will be as on a trial by the court.

Objections before the judge to errors on the trial before the jury must be seasonably taken. Bowen v. Becht, 35 Hun, 434; Arnold v. Parmelee, 97 N. Y., 652; Watt v. Starke, 101 U. S., 247.

The party making a case before judgment, for a motion for new trial after decision of the court in a cause

in which special questions have been tried by a jury, or on appeal, has a right to have the proceedings before the jury included. Chapin v. Thompson, 18 Hun, 446; N. Y. Gen. Rules, No. 32, of 1888; Jackson v. Andrews, 59 N. Y., 244; rev'd on the other point in 80 N. Y., 275, where it was held that the new trial of the special questions must be sought before judgment.

Judgment will recite the making of the order for trial of special issues, and the trial and verdict, and also the trial of the remaining issues before the judge.

pleadings, proof, and findings of the jury on specific issues herein, settled for trial by jury, by an order entered the day of _____, 18____, and upon the verdict rendered by said jury—*may recite it as desired in Form 1639*¹—and the remaining issues having been tried on the _____ day of _____, 18____, before the undersigned, and said verdict adopted,² and the allegations and evidence of the parties—upon the other issues³—having been heard—*thence proceed as in the same Form 1611, p. 847, from the † to the end*].

Form No. 1647.

Order setting aside issues already tried, and directing a new settlement, by a referee.⁴

At a special term [*&c.*, as in
Form 493, p. 4].

[*Title of action.*]

This action being on the calendar of this court for the present special term thereof, and duly called on for trial, the counsel for the parties being present, and the plaintiff having moved the cause for trial, and produced the order for the trial of issues of fact, duly entered on the stipulation of the respective parties on the _____ day of _____, 18____, and the verdict of the jury impaneled on the trial thereof, at a circuit court held in _____, on the _____ day of _____, 18____ [and having offered evidence in the case]; and the court having considered the pleadings in the action, and the said order for trial and verdict [and said evidence]:

ORDERED, that the issues of fact arising on the pleadings in this action be tried by a jury; and whereas the issues already tried do not embrace the question of fraud involved, the same [and the verdict thereon] are hereby set aside, and it is hereby referred to R. F., Esq., of _____, to settle the issues arising on the pleadings herein, for trial by a jury, at [a time and place to be directed on the coming in of his report—*or as in end of Form 1603*].

¹ *Ikerd v. Beavers*, 106 *Ind.*, 483; 7 *Northeastern Rep.*, 327.

² A recital of the findings manifests an approval. *California Southern R. Co. v. Southern Pac. R. Co.*, 67 *Cal.*, 59; s. c., 7 *Pacific Rep.*, 123.

The court may disapprove of the verdict and render the findings on the whole issues. *Carroll v. Deimel*, 95

N. Y., 252; *Learned v. Tillotson*, 97 *N. Y.*, 6, unless jury trial was on of right.

³ The court has in its discretion power on adopting the verdict to refuse to receive evidence except on the other issues.

⁴ Sustained by the Supreme Court in *Collie v. Tift*, 47 *N. Y.*, 119.

SECTION VI.

TRIAL BY THE COURT WITH THE AID OF REFERENCE.

[Forms more commonly used in connection with trial by jury or by the aid of a jury or trial by referee are not repeated here, although such as might be used on trial by the court with aid of referee.]

FORMS.

- | | |
|--|---|
| (1648.) Order of reference to determine, or to report on specific questions pending trial. | before referee on accounting. |
| (1649-1651.) Statements suitable to insert in foregoing Form. | (1666.) Report of referee, on accounting (in partnership cause). |
| (1652.) Order of reference to take and state an account before judgment. | (1667.) Exceptions to referee's report on accounting. |
| (1653-1661.) Statements suitable to insert in foregoing Form. | (1668.) Notice of application for judgment after reference, or to set aside or modify report. |
| (1662.) Interlocutory judgment with reference thereunder. | (1669.) Order adjourning motion for judgment, and directing reference to settle form of judgment, &c. |
| (1663.) Appointment of first meeting on reference. | (1670-1673.) Final judgments after trial aided by reference. |
| (1634.) Schedule of account to be presented on reference (partnership cause). | (1674.) Clause in judgment giving leave to apply for further directions. |
| (1665.) Appearance of third persons | |

Form No. 1648.

Order of reference to determine, or to report on specific questions pending trial.¹

At a special term [*or*, circuit—*&c.*; *see Form 493, p. 4*].²
 [Title of action.]

This cause coming on to be tried at a special [*or*, trial] term [*or*, at a circuit court], held on the day of , 18 , before Mr. Justice J. K. [*may recite appearances and defaults, &c., as in Forms 1455, 1470, 1621, &c.*], and it appearing that the inquiries hereafter stated should be made for the in-

¹ See *Kelly v. Charlier*, 18 *Abb. N. C.*, 416; *City of Memphis v. Brown*, 20 *Wall.*, 289; *Central Trust Co. v. N. Y. City R. R. Co.*, 18 *Abb. N. C.*, 381, 411, and note on reference of part of the issues, in *id.*, 419, and cases there cited. So the court may order a reference preliminary to trial by jury. *Smith v. Dodd*, 3 *E. D. Smith*, 348.

² This is always a court order. *Scudder v. Snow*, 29 *How. Pr.*, 95.

But entry of such order may be allowed *nunc pro tunc* on payment of costs. *Id.*

Where a first order is irregular and not void, the court on making a fresh order may direct that evidence taken under the first order stand and be taken as being in evidence under the second order, with such other evidence as may be adduced. *Roberts v. White*, 73 *N. Y.*, 375; aff'g 43 *Super. Ct. (J. & S.)*, 455.

formation of the court before [proceeding with the trial and] judgment; Now, on hearing counsel for the respective parties [and on motion of A. T., for the plaintiff]:

ORDERED, that it be referred to R. F., Esq., of [direct for what, as thus], to take proof [such as may be offered by either of the parties to this action or by the holders of any of the bonds mentioned in the complaint], and to report the same with his opinion to the court upon the following questions of fact [stating them. See also the following Forms].

Enter: [signature of judge by initials of name and title.]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1649. *Further directions.*] And it is further ordered, that any of the parties to this cause have leave, from time to time, to apply for further directions respecting the reference herein ordered.¹

1650. *Saving clause as to effect of report.*—*May add by way of caution:*² It is further ordered, that the report of the referee hereunder shall be without prejudice to the consideration of such or any other questions in the cause arising upon the trial or upon any proceedings herein for their review.

1651. *Bring on trial again.*] It is further ordered, that on the filing of said referee's report this cause may be brought for further trial and final judgment by either party on the usual notice of trial [or, on days' notice].

Form No. 1652.

Order of reference to take and state an account before judgment.³

[Title (court order) and recitals as to cause being brought on for trial, as in other cases:] and the examination of a long account being required in [ascertaining the damages—and no difficult question of law being involved⁴]; Now, on motion of A. T., for the plaintiff:

ORDERED, that it be referred to R. F., Esq., of [directions as in other Forms below].

¹ Without this clause the court have power to give further directions at any time; but a party could not always move for such directions without formal leave.

² See *Central Trust Co. v. N. Y. City R. R. Co.* (above cited), and *Much Muhlenbrinck v. Boler*, 40 *Hun*, 526.

If the reference is not expressly or

in effect to hear and determine an issue made by the pleadings, this clause is quite unnecessary.

³ Sustained by cases cited in preceding note.

⁴ Not necessary that this appear except when the reference is of an issue arising on the pleadings, and the referee is to hear and determine.

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1653. *To take and state an account.—Of an assignee for benefit of creditors:]* to take and state the account of the defendants, as assignees under the assignment to them in the complaint mentioned, and especially of all the assigned property which has come into their hands, and of the money received or collected by them, and of all moneys paid or expenses incurred by them in the discharge of their trusts under the assignment; and that in taking and stating the said account, he make therein all just and proper allowances; and that he also report a statement of the remaining uncollected notes, accounts, and effects belonging to the said assigned estate, with such facts in relation thereto as may be requisite to enable this court to give proper directions for the disposition thereof.¹

1654. *To report amounts due to creditors who may come in, &c.:]* And it is further ordered, that the said referee also ascertain and report the amount due and owing to the plaintiff upon his demand in the complaint mentioned, and also the amount due and owing to each of the other creditors respectively, of the limited partnership of M. & N., in the complaint mentioned, who shall come in under this order and seek the benefit of this action, and contribute to the costs and expenses thereof, such contribution to be settled by said referee; and for that purpose the said referee is to cause advertisement for such creditors to come in and exhibit their demands before him by a day to be fixed by him for that purpose, which advertisements are to be published once in each week, for at least _____ weeks, in the _____, printed at _____, and also in the _____, printed at _____, and the _____, printed at _____; and he is to fix a peremptory day for that purpose; and such of them as shall not come in and prove their debts by the time so to be limited, shall be excluded from the benefit of this order; but such persons, not parties to this action, who shall come in before the said referee to prove their debts, must, before they are allowed to recover herein as such creditors, contribute their proportion of the costs and expenses of this action, to be settled by the said referee.²

1655. *To report special facts:]* And it is further ordered, that the said referee shall be at liberty to report any special facts that may be proper to enable this court to make a final order or judgment, as well as his reasons for allowing or disallowing any claims that may be made.

1656. *Breach of covenant:]* to ascertain and report [the amount of wharfage which should be allowed to the plaintiffs for the breach of the covenant by the defendants, contained in the grant mentioned in the pleadings]. And for such purpose he is to ascertain [&c., specifying the principles on which the account is to be taken]. And he is to compute the interest on such amount, and state the same in his report.

1657. *Accounting in partnership cause:]* to take and state an account of all dealings and transactions between the plaintiff and defendant, as partners, under the style of A. B. & Co., and for the better taking and stating of which account the parties are to produce before the said referee, under oath, all books, deeds, papers, and writings in their custody, or under their control, relating thereto, or to the dealings of said partnership, or to its assets or any of them; and are to be examined upon oath, as the said referee shall direct, who, in taking the said account, is to make all just allowances to the parties as between themselves, and to report what, on the balance of the said account, shall appear to be due from either party to the other.³

¹ From *Kerr v. Blodgett*, 48 *N. Y.*, 62; compare 19 *Abb. N. C.*, 177.

² *Id.*

³ See *Rutty v. Person*, 12 *Abb. N. C.*, 352; *Streat v. Rothschild*, *id.*, 383;

Trufant v. Merrill, 6 *Abb. Pr., N. S.*, 462; *Kennedy v. Shilton*, 1 *Holt.*, 546; *s. c.*, 9 *Abb. Pr.*, 157, note; *Hathaway v. Russell*, 7 *Abb. N. C.*, 138.

1658. *Accounting in an action to redeem:*] to take and state an account between the several parties to this action, in the manner and under the directions following, to wit:

That he compute the amount due upon the bond and mortgage executed by the plaintiff to the defendant Z., mentioned in the complaint, from the day of , 18 , down to which time the interest appears to have been paid.

That he ascertain (from the deeds or otherwise) the consideration paid by the purchasers and defendants X. and Y., from the said Z., at the auction sale of the said premises made on the of , 18 [proceeding to state the mode of apportioning the redemption money among them].

That he open and state an account with each of such defendants, in which he is to allow such party his proportion of the mortgage money so ascertained as aforesaid, with interest; and also all taxes and assessments paid by him or those under whom he claims, upon the lots now held by him; and also any sum paid for necessary repairs upon the same, and any amount expended for lasting improvements, with interest on such sums respectively; and that he state and charge such party with any rents and profits of such lots received by him, or those under whom he claims, or by any one on his or their behalf, or which could have been received without willful default, with interest.

1659. *Accounting as to value of use and occupation, in action for specific performance:*] to take such testimony as may be produced before him by either party to this cause in relation to the value of the use and occupation, by , of the premises [briefly designating them], since the day of , 18 , and the amounts received and collected by , or which, with reasonable diligence, might have been received and collected for the same since said day, the amounts expended by said for taxes, assessments, repairs, or otherwise, in and upon said premises [and also in relation to all policies of insurance upon said premises, and as to any actions brought upon the same].

1660. *Accounting of trustees:*] to take and state an account of all and every the trust, property and effects, rents, issues and profits which may have come to the hands of the defendants or either of them, or any other person or persons to the use or order of them or either of them, or which, but for the default or the neglect of the defendants or either of them, might have been so received by them or either of them, or any such person.

1661. *To determine priority among creditors:*] to ascertain and report who are the creditors of the said firm of , and the amounts due to said creditors respectively, and the order in which they are entitled to payment out of the assets of the said firm of [in conformity with the said provisions of the statute of limited partnerships].

That any party to this action, or any person claiming to be a creditor of said firm, and presenting to the said referee *prima facie* evidence of his claim, shall have the right to contest any claim preferred by any other creditor, and that testimony may be taken before said referee on the part of the claimants and contestants. That the said referee report to this court the names of the creditors, and the amounts found by him to be due to each respectively, and the order in which they are entitled to payment; and that in case any of said claims be contested, the said referee do report the facts relative to the claim so contested, and the grounds of objection alleged by the contestant, and the decision of the said referee thereupon.

And it is further ordered, that on the coming in of the referee's report, any party to this action, or any creditor whose claim is allowed by the referee, may apply to this court for an order for the final distribution of the balance of the funds in the hands of the receiver herein, among the creditors of said firm as ascertained by said report, or by the order of the court thereupon.

Form No. 1662.

Interlocutory judgment with reference thereunder, before final application to the court for judgment.

[*Caption and recitals as in Form 1621, to n. 2 on p. 855, continuing:*] whereby he finds facts and conclusions of law which entitle plaintiffs to this interlocutory judgment; Now, on motion of A. T., plaintiff's attorney:

It is ORDERED and ADJUDGED [*substance of judgment*].

And it is further ORDERED and ADJUDGED, that it be and hereby is referred to R. F., Esq., of [*state object of reference as in preceding Forms*].

[*As to costs:*] And it is further ORDERED and ADJUDGED, that the plaintiff is entitled to recover of defendant [*or, to retain out of the fund*] his costs to be taxed upon final judgment [*and so on—or, And all questions as to costs are reserved till final judgment*].

[*As to final judgment:*¹] And it is further ORDERED and ADJUDGED, that on the coming in and confirmation of the report of said referee, the final judgment herein may be settled by a judge of this court [*or, by R. F., Esq., hereby appointed referee for that purpose*] on [*two*] days' notice from either party.¹

[*As to further directions:*] And that plaintiff [*or, either party*] has leave to apply to this court for such further order or judgment as he may be advised.

Interlocutory judgment, signed this day of , 18 .
[*Signature of*], Clerk.

[*Or may direct final judgment as thus:*] That upon the coming in of the report of the referee and the confirmation of the same, the plaintiff recover from the defendants and each of them the sum that may be found due to him from the said defendants and each of them; or if it shall appear upon such accounting that any sum of money is due or owing to either of the defendants and payable to them from the partnership, and for which either party hereto shall be as a partner liable to the other, that provision be made in the judgment to be entered upon the confirmation of the referee's report, for its payment by the party so liable.

V. That the question of costs be reserved until the coming in of the referee's report.

¹ Common practice. Sanctioned also by *N. Y. Code Civ. Pro.*, § 1231.

Form No. 1663.

Appointment of first meeting on reference.¹[*Title of court and action.*]

The undersigned referee[s] herein, hereby appoint[s] the
 day of next, at o'clock in the noon, at the
 office of , No. street, in the city of
 for the trial of this action. [Signature.]

[Date.]

[*Notice of hearing or referee's summons as in Forms 1282 or 1284. Oath of referee as in Form 1283, or if an issue on the pleadings is referred, as in Form 1697. Subpœna, see Form 1282a. Order to deposit books, &c., see Form 1285.*]

Form No. 1664.

Schedule of account to be presented on reference (in partnership cause).

[*Title of court and action.*][*Venue.*]

Schedule and statement of mutual accounts between the plaintiff and defendant as partners, under the name of A. B. & Co. [since last balance and settlement had between them on the day of , 18].

[*Here state items, in a debtor and creditor account.*]

A. B., the above-named , being duly sworn, says that the foregoing account, and the said several accounts and entries embraced in the settlement of the day of , 18 , upon the partnership books herewith deposited with the referee in this action, including both debits and credits, are correct, according to the best of deponent's knowledge, information, and belief, and this deponent does not know of any error or omission in said account to the prejudice of the above-named , deponent's copartner. [Signature.]

[*Jurat.*]

¹ A written appointment is not essential (*Sage v. Mosher*, 17 *How. Pr.*, 367; *Stephens v. Strong*, 8 *id.*, 339); but is convenient, especially where there are several referees.

Where the reference is special, in aid of the court the referee may properly give notice to both parties if necessary.

Form No. 1665.

Appearance of third persons before referee on accounting.¹

[*Title of court and action.*]

A. N. & Co., creditors under the assignment of W. F., hereby appear in the above action by H. D. H., of street, city, their attorney.

[*Date.*] [*Signature and office address of*],

Attorney for the above-named creditors.

[*Address to referee and attorneys.*]

[*File and serve copy on referee, and on the attorneys for the original parties.*]

[*Termination of reference for delay; see Forms 1669 and 1710.*]

[*Requests to find, when desired, may be adapted from Form 1610.*]

Form No. 1666.

Report of referee on accounting (in partnership cause).²

[*Commencement and recitals of appointment, appearances, oath, &c.; see Forms 1700, &c.*]

II. That on such hearing, the books, deeds, papers and vouchers of the said partnership having been produced before me, the defendant rendered his [*or, both parties rendered their*

¹ This, under an order of reference extending to the benefit of those who may come in, is held to entitle the creditor so appearing, to notice of further proceedings; but an order of court may be applied for expressly making the creditor a party, if preferred.

² It is not enough, in a report on taking and stating an account, to state results, but details should be set forth. *Zimmerman v. Huber*, 29 *Ala.*, 379; *Craig v. McKinney*, 72 *Ill.*, 305; *Nims v. Nims*, 20 *Fla.*, 204; *Reed v. Jones*, 15 *Wisc.*, 40.

The report may annex the account filed, and state what items are disallowed, and why, and the corrected result; but if the account involves several rights or liabilities of different persons, the referee should prepare

schedules reporting as to each. *Spencer v. Spencer*, 11 *Paige*, 299; *Eaton's Appeal*, 66 *Penn. St.*, 483. When the referee has drafted his report he may give the parties who have appeared before him notice that it is ready for examination at his office; and that on a specified day and time he will finally settle its terms.

A referee's report should not state the evidence unless such is the purport of the order, but by *N. Y. Gen. Rules*, No. 30, of 1888, "in references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony."

respective] accounts, which are hereto annexed, and marked Schedule A.

III. That I examined said defendant, and also , concerning the transactions aforesaid, and adjusted a mutual account between the plaintiff and defendant, making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, and marked Schedule B.

IV. That said defendant owes to said partnership, at this date, the sum of dollars, with interest from the day of , 18 , at the rate of per cent. per annum, amounting to dollars, which sum I have allowed.

V. That the balance shown by said Schedule B., after defendant has made good to said partnership said sum, belongs to plaintiff and defendant in equal shares [*or, in the following proportions—stating them*].

VI. That all the evidence taken by me under the said order of reference is hereto annexed [except the said on the records of this court], [together with my opinion].

[*Date.*] [Signature of],
Referee.

[*Annex testimony and documentary evidence.*]

[*Findings when necessary; see Form 1611.*]

Form No. 1667.

Exceptions to the report of a referee appointed to take and state an account.

[*Title of court and action.*]

The above-named defendant excepts to the report of R. F., Esq., the referee, filed herein the day of , 18 , in the following particulars [*state exceptions to findings and refusals to find, if any, as in Form No. 1613, continuing*]:

V. Because said referee found [*or, did not find—here state in detail each item objected to as found or not found,¹ and the ground of the objection*].

[*Date, signature and addresses, as in Form No. 1536.*]

¹ *Story v. Livingston*, 13 *Pet.*, 359; *People v. Empire Mut. Life Ins. Co.*, *Lawrence v. Fowler*, 20 *How. Pr.*, 407; *N. Y. Daily Reg.*, Oct. 19, 1883.

Form No. 1668.

Notice of application for judgment after reference,¹ or to set aside or modify report.

Please take notice, that this cause will be brought on for final hearing on the report of the referee, R. F., Esq., filed the day of , 18 , and on the exceptions thereto [a copy of which has been served on you], and on the pleadings and previous proceedings [on the trial] herein, at a special term of this court, to be held at the county court house [or, city hall] in the city of , on the day of , 18 , at the opening of the court on that day, or as soon thereafter as counsel can be heard, and a motion will be made to confirm said report and for final judgment herein [or, to set aside said report—if on the ground of irregularity, specify it—or, to modify said report by—stating in what], and for such other or further relief as may be just.

[Date, signature and addresses, as in Form 1536.]

Form No. 1669.

Order adjourning motion for judgment, and directing reference to settle form of judgment and fix allowances.

At a special [or, trial term—
or, circuit—&c.; see Form
493, p. 4].

[Title of action.]

On reading and filing the affidavit of A. B., and notice of motion for final judgment herein, together with a proposed final judgment, and on due proof by affidavit of the service of copies thereof on the attorneys of all the parties who have appeared in this action, and on hearing A. T., for plaintiff, and T. Z., for defendant Y. Z.; and on motion of A. T., attorney for plaintiff:

ORDERED, that the hearing of the motion for final judgment be adjourned to the day of , 18 , at [the special term of this court at the city hall, in the city of , for the trial of issues of law and fact], then and there to be

¹ If any issues remain to be tried, substitute a notice of trial before the court (see Form 1490), omitting "and an inquest taken therein," and adding thereto: and at the same time appli-

cation will be made to confirm the report of the referee filed herein the day of [notwithstanding the exceptions filed thereto].

heard, and that in the meantime it be referred to R. F., Esq., as referee, to report to this court at the time and place last named a proper and suitable form of final judgment in this action [together with proper allowances to the several parties who have appeared in this action, in addition to taxable costs], and that said reference proceed upon [two] days' notice by any of the parties to the other.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1670.

Judgment (final) after verdict on issue of fact as to defendants appearing, and a reference as to those in default.¹

[*Title of action.*]

This cause having been regularly brought on for hearing before Mr. Justice J. K. at a special [*or, trial*] term of this [*or, at a circuit*] court held at on the day of , 18 , upon the verdict of the jury rendered upon the issues of fact made and settled in this action and submitted to said jury; and proof having been made and filed of the service of the summons in this action upon all the defendants more than twenty days since, and personally on all [except the unknown owners, and the defendant W. V., who is an absentee, who have all been served by publication, pursuant to an order entered herein the day of , 18], and that although the time therefor has elapsed, no demurrer or answer has been put in on behalf of any defendant, except the defendant W. X. [and also the defendant Y. Z., who is an infant, and has put in the usual general answer by his guardian *ad litem*, not controverting any material allegation in the complaint], and that the complaint, and due notice of the pendency of this action, were filed on the day of , 18 , in the office of the clerk of the county of ; and on reading and filing said proofs, and on the pleadings and proceedings in this action, including said verdict, together with the report of R. F., referee herein, appointed by an order of the court, bearing date the day of , 18 , whereby it appears [*&c., briefly stating conclusion*], and the court having approved said verdict and confirmed said report [*and if further evidence was taken and findings made, recite the fact*], and the costs of the having been duly adjusted at dollars:

IT IS ADJUDGED [*continuing as in other Forms*].

¹ See *Frow v. De La Vega*, 15 Wall., 193; *McCrackan v. Valentine*, 9 N. Y., 552; *Cram v. Bradford*, 4 Abb. Pr., 42.

Form No. 1671.

Judgment (final) after trial, and reference preliminary to final judgment.

[*Caption, and recitals of trial by court, of findings made, &c., and interlocutory judgment, if any, as in Forms 1621, 1662; or if, instead of interlocutory judgment, a mere order of reference was taken, state it as thus:* and by an order entered on the day of , 18 , it having been referred to R. F., Esq., to take and state the account between the plaintiff and the defendant, and his report having been filed on the day of , and no exceptions having been filed thereto—*or if any, indicate them as in Form 1672*]; Now, on motion of A. T., attorney for plaintiff:

IT IS ADJUDGED [*&c., as in other Forms*].¹

Form No. 1672.

Judgment (final) after reference of a special question followed by findings of the court on the remaining issues.²

[*Title of court and action.*]

This action having been regularly brought on for trial on the day of , 18 , before Mr. Justice J. K., at a special [*or, trial*] term of this [*or, at a circuit*] court, upon the answer of the defendant W. X., and the answer of the infant defendant Y. Z., and an order having been made on ,

¹ If the final judgment is settled by judge or referee pursuant to direction in interlocutory judgment, take signature of judge or referee at the foot of the final judgment to be filed. *N. Y. Code Civ. Pro.*, § 1231; *Clapp v. Hawley*, 97 *N. Y.*, 610.

² Adapted from 40 *Hun*, 526, where the court say: "the reference was ordered not to determine the facts in the case, or the rights of the parties, by the action and conclusion of the referee, but to supply the court with information upon which itself could intelligently act and adjudge the rights of the parties. When the case was brought before the court subsequent to the hearing and report of the referee, it was presented for its examination and decision upon the evi-

dence which had been taken, and the facts which that evidence was found to have proved. It was for the court to determine what were the rights of the parties upon the proof, which in this manner had been obtained. It therefore proceeded regularly in considering and determining whether, upon the evidence produced, the plaintiff was entitled to recover in the action.

"The power to do that was not excluded by the omission of one of the defendants to answer the complaint. For, as the facts were stated in it and ascertained upon the reference, the question was still presented whether the plaintiff was entitled," &c.

18 , referring it to R. F., Esq., to take proof of the facts [*stating as to what*], and to report the same with the evidence and his opinion thereon, and a report having been made by him and filed on , 18 , and exceptions to said report having been filed by the said infant defendant on , 18 , and the plaintiffs having given notice of trial at special term in the ordinary form on , 18 , and the case having been duly reached in its ordinary course on the calendar of the special term of this court, and the court having considered the report of the said R. F. as referee with the evidence taken before him, and the exceptions filed by the said infant defendant, and having heard the testimony of witnesses called and examined by the plaintiff, and the court having after due deliberation thereafter announced its decision, confirming said report and stating findings of fact and conclusions of law, and directing judgment to the effect hereinafter stated, and said decision having been duly filed and the costs of the having been duly adjusted at dollars; Now, on motion of A. T., attorney for plaintiff:

IT IS ADJUDGED [*&c., as in other Forms*].

Form No. 1673.

Judgment (final) where an issue of fact as to one defendant has been tried by a referee, and a reference had on default of other defendants, and exceptions have been taken to the report.

[*Title of court and action.*]

This cause having been regularly brought on for hearing, upon the pleadings and proceedings therein, including the report of R. F., the referee to whom the issues of fact joined by the answer of W. X. were referred, to hear and determine, which report was filed the day of , 18 ; and, also [the report of S. F.], to whom it was referred [to compute the amount due to the plaintiff upon the bond and mortgage mentioned in the complaint—and, in foreclosure, if there are infant defendants having answered generally, or absentee defendants, add: and to take proof of the facts and circumstances stated in the complaint, and examine the plaintiff or his agent on oath as to any payments made, and which ought to be credited on said bond and mortgage], which report was filed on the day of , 18 [and also upon the exceptions to said report, made and filed thereto on behalf of the defendant W. X.—*recite other proceedings, such as service and default of those not appearing, lis pendens, &c., as in other cases*], and after hearing counsel for the respective parties on said report

of _____, and exceptions thereto, and due deliberation being had, and the court having directed judgment as hereafter stated, and the costs of the _____ having been duly adjusted at the sum of _____ dollárs; Now, on motion of A. T., attorney for the plaintiff:

It is ORDERED AND ADJUDGED, that the said report of the said referee be, and the same hereby is, in all things, confirmed [and that the said exceptions be overruled and disallowed—*or, where any exceptions are sustained, say:* that the first of said exceptions be, and the same hereby is overruled, and the second exception is allowed, and that said report is modified accordingly by setting aside the _____ finding of said referee, and disallowing—&c., *stating the modification*—and that said report, as so modified, hereby is confirmed].

And it is further ADJUDGED [*&c., as in Forms 1711, &c.*].

Form No. 1674.

Clause in judgment giving leave to apply for further directions.¹

The plaintiff [*or, any party to this action—or any successor in interest to any such party, and any other party claiming under the said M. N.*] may apply from time to time on the foot of this judgment for such further directions or instructions as may be proper.

¹ See *Texas v. Chiles*, 10 *Wall.*, 127; *Smith v. Woolfolk*, 115 *U. S.*, 143; *Rhodes v. Jenkin*, 52 *L. T. R., N. S.*, 806; *Savage v. Sherman*, 87 *N. Y.*, 277; rev'g in part 24 *Hun*, 307; *Trotter v. Hecksker*, 42 *N. J. Eq.*, 254; 4 *Ath. Rep.*, 94; *Gerrish v. Black*, 109 *Mass.*, 474.

It is not usual to prescribe the mode in which notice of such an application shall be given, but that is left to be settled by voluntary appearance, or by the direction of the court when application is to be made.

ARTICLE VI.

PROCEEDINGS IN CASE OF TRIAL BY REFEREE.

[Forms more commonly used in connection with trial by jury or by court are not repeated here, although such as may be used on trial by referee.]

SECTION I.—ORDERING REFERENCE TO HEAR AND DETERMINE.

II.—BRINGING ON; AND THE HEARING.

III.—REPORT, COSTS, JUDGMENT, AND NEW TRIAL.

SECTION I.

ORDERING REFERENCE TO HEAR AND DETERMINE.

I. COMPULSORY REFERENCE.
FORMS.

(1675.) Affidavit to move for reference, &c.

(1676.) Notice (or order to show cause) thereon.

(1677.) Affidavit to oppose motion.

(1678-1680.) Statements suitable to insert in foregoing Form.

(1681.) Stipulation agreeing on nomination of referee.

(1682.) Order on motion referring cause to hear and determine.

(1683-1687.) Statements suitable to insert in foregoing Form.

(1688.) Order referring the cause, without motion.

II. REFERENCE BY CONSENT.

(1689.) Stipulation to refer cause, &c. (short Form).

(1690-1694.) Statements suitable to insert in foregoing Form.

(1695.) Order referring cause, by consent.

I. COMPULSORY REFERENCE.

Form No. 1675.

Affidavit to move for reference of an action involving a long account.¹

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

¹ This Form has been sustained in *Place v. Chesebrough*, 63 N. Y., 315, and numerous other cases. But where the pleadings disclose only a single demand and an issue not apparently involving an account, a general alle-

I. That he is the plaintiff¹ [*or, defendant*] in the above-entitled action. *

II. That said action is brought to recover [*here designate nature of cause of action*].

III. That issue was joined² on [*or, as of*] the day of last, by the service of [*defendant's answer*], setting up [*here designate the defenses, e. g., thus:*] payment as to part, and a counter-claim rising out of several items of services alleged to have been rendered by him to the plaintiff [*or, denying the quality and value of the several items of services and materials charged for in said account*].

IV. That the trial of the aforesaid issue will require the examination of a long account on the side of the plaintiff [*or, defendant—or, both parties*], consisting of at least items of charges and [*credits*] of the aforesaid [*goods and services*] of various dates.⁴

[*If order to show cause is asked, state as on p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1676.

Notice (or order to show cause) to move for reference.

[*Title and recitals (moving the court), as in Form 488 or 491, stating relief thus:*] referring this action to a referee

gation that the issue "will require the examination of a long account involving very numerous items of charges and credits amounting to many thousand dollars and extending over several years," is no evidence that an account is so directly involved on either side, as the immediate object of the suit or defense, as to justify a reference. *Kain v. Delano*, 11 *Abb. Pr.*, N. S., 29. In case, therefore, the pleadings do not show or suggest an account, state the facts here in "more detail, showing *how* the account is involved. For notwithstanding an undenied general affidavit, the court may find that the pleadings do not involve a long account. *Untermeyer v. Beinhauer*, 105 *N. Y.*, 521.

¹ The affidavit should be made by a party, or excuse be stated in it (*Wood v. Crowner*, 4 *Hill*, 548), unless

the truth of its allegations as to an account being involved appears by the pleadings.

² Joinder of issue should be stated. *Jansen v. Tappen*, 3 *Cow.*, 34. If the place of trial has been changed from that named in the complaint, it is useful to state it; but this is not essential. *Feeter v. Harter*, 7 *Cow.*, 478.

³ *Welsh v. Darragh*, 52 *N. Y.*, 590.

⁴ It is better in doubtful cases to state thus the facts which sustain the general allegation that the issue will require examination of a long account (see *Whitaker v. Desfosse*, 7 *Bosw.*, 678); although the order may be granted upon an affidavit in which such facts are not stated, if the fact that the account is involved appears expressly by the pleadings. *Dean v. Empire State Mutual Ins. Co.*, 9 *How. Pr.*, 69.

[*or*, one or more referees—*or*, to R. F., Esq., of]¹ to
hear and determine, and for such other relief as may be just
[with costs of this motion to abide the event].

[*Date.*] [Signature and office address of],
[Address] To , Attorney for .
Attorney for .

Form No. 1677.

Affidavit to oppose motion for reference.

[*Formal parts as in Form 1675 to the *.*]

II. That deponent has fully and fairly stated the case in this cause to his counsel A. T., who resides at No. street, in the city of , and that the trial of the issues of fact in this cause will, as deponent is advised by said counsel, after such statement, and verily believes [*state objection as thus or in Forms below*], require the decision of difficult questions of law. That [*here state, unless the moving affidavits correctly state it, the nature of the issue, as in Form 1675, and that*] the following will be insisted on on behalf of said plaintiff [*here briefly state deponent's points of law*²]. And deponent is informed and believes that the defendant's counsel will urge [*here briefly state his anticipated points*], which points, as deponent is advised by his said counsel, are material to the cause, and are difficult, especially in their application to the facts in this case.

[*Jurat.*]

[*Signature.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1678. *Denial that account is involved.*—Add to or substitute for part of last Form:] II. That the issue joined herein will not require the examination of a long account within the meaning of the statute; that all of the goods referred to in the complaint were sold at one time, and as one transaction, and the alleged credit is a payment made by defendant at said time, and then deducted from the amount to be due from defendant to the plaintiff; and there are no other items of charge or credit involved in the issues herein.

1679. *That other issues should be tried before the account.*³] That this action

¹ It is not essential that he reside in the county. *O'Brien v. Catskill Mountain R. R. Co.*, 32 *Hun*, 636.

² Questions of admissibility of evidence are questions of law within the rule. *Goodyear v. Brooks*, 4 *Robt.*, 682; s. c., 2 *Abb. Pr.*, N. S., 296.

³ From an unreported case in

which an order granting a reference notwithstanding this affidavit was reversed, the general term holding that the issue as to the release should be tried before an accounting should be ordered; s. p., *Rutty v. Person*, 12 *Abb. N. C.*, 352; 49 *Super. Ct. (J. & S.)*, 55.

is brought by the plaintiff as administrator for an alleged accounting [claiming such as administrator of J. E. F., deceased, who in his lifetime was in copartnership with the defendants]; that the answer, among other defenses, sets up a joint release of all claims of the plaintiff against the defendants; that no reply has been served herein, and deponent is advised that this issue is not referable until the validity of that release has been passed on by the court; that if said release shall be held to be a valid release, it would be a bar to any accounting herein, and said accounting would be unnecessary.

1680. *Where fraud is set up.*] That this action is brought upon an [insurance policy alleged to have been made by defendants; and that the only items of account are the items of damage, which plaintiff claims he has sustained by a peril insured against]. And that the defense [or, one of the defenses] set up by the defendants is fraud on the part of the plaintiff, in [here briefly disclose it], as more fully appears by reference to their answer herein.¹

Form No. 1681.

Stipulation agreeing on nomination of referee.²

[*Title of court and cause.*]

Stipulated that in case the within motion be granted, the reference shall be to R. F., Esq., of [counselor at law].

[*Date.*]

[*Signatures of attorneys or of parties.*]

Form No. 1682.

Order on motion referring cause to hear and determine.

[*Title (court order) and recitals, according to motion; see Form 493, p. 4.*]

ORDERED, that this cause and all the issues³ [of law and

¹ This is an answer to the motion in such a case. *Freeman v. Atlantic Mutual Ins. Co.*, 13 *Abb. Pr.*, 124.

If the foundation of the action and the substantial issue is fraud, the fact that the examination of a long account is involved does not justify a compulsory reference. *Clarke v. Candee*, 29 *Hun.* 139, and cases cited; *Morrison v. Horrocks*, 40 *id.*, 428. See also *Morrison v. Van Benthuyzen*, 103 *N. Y.*, 675; *Untermeyer v. Beinhauer*, 105 *id.*, 521. But the fact that fraud of defendant is alleged in the complaint, is not always an answer. *Atocha v. Garcia*, 15 *Abb. Pr.*, 303.

² Where such a stipulation is made, it may be stated in the moving affi-

davits that no party is an infant. See *Code Civ. Pro.*, § 1011.

³ An order referring "this cause" amounts to a reference of the whole issue. *Renouil v. Harris*, 2 *Sandf.*, 641.

A reference of the whole issue includes the taking of an account where that is part of the relief to be had on the finding of an issue for the plaintiff. *Crosbie v. Leary*, 6 *Bosw.*, 312. But if the referee determines the issues, but does not take the account, the court may appoint another referee to do so. *Mundorff v. Mundorff*, 1 *Hun.* 41; s. c., 3 *Supm. Ct. (T. & C.)*, 171.

fact] therein are hereby referred to R. F., Esq., of _____, as referee, to hear and determine.

[*For special directions, if desired, see Forms 1683 to 1687.*]

Enter: [*signature of judge by initials of name and title.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1683. *To speed the reference:* The hearing may be brought on by either party on _____ days' written notice to the other.¹

[The referee is to proceed from day to day, unless for good cause shown, he shall in his discretion grant an adjournment—*may add:* on payment of the costs of the session by the party applying therefor.]

1684. *Leave to sit in another county:*² that for the convenience of witnesses the trial of this action [*or, the hearing before said referee*] be had in the city and county of _____ [*or, that the said referee is hereby empowered to sit for the purpose of taking testimony in the county of _____—or, in any county in this State*]³—*and may add:* on condition that the _____ pay the expenses of the said referee while attending in such other county].

1685. *Reservation of leave to amend:* Either party is to be at liberty to amend his pleading as of course at any time at least _____ days before the day noticed for the first hearing before said referee.

1686. *To take accounting:* And if an accounting be necessary, said referee shall proceed to take and state the same, and may compel the production of the necessary books and papers as fully as the court might do, and award final judgment to be entered in his report.⁴

1687. *Direction for judgment where rule or statute does not provide for it:* Upon filing the report of said referee with the clerk of the court, judgment may be entered in conformity therewith as if said cause had been heard before the court.⁵

¹ As to fixing the time for the hearing before the referee in a way to make it a condition, see *Parkhurst v. Berdell*, 87 *N. Y.*, 145. For provision against delay or cessation of one or more of the referees to act, see *Devlin v. Mayor, &c.*, of *N. Y.*, 62 *How. Pr.*, 260.

² Supported by *Pierce v. Voorhees*, 3 *How. Pr.*, 111.

³ *O'Brien v. Catskill R. R.*, 32 *Hun*, 636.

⁴ The court may grant to referee to determine an action against a trustee for an account, power to compel

production of books and papers. *Fraser v. Phelps*, 4 *Sandf.*, 682. It was also held in that case that unless they do so he has not that power, but application must be made to the court. The better opinion now is that a referee to hear and determine the issues has all the power of the court in this respect; and so I understand the practice to be.

⁵ Sustained by *Belmont v. Washington & Georgetown R. R. Co.*, 13 *Wash. L. Rep.*, 82; *Austin v. Rawdon*, 42 *N. Y.*, 155. Unnecessary in actions under the *N. Y. Code*.

Form No. 1688.

Order referring the cause, without motion.

At a circuit [*or*, at a special—*or*,
trial term—&c.; *see Form*
493, *p.* 4].

[*Title of action.*]

This cause coming on to be tried, and it appearing to the satisfaction of the court that it will require the examination of a long account, and does not involve any difficult question of law:

ORDERED [*as in preceding Forms*].

II. REFERENCE BY CONSENT.

Form No. 1689.

Stipulation to refer cause to hear and determine issues (short Form).¹

[*Title of court and action.*]

Stipulated that² this cause and the issues of [law and] fact therein be referred to R. F., Esq., of [counselor at law], as sole referee [*or*, to—*names, &c.*—as referees], to hear and determine.³

[*Signatures of attorneys.*]
[*Date.*] [Or signatures of parties, with acknowledgment or proof; *see Form* 495, *p.* 6.]

¹ Not suitable in divorce, nor in an action for dissolution of a corporation, or to appoint a receiver, or have distribution of its property, unless the attorney-general sues (as to foreclosure against a corporation, *see p.* 123), nor in an action where a defendant to be affected by the result is an infant. *N. Y. Code Civ. Pro.*, § 1012. For Form suitable to those cases, *see No.* 1682.

The consent ought to be in writing, and filed; or, if oral, made in open court and entered in the minutes; but in some cases proceeding without this is a waiver. *See Baird v. Mayor, &c.*, of *N. Y.*, 74 *N. Y.*, 382, and *cas. cit.*

² If desired also to waive trial by jury, insert here, "trial by jury is waived, and —." *See Form* 1595.

If desired to restrict the reference to a trial of issues already joined, say: "the issues heretofore joined in this cause." Whether this would preclude the referee from exercising his statutory power to amend the pleadings as to those issues. *query.*

³ The word "determine," though appropriate, is not essential; an order referring "the cause and all the issues to hear the same and report to this court," is construed as equivalent to an order to hear and decide. *McCleary v. McCleary*, 30 *Hun.* 154.

Under this stipulation, as regulated by *N. Y. Code Civ. Pro.*, § 1011, the waiver of trial by jury and stipulation for trial by referee stands, even though the referee agreed or refused to serve, or though, after he has served, a new

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1690. *To prevent substitution in case of refusal or new trial:]* In case said referee refuses to serve, or if a new trial is granted, another referee shall not be appointed under this stipulation except by consent.

1691. *To secure substitution in case of death or other incapacity:]* In case said referee fails to serve with effect, for any cause, another referee shall be appointed by the court on motion of either party.

1692. *Power to enter judgment where statute does not give it:]* and that upon filing his report judgment may be entered by the clerk in conformity therewith without further notice.¹

1693. *To authorize entry of order where statute does not:']* Either party may enter an order to the foregoing effect without further notice.

1694. *Where stipulation is given in compliance with a conditional order.—Commence:]* Pursuant to the foregoing order [or, an order herein entered the day of _____, 18 ____], it is hereby stipulated [continuing as in Form 1689, from the beginning, except that if the referee is not agreed on, say: a referee to be appointed by the court, and add at end any further element of the condition, as for instance:] the trial to proceed on _____ days' notice.

trial be ordered for his error; and the court, unless in its discretion it vacates the order (*Parkhurst v. Berdell*, 87 *N. Y.*, 145), will appoint a new referee on motion of either party. *May v. Moore*, 24 *Hun*, 351; *Marsh v. Brown*, 57 *N. H.*, 173. But it is otherwise at common law; and is still otherwise where the referee does not refuse, but dies. *Devlin v. Mayor*, 62 *How. Pr.*, 163; s. c., 11 *Weekly Dig.*, 116. Compare *Strong v. Willey*, 104 *U. S.*, 512; *Marsh v. Brown*, 57 *N. H.*, 173; *Grant v. Reese*, 82 *N. C.*, 73; *Mundorff v. Mundorff*, 3 *Supm. Ct. (T. & C.)*, 171; s. c., 1 *Hun*, 41; s. p., *Caruth Byrnes Co. v. Wolter*, 91 *Mo.*, 484; 8 *Western Rep.*, 591.

Under *N. Y. Code Civ. Pro.*, § 1011, the clerk must enter an order of course where the stipulation names the referee, and therefore express consent to the entry of an order is not necessary.

Under *N. Y. Code Civ. Pro.*, §§ 1018, &c., which provide for judgment on the report, no mention of

entry of judgment is necessary. See Form 1692.

An attorney has implied power to bind his client by consent to a reference, even though of all the issues in the cause, and even though the client be a corporation. *Alexandria Canal Co. v. Swann*, 5 *How. U. S.*, 83; *Tiffany v. Lord*, 40 *How. Pr.*, 481.

A consent signed by counsel will be sustained where it appears that the attorney had notice of it and made no objection below. *Id.*

By *N. Y. Code Civ. Pro.*, § 1011, signature by attorney is required. If the attorney desires the sanction of his client's signature to appear in the proceeding itself, the client's signature may be added.

¹This is sufficient authority. *Bowie v. Borland*, 68 *Cal.*, 233; 9 *Pacif. Rep.*, 79; s. p., *Heckers v. Fowler*, 2 *Wall.*, 123, 127. But is not necessary where, as in New York, the statute so provides.

²Not needed in New York. See Volume I, p. 239.

Form No. 1695.

Order referring cause, by consent.¹

[Name of] Court [or if a court order²] At a special term [&c.,
as in Form 493, p. 4].

[Title of cause.]

On reading and filing the annexed consent, and on motion of A. T., for plaintiff [or, defendant] :

ORDERED, that * this cause and the issues of law and fact herein are hereby referred to , of [counselor at law], as sole referee [or to—names of three—as referees], to hear and determine [add special clauses, if any, as in stipulation].

[Authentication by clerk, or as in Form 491, p. 3.]

SECTION II.

BRINGING ON ; AND THE HEARING.

FORMS.

(1696.) Notice of trial before referee.

(1698a.) Requests to find.

(1697.) Oath of referee.

(1699.) Notice to terminate reference for delay to report.

(1698.) Entry as to oath, in referee's minutes.

Form No. 1696.

Notice of trial before referee.

[Title of court and cause.]

Please take notice, that this cause will be brought to trial before R. F., Esq., the referee, at [his office], No. ,

city, on the day of , at o'clock in the noon.

[Signature and office address of],

[Date.]

Attorney for .

[Address] To

Attorney for .

¹ An order is necessary. A judge's memorandum in his minutes is not enough. *Bonner v. McPhail*, 31 *Barb.*, 106.

It is the better practice in all cases to take an order of court, so as to put beyond doubt the power of the referee to punish for contempt. See *N. Y. Code Civ. Pro.*, § 2272. If the referee is not named by the stipula-

tion, the clerk cannot, under the New York statute, enter the order without direction of court or judge.

² An order on consent which names the referee cannot refer the cause to any other than the referee named in the consent. Any substitution must be by consent also. *Haner v. Bliss*, 7 *How. Pr.*, 246; *Billings v. Vanderbreck*, 15 *id.*, 295.

Form No. 1697.

Oath of referee.¹[*Title of court and cause.*][*Venue.*]

R. F., the referee appointed herein, by order entered the day of _____, 18____, being duly sworn, says, that he will faithfully and fairly * try the issues [*if any special questions besides the issues arising on the pleadings are referred, add:* and † determine the questions referred to him] and make a just and true report according to the best of his understanding.

[*Jurat.*][*Signature.*]

Form No. 1698.

Entry as to oath, in referee's minutes.

[*Oath annexed.*] The referee was sworn before M. N. [notary public], whose certificate, dated the _____ day of _____, 18____, is hereto annexed.

[*Waiver of oath.*²] All the parties whose interests could be affected by the result of this reference being of age and present in person or by attorney, they expressly waived the referee's oath.

Form No. 1698a,

Requests to find.

[*As in Form 1610.*]

¹ At common law, that is to say, in the absence of statute or rule of court, an oath is not required. *Thompson v. Smith*, 2 *Bond*, 320. It is required by *N. Y. Code Civ. Pro.*, in references under §§ 1011-1016, which requirement, however, has been held not to apply to a reference to compute amount due on failure to answer. *McGowan v. Newman*, 4 *Abb. N. C.*, 80. *Contra*, *Exchange Fire Ins. Co. v. Early*, 4 *Abb. N. C.*, 78.

A party *sui juris* by appearing and going on with the reference, without objection, waives the omission. *Newcomb v. Wood*, 97 *U. S.*, 581; *Nason*

v. Ludington, 8 *Daly*, 149; aff'g 55 *How. Pr.*, 342. But it is the better practice in cases of waiver to have the referee enter the waiver in minutes. *Browning v. Marvin*, 5 *Abb. N. C.*, 285 (holding that even attending and refusing for another reason to go on, does not waive the objection unless a waiver is so entered).

The oath should not be taken before an attorney for a party. *Katt v. Germania Fire Ins. Co.*, 26 *Hun*, 429. See also Volume I, p. 31.

² See *Browning v. Marvin*, 5 *Abb. N. C.*, 285; *Nason v. Ludington*, 8 *Daly*, 149.

Form No. 1699.

Notice to terminate reference for delay to report.¹

[*Title of court and cause.*]

Please take notice, that the [defendant] in this action elects to end the reference therein.

[*Date.*]

[*Signature and office address of*],

Attorney for

[*Address to adverse attorney and to referee.*]

SECTION III

REPORT, COSTS, JUDGMENT, AND NEW TRIAL.

FORMS.

(1700.) Report of referee.

(1701–1705.) Recitals suitable to insert in foregoing Form.

(1706.) Certificate by referee to support motion for allowance.

(1707.) Judgment on the report of referee.

(1708.) Motion to set aside report.

(1709.) Motion for further findings, &c.

(1710.) Affidavit to move to vacate proceedings, &c.

Form No. 1700.

Report of referee (containing findings and direction for judgment) upon a trial.

[*Title of court and action.*]

To the Court of [the State of New York]:

Pursuant to an order of this court entered herein on the day of , 18 , referring it to me to [*very briefly indicate the directions, as thus:*] hear and determine the issues in this action, I, the undersigned, as referee, report that I first took the oath prescribed by law which is hereto annexed, and having heard the allegations and evidence of the parties [*for other recitals, if desired, see Forms 1701–1705 (below); and continue as in Form 1611 from the * to the end*²].

[*Signature of*], Referee.

¹ Sustained by *Gregory v. Cryder*, 10 *Abb. Pr., N. S.*, 289. See also *Little v. Lynch*, 99 *N. Y.*, 112; *rev'g* 34 *Hun*, 396; *Dwyer v. Hoffman*, 39 *Hun*, 360.

² The report should specify the facts distinctly and positively. *Bradley v. McLaughlin*, 8 *Hun*, 545; *Mason*

Lumber Co. v. Buchtel, 101 *U. S.*, 633. For other notes to this Form, see Form No. 1611.

He should pass on the question of costs if the action is one in which they are discretionary. *First National Bank v. Levy*, 41 *Hun*, 461.

If the referee should neglect to

RECITALS SUITABLE TO BE INSERTED IN FOREGOING FORM.

1701. *If any party was in default.*—*Notice by attorney:*¹] that plaintiff's counsel produced notice of trial and proof of due service thereof upon the attorney for Y. Z.

1702. *The same.*—*Notice by referee's summons:*¹] that I issued my summons to the attorney of the adult defendants and the attorney of the guardian *ad litem* of the infant defendant to attend upon the said reference, which was duly served upon the said parties, as appears from a copy of said summons hereto attached marked Schedule A, with admission of service indorsed thereon.

1703. *Appearances:*] that I was attended by A. T., of counsel for the plaintiff, and by T. Z., of counsel for the defendant Y. Z.

1704. *Leave to amend:*²] that during the trial counsel for plaintiff moved to amend the complaint [*stating how*], and I thereupon ordered the complaint to be amended accordingly.

1705. *Motion to dismiss:*³] that the defendant moved to dismiss the complaint [*state grounds*], which motion I denied.

Form No. 1706.

Certificate by referee to support motion for allowance.⁴

[*Title of court and action.*]

I certify, that in my opinion this is a difficult and extraordinary case [*if so, may add*], and that the trial involved difficult, complicated and important questions of law and fact [*may state*

direct the form of judgment, the court can settle it on motion.

The power of the referee to award costs is co-extensive with the general equity power of the court, but is not understood to extend to the statutory powers to award costs against an executor, administrator, &c., whether to be paid personally or out of the assets, to grant an allowance, &c. In respect to those he may certify the facts. See Forms 1549–1554.

¹ Notice is presumed to have been given even without such recitals, so far as to cast the burden upon the other party to move. *Lutz v. Linthicum*, 8 *Pet.*, 165, 168. A recital of having given reasonable notice held sufficient in the absence of any evidence to the contrary. *State v. McIntyre*, 53 *Me.*, 214.

² *Smith v. Bodine*, 74 *N. Y.*, 30;

Stevens v. Mayor, &c., of *N. Y.*, 84 *id.*, 296; *Bockes v. Lansing*, 74 *N. Y.*, 437, as explained in *Matthews v. Del. & Hud. Canal Co.*, 20 *Hun*, 427, 437.

³ *Coffin v. Reynolds*, 37 *N. Y.*, 640 (dismissal for insufficiency of complaint); *Morange v. Meigs*, 54 *N. Y.*, 207; *Salter v. Malcolm*, 1 *Duer*, 596; *N. Y. Gen. Rules*, No. 30, of 1888 (dismissal for non-appearance); *Peyser v. Wendt*, 87 *N. Y.*, 322 (dismissal for refusal to bring in necessary party); *Van Derlip v. Keyser*, 68 *N. Y.*, 443; *Scofield v. Hernandez*, 47 *N. Y.*, 313; *Aylesworth v. St. John*, 25 *Hun*, 156 (dismissal for insufficiency of evidence). If a case is made, this motion and the ruling will appear there. *Pritchard v. Hirt*, 39 *Hun*, 378.

⁴ For other motion papers see Form 1555.

details], and that I am of the opinion that an allowance ought to be made to the successful party, in addition to costs.

[Date.]

[Signature of], Referee.

[Other proceedings as to costs, as in case of trial by jury, Forms 1549–1565.]

Form No. 1707.

Judgment on the report of a referee.

[Title of court and action.¹]

This action having been referred by an order entered herein the day of , 18 [if on consent, add: upon the written consent duly filed of all the parties—or, upon the oral consent of all parties given in open court and duly entered in the minutes], to R. F., Esq., to hear and determine the whole issues herein, and after trial had on due notice to all the parties, said referee having on the day of , 18 , duly made and filed his report herein, stating the findings of fact herein and conclusions of law thereon [may recite facts supporting judgment], and directing judgment as hereinafter stated, and 's costs having been duly adjusted at dollars; Now, on motion of A. T., attorney for :

IT IS ADJUDGED [&c. For other recitals see Forms 1570 to 1586, and substance of adjudication as in judgment after trial by jury or by the court; see Forms 1588 to 1590].

[Notice of exceptions, as in Form 1613; Notice of filing, Form 1614; Motion for time to make case, Form 1539; Motion for leave to file exceptions and make case nunc pro tunc, as in Forms 1615, 1616; Case, settlement, &c., as in trial by judge, see Forms 1618, &c.; Motion for new trial for surprise, newly-discovered evidence, &c., adapt from Forms for like motion after trial by jury, pp. 798–801.]

¹ The directions in the report are a sufficient sanction to the clerk to enter judgment accordingly, with the same caption and conclusion as if directed in open court. *Hancock v. Hancock*, 22 N. Y., 568; s. p., *N. Y. Code Civ. Pro.*, § 1228; *N. Y. Gen. Rules*, No. 30, of 1888; *Terpenning v. Holton*, 9 Colo., 306; 12 *Pacif. Rep.*, 189. The

court cannot direct a different judgment upon the report (*Schroeter v. Schroeter*, 23 *Hun*, 230; *Schweizer v. Raymond*, 6 *Abb. N. C.*, 378), except on appeal; but if the referee fails to direct the form of judgment, the court have power to settle it in accordance with the report. *Vagen v. Birngruber*, 9 *N. Y. State Rep.*, 729.

Form No. 1708.

Motion to set aside report.

[*The object of the motion or order may be stated thus:*] that the report of R. F., the referee herein, dated the day of , 18 , be set aside [for irregularity in this, that—*specifying grounds*]; and that it be referred back to him to make a further or amended report [*or, and that a new trial be had before the same referee, with costs, &c., to the* , to abide the event of the action—*or, and that the order of reference to him, entered the* day of , be set aside, and the action proceed as if no reference had been ordered—*or, agreed on—or, and that a new trial be had and it be referred to* , of , counselor at law, to hear and determine the whole issues in this action, with costs—*&c.*].

Form No. 1709.

Motion for further findings,² with extension of time to make case.

[*The object may be stated thus:*] an order sending the case herein back to R. F., Esq., the referee herein, and directing said referee to pass specifically upon the [plaintiff's] requests to find.³ [And the plaintiff's time to file a case herein is hereby extended until ten days after the decision of this motion.]

Form No. 1710.

Affidavit to move to vacate proceedings taken after notice terminating reference.⁴

[*Title of court and action.*]

[*Venue.*]

T. Z., being duly sworn, says:

I. That he is the attorney of the defendant herein.

¹ See *Van Slyke v. Hyatt*, 46 *N. Y.*, 259; *Barton v. Herman*, 8 *Abb. Pr.*, *N. S.*, 399; s. c., 3 *Daly*, 320; *Leonard v. Mulry*, 93 *N. Y.*, 392; *Carroll v. Lupkins*, 29 *Hun*, 17; *Burrows v. Dickinson*, 35 *id.*, 492; *Schweizer v. Raymond*, 6 *Abb. N. C.*, 378.

If a case is necessary the motion is an "enumerated" motion under the

New York practice. See p. 101 of Volume I.

² See *Bigler v. Pinkney*, 80 *N. Y.*, 636; *Turner v. Haughton*, 71 *N. C.*, 370.

³ Under the present practice new requests cannot be made after report.

⁴ Sustained in *Gregory v. Cryder*, 10 *Abb. Pr.*, *N. S.*, 289.

II. That the whole issues in this action were by an order entered the day of , 18 , referred to R. F., Esq., of , as sole referee, to hear and determine, and that thereupon the trial of said issues proceeded before him from time to time until the day of , 18 , and on that day the said action was finally submitted to him.¹

III. That up to and including the day of last, no report had been delivered or filed by the said referee upon the issues so referred to him, and that on the day last aforesaid. deponent served on the plaintiff's attorney [and on said referee] a notice, of which the annexed is a copy, as appears by the annexed affidavit of C. D.

[*State what further proceedings have been taken, if any, as thus:*] IV. That on the day of last, plaintiff served on the defendant's attorneys a paper purporting to be a copy of an alleged report of the said referee, bearing date the day of .

V. That the time limited by law for the making and delivery of the said report has not been extended or enlarged by any order of the court [made prior to], nor by any stipulation of the parties or their attorneys.

[*If order to show cause is asked, state as on p. 2.*]

[*Date.*]

[*Signature.*]

¹ As to oral extensions, see *Ballou v. Parsons*, 55 *N. Y.*, 673; *aff'g* 67 *Barb.*, 19.

ARTICLE VII.

STATEMENTS OF RELIEF APPROPRIATE TO JUDGMENTS IN VARIOUS SPECIAL CASES.

[In order to adapt the Forms to the largest usefulness, these statements of relief are here given in a way to make them readily adaptable to judgment on trial by Jury, p. 825, on trial by Judge alone, p. 836, trial by Judge with aid of Jury, p. 861, or with aid of Referee, p. 863, or trial by Referee, p. 876. Special cases which require peculiar proceedings before or on judgment, such as *Divorce, Dower, Ejectment, Foreclosure, Partition and Redemption*, are treated in the next Article.]

1711. AFFIRMATIVE RELIEF BETWEEN CODEFENDANTS: *determining rights as between themselves.*¹] And it is further ordered and adjudged, that, as between the defendants herein, said W. & X., who compose the firm of W. & Co., pay to the said Y. & Z., who did business under the firm name of Y. & Co., any deficiency beyond the excess of receipts retained by said Y. & Co. on any sale of said property after payment of the amount of their advances and charges to or against said W. & Co., and after applying any money in their hands which may have been left for their indemnity by said W. & Co. in their hands, upon the return of said property by said Y. & Co. to the plaintiffs, or their payment to said plaintiffs of the value thereof, and upon payment of the damages to said plaintiffs for detention, assessed as aforesaid, and their costs.

And it is further ordered and adjudged, that, upon default of such return and payment by said W. & Co., the defendant V. pay said deficiency to said Y. & Co., and that said V. have his recourse therefor over against said W. & Co.

[Leave to apply for further directions, &c., see Form 1674.]

1712. CONFLICTING CLAIMS: *to real property.*] It is adjudged, that the defendant [naming him], and all persons claiming under him, by title accruing subsequently to the day of , 18 , the day of the filing of the judgment-roll herein [or if notice of his pendency was filed: the day of the filing of notice of the pendency of this action] be forever barred from all claim to any estate of inheritance or for life, or for a term of years not less than ten from the day of , 18 , in the premises mentioned in the complaint, or any part thereof; and, further, that the plaintiff recover of the defendant dollars, his costs of this action.

1713. CORPORATION: *directors' acts annulled, and money diverted to be refunded.*²] I. That the acts of the defendants W. W., D. W. and J. C., as directors of the defendant the Company, of the of , 18 , allowing to the defendant D. W., \$933.33 for past services, be and the same is hereby declared void; and that the payment to him of that amount, under that resolution, was unauthorized and illegal.

¹ Common practice in equity, extended to all actions by *N. Y. Code Civ. Pro.*, § 1204, with § 521. *Metropol. Trust Co. v. Tonawanda R. R. Co.*, 18 *Abb. N. C.*, 368; s. c., 43 *Hun*, 522, and cases cited; *Derham v. Lee*,

87 *N. Y.*, 599; aff'g 47 *Super. Ct. (J. & S.)*, 174.

² From *Butts v. Wood*, 37 *N. Y.*, 317 (aff'g 38 *Barb.*, 181), where it was approved.

See note in 20 *Abb. N. C.*, 431

II. That the defendants D. W., W. W. and J. C. pay to the defendant the Company, for the benefit of and distribution among the stockholders thereof, the said sum of \$933.83, so paid to the defendant D. W., with interest thereon from the day of , 18 , within thirty days after notice of the entry of this judgment shall have been served on the attorney of said defendants; and that in case such payment and distribution shall not be made within that time, the plaintiff shall be at liberty to apply to this court for further directions and relief in respect thereto.

III. That the plaintiff I. B. recover of the defendants W. W., D. W. and J. C., the sum of \$214.66, his costs and disbursements herein, and that he have execution therefor.

1714. — *sequestrating effects of corporation, at suit of a judgment-creditor, and appointing receiver for distribution: Recitals as to services, trial, &c., as in other Forms, adding recital of service on or appearance of attorney-general, see Forms 689 to 700; and if temporary receiver was appointed, add:]* and R. C. having been by order entered herein on the day of duly appointed receiver of all the assets of said company, and having duly qualified and entered upon his duties as receiver [&c.]:

It is adjudged, 1. That the stock,¹ property, real and personal, things in action and effects of the said corporation defendant, the G. W. Co., be and the same hereby are sequestrated,² and vested in the receiver hereby appointed, and the said defendant is hereby directed to execute a good and sufficient conveyance thereof to the said receiver.

2. That R. C., Esq., heretofore appointed receiver of the said corporation, is hereby continued as the permanent receiver thereof,³ with the usual powers and duties, and vested with all the rights and powers of receivers in like cases [*may give special directions, as thus: and see Forms 694, 697*]; and said receiver is hereby directed and empowered to collect and receive the debts, demands and other property of the said corporation to preserve the property and the proceeds of the debts and demands collected,⁴ to sell or otherwise dispose of the property as directed by the court, to collect, receive, and preserve the proceeds thereof, and to maintain any action or special proceedings for either of those purposes.

3. That the injunction herein granted by order entered the day of , 18 , is hereby made perpetual, and [*repeat its terms,⁵ so far as necessary*].

4. That said receiver is hereby directed to procure and publish an order requiring all the creditors of the said Company, defendant, to exhibit and prove their claims to said receiver at a place to be specified in said notice, and become parties to the above-entitled suit or proceeding within [*not less than six*⁶] months from the first publication of the notice of the order, and that all and every of the said creditors who make default in so doing shall be precluded from all benefit of this judgment and from any distribution which shall be made under this judgment.

5. That the said receiver make a fair and just distribution of the said property of the said Company and of the proceeds thereof among its fair and honest creditors who have exhibited and proved their

¹ For directions as to unpaid stock subscriptions, or liability of stockholders, see *N. Y. Code Civ. Pro.*, §§ 1790-1796; *People v. Hydrostatic Paper Co.*, 88 *N. Y.*, 623.

² *N. Y. Code Civ. Pro.*, § 1784.

³ *Id.*, §§ 1789, 713. May require new bond. For other forms of appointment of receiver, see pp. 141-

200, where directions to transfer assets, books, &c., will be found. As to general powers, see *Verplanck v. Mercantile Ins. Co.*, 2 *Paige*, 438.

⁴ As to deposit of moneys, see Form 694.

⁵ For terms of injunction, see Form 697, &c.

⁶ *N. Y. Code Civ. Pro.*, § 1807.

claims in the order and in the proportion prescribed by law as in the case of a voluntary dissolution of a corporation.¹

6. That before distributing any part of said fund or assets, and within [twelve] months from the entry of this judgment, the said receiver report to this court his proceedings under this order, with an exhibit of the accounts and demands for and against said Company, and all its open and subsisting contracts, and a statement of the amount of money and assets in the hands of said receiver, together with a statement of his expenses and commissions; to the end that such order may be made in regard thereto as the nature of the case may require; and that until the coming in of said report, and the hearing thereon, the question as to the distribution of said assets and moneys, and of the rights and interests of the respective parties claiming the same, or any portion thereof, and other questions not herein disposed of, including the question of costs, be reserved for further directions.

1715. CREDITORS' ACTIONS: *judgment removing fraudulent obstruction to execution.*² It is adjudged, 1. That the conveyance [*describing it, as thus*], dated the day of , 18 , to the defendant W. X., and recorded the day of , 18 , in the office of the clerk of the county of , in Book of Conveyances, p. [*or, a copy of which is annexed to the complaint herein*], was executed by the defendant Y. Z., with intent to hinder, delay and defraud the creditors of the said Y. Z., and is void as against the plaintiff in this action; and that the judgment confessed by the defendant Y. Z. in favor of the defendant U. V. in the court, and entered in the office of the clerk of , for dollars, was made with intent to defraud the creditors of said Y. Z. [*or, is insufficient, and, in law, fraudulent as against the creditors of said Y. Z.*]; and that the same, and all the proceedings thereon, the execution, and the sale thereunder, and the sheriff's certificate of sale, bearing date the day of , 18 , and his deed, bearing date the day of , 18 , to the defendant S. T., in pursuance thereof, are each and all void as against the plaintiff in this action [*may add direction to clerk or recording officer to mark accordingly*].

2. That the plaintiff recover of the defendants [*naming which*] dollars costs of this action.

3. That the real property [*describing it*] is subject to and bound by the lien of the judgment recovered by plaintiff the day of , 18 , and mentioned in the complaint herein; and the personal property [*describing it*] is subject to and bound by the lien of the execution issued on said judgment, [*or, the lien effected by the commencement of this action*].

4. That the plaintiff in this action is at liberty to proceed upon his execution heretofore issued upon the judgment in his favor mentioned in the complaint, or to issue another execution, as he may be advised, and that the said defendant [*name*] deliver to the sheriff upon any such execution said property [*describing the property reached*], to be sold and applied to satisfy said judgment, and interest, and also the costs of this action.

1716. — *Another Form, directing transfer to receiver;*³ *with reference; and relief against fraudulent transferees:*⁴ It is adjudged, 1. That the plaintiff, by virtue of his judgment and execution, and the commencement of this

¹ N. Y. Code Civ. Pro., §§ 1784, 1793.

² Erickson v. Quinn, 15 Abb. Pr., N. S., 166; Vrooman v. Clow, 25 Week. Dig., 139; Kennedy v. Barandon, 4 Hun, 642; Murray v. Berdell, 98 N. Y., 480.

As to providing for the rights of

third persons, see Mitchell v. Sawyer, 45 Ill., 650; s. c., 6 Northeastern Rep., 109; s. r., Lore v. Dierkes, 16 Abb. N. C., 47, 58.

³ See cases in note to last Form, and Wagener v. Mars, (So. Car., 1887) 2 Southeastern Rep., 844.

⁴ See note in 16 Abb. N. C., 59.

action, has a lien upon all the property of every description of the said defendant Y. Z., including all that was assigned or transferred by him to the defendant W. X., or so much thereof as may be necessary to satisfy the plaintiffs' judgment, interest and costs, which lien took effect on the day of 18 ; and that the assignment of the defendant Y. Z. to the defendant W. X., in the pleadings mentioned, was made with intent to hinder, delay, and defraud the plaintiff [and other creditors of the said Y. Z., and], was and is void as against him [and them], and the same hereby are set aside and declared void as against plaintiff.

2. That the said W. X. do forthwith account for, convey, pay and deliver all the money and other property assigned to him, and the proceeds thereof, to R. C. [receiver heretofore appointed of the property of the said Y. Z., and], who is hereby appointed receiver in this action, as well as of the property belonging to the said Y. Z., as of that assigned to said W. X. [may require new bond and give further directions]. [*Injunction may be inserted,*¹ see Forms 564, 585, &c.; or if already granted, made perpetual, see Form 1714.]

3. That the defendant W. X. do transfer and deliver all the property assigned to him, and the proceeds thereof, to the said receiver² [if there is real property, add: and the defendants, W. X. and Y. Z., are hereby directed to execute, acknowledge, and deliver a conveyance of said premises to said receiver; and that said receiver do forthwith thereafter proceed to advertise and sell at public auction said premises, and to give public notice of the time and place of such sale, in the same manner as provided by law and the practice of this court for the sale of mortgaged premises under a judgment of foreclosure and sale; and that said receiver execute and deliver to the purchaser a conveyance of the premises so sold, and that the purchaser at such sale be let into possession of said premises on production of such conveyance].

And that out of said property [or, the proceeds of such sale], after deducting the amount of his fees and expenses [and of any prior liens upon said premises so sold at the time of said conveyance to said receiver], he pay to the plaintiff, or his attorney dollars, the costs of this action, and out of the residue, if there be sufficient for that purpose, he pay to the plaintiff [or his attorney] the amount of his said judgment, and interest thereon from , 18 .

4. That the residue, if any, be by said receiver paid to said defendant W. X. [or, be brought into court to abide the further order of this court], and in case the amount realized by said receiver shall be insufficient to pay said costs and the judgment of the plaintiff, with interest as aforesaid, that he report the amount of such deficiency to this court, and that the plaintiff have judgment against the defendant W. X. therefor.

5. [*If account is necessary:*] And it is hereby referred to R. F., Esq., counselor at law, of the city of , to examine into the accounts and do-

¹ Injunction may be embodied in judgment. *N. Y. Code Civ. Pro.*, § 1866.

² Merely setting aside a fraudulent transfer of real property leaves the title where it was before the transfer, *i. e.*, usually in the debtor. Personalty vests in the receiver by force of his appointment, and may be sold without a formal conveyance or assignment to the receiver. As to real property, the execution of an assignment to the receiver should always be required, unless he is by statute, as in the case

of receivers in supplementary proceedings, and many corporate receivers, under New York law, vested with title by force of the statute on his appointment. As to providing for dower of debtor's wife, see *Wright v. Nostrand*, 94 *N. Y.*, 31; rev'g 47 *Super. Ct. (J. & S.)*, 441; *Malony v. Horan*, 12 *Abb. Pr., N. S.*, 289; rev'g 53 *Barb.*, 29. As to sale being subject to prior judgments, see *Jackson v. Holbrook*, 36 *Minn.*, 494; *s. c.*, 32 *Northwestern Rep.*, 852, and cases cited.

ings of the said [assignee], while acting or professing to act as assignee under the said assignment, and also to decide upon what sums are properly and what sums are improperly charged, credited, or entered by said defendant [assignee] in his accounts as such assignee, and to adjust and settle the said accounts, and to direct the delivery to said receiver, and the payment to him of any assets or moneys pertaining to said assigned estate yet remaining in the hands of said defendant, or for which he is or ought to be chargeable.

[For other directions as to accounting, see Forms 1653-1661.]

1717. — *Judgment setting aside assignment of personal property, and directing sale by receiver.*¹ It is adjudged, 1. That the sale, transfer and conveyance of the personal property of Y. Z., made by the defendant Y. Z. to the defendant W. X., on or about the day of , 18 , was and is fraudulent and void as against the plaintiff herein, and is hereby annulled, set aside and cancelled as against him [*if of record may direct cancelling of record*].

2. That the said defendants and each of them be and they are hereby ordered, adjudged and required to account and pay over and deliver² to the receiver hereinafter named, all the said property or its proceeds, which came into their hands or into the hands of either of them.

[*Injunction*,³ *if necessary*; see Forms 564, 585, &c., and 1714 (3)].

3. That R. C., Esq., of , be and hereby is appointed receiver of all of said property upon giving a bond [*proceed as in Form 1714 (2)*].

4. That R. F., Esq., of , be and hereby is appointed referee for the purpose of ascertaining and determining, if contested, the amount of the proceeds and property which the defendants should pay over to said receiver in accordance with this judgment [*a charge against one who purchased for value, but not in good faith*,⁴ *may be added thus*], and that said referee do also examine and inquire, so far as is practicable, what disposition has been made of the property sold to the said [purchaser], and where the same now is; that he charge the said [purchaser] with the sum of dollars, as the price of the said property, and credit him with any portion of the same that he may deliver to the receiver at its value, based upon the estimate that the whole property so sold was worth dollars.

5. That the said receiver pay over to the attorneys for the plaintiff the sum of dollars, costs of this action, and amount of the judgment of the plaintiff, to wit, the sum of dollars, with interest thereon from the day of , 18 .

6. That said receiver hold the balance of the proceeds after making the payments as aforesaid, and after paying his fees and the expenses of carrying out this decree, subject to the further order of the court [*or direct repayment to defendant*].

[*Direction for execution for deficiency, if needed, as in Form 1716 (4).*]

[*Leave to apply for further directions, Form 1674.*]

1718. — *Reaching surplus income of trust.*⁵ It is adjudged, 1. That the said surplus income of the said trust estate amounted, during the year[s] subsequent to the commencement of this action, to dollars and dollars, respectively; and in the aggregate to the sum of dollars;

That said defendants, P. Q. and R. S., as trustees under [the last will and testament of T. W., deceased], out of said surplus pay to the plaintiff [*or if the surplus be insufficient*: apply said surplus toward the payment to the plaintiff of] said debt due to the plaintiff, with interest thereon to the date of

¹ See notes to two last Forms.

³ *Id.*, § 1866.

² May be enforced by punishment for contempt, and also by directing the sheriff to take and deliver. *N. Y. Code Civ. Pro.*, § 718.

⁴ See note in 16 *Abb. N. C.*, 59.

⁵ See *Tolles v. Wood*, 16 *Abb. N. C.*, 1, and cases cited.

the judgment to be entered herein, amounting in the aggregate, at the date hereof, to the sum of dollars;

[That from year to year hereafter the said defendants, P. Q. and R. S., as such trustees, pay over to the plaintiff the surplus income of the said trust estate hereafter to accrue, until the plaintiff's said judgment, with accruing and accrued interest, and the costs of this action shall be fully paid and satisfied;]

That the said plaintiff recover of the said defendants, P. Q. and R. S., as such trustees, to be paid out of such surplus income, his costs and disbursements in this action to be taxed.

1719. — *Dismissal, setting off defendant's costs against plaintiff's judgment: add to usual judgment of dismissal, Form 1639.*] and that said costs be, and the same hereby are set off against so much of the plaintiff's judgment mentioned in the complaint for dollars, entered in the office of the clerk of the county of , on the day of , 18 .

1719a. INJUNCTION. [See Forms p. 49 to p. 86 of this Volume.]

1720. INTERPLEADER: *judgment directing that action be commenced:*¹] That the defendant Y. Z. shall within [twenty] days after the entry and service of a copy of this judgment [upon the attorney], commence an action against the defendant W. X. [and such other parties as may be necessary or proper] for [stating relief], and that if said Y. Z. does not within such time commence such action said defendant W. X. shall be at liberty to commence such action as plaintiffs.

2. That in the action so to be commenced by either of the defendants, the defendant therein shall be at full liberty to claim said [designating property], to the end that a full decision and judgment may be had between the parties defendant in this action as to which of them is entitled thereto.

1721. — *Another Form: Order for judgment and reference:*²] That the said complaint [or, bill of interpleader] is properly brought by the plaintiffs in this action; that the plaintiffs be paid their costs of this action, to be taxed by deducting the same from out of the fund in the complaint mentioned, and dollars as an additional allowance; and that the plaintiffs thereupon, within thirty days hereafter, pay into court, and deposit the amount of the residue of said fund, principal and interest to the time of such payment, with the clerk of this court, for the benefit of such of the defendants as shall be found to be entitled thereto; and that the plaintiffs so paying said amount into court, and depositing the same with the clerk of this court, be dismissed from the further prosecution of this action, and thereupon be released, acquitted, and discharged from all claims or liability to either or any of the defendants in this action, for, upon, or by reason of said fund, on the payment thereof into court as aforesaid.

And it is further ordered, adjudged, and decreed, that the said defendants do interplead, settle, and adjust their several claims, demands, and matters in controversy in this action, as between themselves.

[And, for that purpose, it is further ordered and adjudged, that it be, and is hereby referred to R. F., Esq., counselor at law, of , as sole referee, to hear and determine the same—fourteen days'—notice of such hearing to be first given to the respective defendants, or their attorneys; with power to require said several defendants to present, try, and determine their several

¹ Sustained by *Leavitt v. Fisher*, 4 Duer, 1, where the clause here inserted in brackets as to joining other parties was held to be implied. For other Forms see 1107-1114.

² Sustained by *City Bank v. Bangs*, 2 Paige, 570; *Hatch v. Beebe*, MS., 1864.

and respective claims to said fund in controversy before him, in such manner and under such regulations as he may deem just and proper.

That the said referee, among other things, examine, ascertain, and determine which of said defendants is entitled to the said fund so deposited with the clerk of this court; and if he shall be of the opinion that any one or more of the said defendants is, or are, equitably entitled to have a share in the same, that said referee also ascertain and determine what portion of said fund belongs to each; and that said referee do find, decide, and report thereon with all convenient speed.]

1722. *Joint-stock company, or unincorporated association or partnership, under the statute.*¹ [Designate the party throughout thus: "Y. Z., as president—or, treasurer—of said company, plaintiff—or, defendant."]

1723. *LIEN: of attorney on client's judgment.*] 1. That the plaintiff, as alleged in the complaint, rendered and performed the services therein set forth for the defendant Y. Z.

2. That said services were reasonably worth the sum of dollars, and that no part thereof has been paid [except the sum of dollars].

3. That on , 18 , the said Y. Z. recovered judgment, which was that day entered in the office of the clerk of the city and county of , against the said defendant W. X. [among other things], for the sum of dollars, and that said judgment remains in full force and wholly unpaid [except the sum of dollars].

4. That said plaintiff has a lien to the extent of dollars upon the judgment aforesaid.

5. That said Y. Z. assign, transfer and set over unto the plaintiff the said judgment of dollars and all their right, title and interest in and to the same, and remedies thereon.

6. That the plaintiff is entitled to enforce collection of said judgment and to apply the same toward the payment of his said judgment hereby rendered in his favor for the sum of dollars and costs.

1724. *MONEY JUDGMENT: on bond conditioned otherwise than for payment of money; or upon penalty for non-performance of agreement.*² [Recite proceedings as in commencement of preceding Forms; and also the verdict, decision, or report, stating its conclusion, as thus:] whereby it appears that the defendant made his bond, as alleged in the complaint, and that the assignment therein of breaches is true, and that the plaintiff is now entitled to recover dollars damages therefor; and the plaintiff's costs [&c.]; Now, on motion [&c.]:

It is adjudged, 1. That plaintiff recover of defendant dollars [the penalty], together with dollars, his costs of this action, together amounting to dollars.

¹ *N. Y. Code Civ. Pro.*, § 1919, &c. Applicable to any seven or more persons having joint or common interest or liability, or having a president or treasurer. But for such statute, a judgment against A. B., treasurer, is a personal judgment. *Dougherty v. McManus*, 36 *Iowa*, 657.

² This Form, sanctioned by the former practice (2 *N. Y. R. S.*, 378; *Western Bank v. Sherwood*, 29 *Barb.*, 383; *Mayor, &c., of N. Y. v. Lyons*, 1 *Daly*, 296; s. c., 24 *How. Pr.*, 280),

and still sometimes used, should in case of bonds made since Sept. 1, 1880, give way to the form appropriate to recover on a covenant. *N. Y. Code Civ. Pro.*, § 1915. Compare *Beatty v. Hanna*, 24 *Reporter*, 293; *Keegan v. Kinnare*, 14 *Northeastern Rep.*, 14 (*Ill.*, 1887). If judgment in such a case is rendered on demurrer, a reference or writ of inquiry should be ordered to assess the damages. *Smith v. Jansen*, 8 *Johns.*, 111.

2. That plaintiff may have execution to collect said damages on occasion of the aforesaid breaches, and interest thereon, which damages and interest thereon, from the [day of assessment], and said costs, together amount to dollars.

1725. — *Against executor, administrator, trustee, &c.*¹] It is further adjudged that said sum be paid by said personally,² and plaintiff may have execution³ therefor [or, said sum be collected and paid out of the estate of said deceased⁴ [adding further directions if desired to adjust equities of creditors of the estate as to priority⁵].

1726. — *Another Form: against a defendant in his own right, and an administrator, with leave to apply for an accounting.*] [Recite proceedings and verdict; decision or report as in other Forms, continuing:] and it appearing thereby that at the date of said verdict [or, report] there was due to the plaintiffs from the firm of W. X. & Co., whereof the defendant is the surviving partner, dollars for principal and interest of moneys which came to the hands of said firm; and from said defendant to Y. Z. individually, the sum of dollars, for principal and interest of [&c.]; Now, [&c.]:

It is adjudged, 1. That the plaintiff recover of the defendant Y. Z., individually and in his own right, and of said U. V. as administrator of said W. X., deceased, said first-mentioned sum of dollars, with interest from the date of said report, and that the said Y. Z. in his own right, and the said U. V. as such administrator, out of the assets of said estate so far as the same are applicable thereto, do pay the same to the plaintiff.

2. That the plaintiff recover of said defendant Y. Z. individually, and that the said Y. Z. pay to the said plaintiff the second-mentioned sum of dollars, together with dollars costs of this action.

3. That the plaintiff have execution accordingly;⁶ and that either party may be at liberty to apply to the court for an account of the assets of said W. X.

1727. — *Heir or devisee: Execution against inheritance, &c.*] That said amount be collected out of the real property which has descended from [or, was devised by] M. N., to the defendant Y. Z., which is described as follows [description in full].

1728. — *In qui tam action:*⁷] that the plaintiff recover of the said defendant, for the People of the State of New York, and for said plaintiff, the sum of dollars, in the [first cause of action in the] complaint mentioned; and that the People aforesaid have one moiety thereof to their own

¹ See Forms 1557-8, for motion.

² *Baucus v. Stover*, 14 *Weekly Dig.*, 313; 89 *N. Y.*, 1; rev'g 11 *Weekly Dig.*, 569. This may be separately docketed. *N. Y. Code Civ. Pro.*, § 1816.

³ It was formerly common to award execution on the judgment, but the present practice in reference to judgment against decedent's estates requires in ordinary cases application for leave founded on evidence as to assets. *N. Y. Code Civ. Pro.*, § 1825.

Informality in this direction may be corrected by motion, and if not so corrected may be disregarded on appeal. *Syms v. Mayor, &c.*, of *N. Y.*, 105 *N. Y.*, 153.

⁴ *Alger v. Conger*, 17 *Hun.*, 45; aff'd in 79 *N. Y.*, 633, without opinion. *Lavallette v. Wendt*, 75 *N. Y.*, 579; s. c., 31 *Am. R.*, 494, with note, modifying and aff'g 11 *Hun.*, 432; *Lough v. Flaherty*, 29 *Minn.*, 295; s. c., 13 *Northwestern Rep.*, 131; *Guice v. Sellers*, 43 *Miss.*, 52.

To make the judgment a lien upon real property belonging to the estate, it should be expressly so declared. *Cook v. Ryan*, 29 *Hun.*, 249; *N. Y. Code Civ. Pro.*, § 1823.

⁵ *Matter of Potter*, 5 *Dem.*, 108.

⁶ See note to last Form.

⁷ As to apportionment of penalty; see *N. Y. Code Civ. Pro.*, § 1898.

use, and the said plaintiff the other moiety thereof to his own use, according to the statute.

1729. — *Stay of execution:*] That execution hereon be stayed until the expiration of days from entry of this judgment and service of a copy thereof on the attorney of record herein for the defendant Y. Z.; after which, if this judgment or any part thereof remain unpaid, said Y. Z. shall have execution for the collection thereof.

1729a. — *or thus:*] That there be a stay of execution on this judgment until the day of , 18 , when, if the defendant pay dollars upon the judgment, there shall be a further stay until the day of , 18 , after which execution may issue for whatever may remain unpaid.

1730. NUISANCE: *Form of judgment for damages, and for injunction in default of payment; see Falker v. N. Y., West Shore, &c., Ry. Co., 17 Abb. N. C., 279.¹*

1731. QUO WARRANTO: *in favor of claimant:*] that said defendant [name] * be ousted from the office of [title], mentioned in the complaint herein.

2. That H. E. D., named in the complaint, and a plaintiff in this action, is, and he is hereby declared to be entitled to the said office, by virtue of the [election] in the said complaint mentioned.²

1732. — *in favor of incumbent:*] that said defendant [name] has not intruded into or usurped the office of [title], but that under and by virtue of the [appointment] in the complaint mentioned, is entitled to hold such office and perform the duties thereof, until the day of , 18 .

1733. RECEIVER: *judgment against, in official capacity:*] That out of any funds which are now or may hereafter come into his hands, or may be under the direction of the court applicable to that purpose, the defendant³ H. J. J., as receiver of the E. R. Co., pay to the plaintiff herein the sum of dollars, with interest from the day of , 18 , until such payment be made.

1734. REPLEVIN:⁴ *recital of proceedings down to verdict, as in other Forms, continuing:*] having found a verdict upon all the issues of fact for the

¹ As to form of judgment to compel defendant to abate, see *De Laney v. Blizzard*, 7 *Hun*, 66; *Rothery v. N. Y. Rubber Co.*, 90 *N. Y.*, 31; *Cogswell v. N. Y., New Haven, &c., R. R. Co.*, 105 *N. Y.*, 319.

As to survey for purpose of abatement, see *Decorah Woolen Mill Co. v. Greer*, 58 *Iowa*, 86; s. c., 12 *Northwestern Rep.*, 128; *Jessel v. Chaplin*, 2 *Jur.*, *N. S.*, 931, *Ex.*; *Leech v. Schweder*, *L. R.*, 9 *Ch. App.*, 463.

A survey may be embodied in the record. *Ill. & St. L. R. Co. v. Switzer*, 117 *Ill.*, 399; s. c., 7 *Northeastern Rep.*, 664.

For injunctions suitable to various cases, see p. 65, &c.

² As to award of costs, see *People ex rel. Furman v. Clute*, 52 *N. Y.*, 576; modifying as to costs, 50 *id.*, 451;

s. c., 10 *Am. R.*, 508; which rev'd 63 *Barb.*, 356, and aff'd 12 *Abb. Pr.*, *N. S.*, 399.

As to damages and fees. *People v. Snedeker*, 3 *Abb. Pr.*, 233; *McVeany v. Mayor, &c., of N. Y.*, 80 *N. Y.*, 185; *People ex rel. Swinburne v. Nolan*, 101 *N. Y.*, 539, 545; aff'g 32 *Hun*, 612; *N. Y. Code Civ. Pro.*, § 1953.

³ *Woodruff v. Jewett*, 37 *Hun*, 205; *Camp v. Barney*, 4 *id.*, 373; *Clark v. Brockway*, 1 *Abb. Ct. App. Dec.*, 351. A personal judgment will be in the ordinary form, without official designation, or if official designation appears in the record, add the word "individually" after defendant's name in the ordinary form.

⁴ As to proving facts down to the time for applying for judgment, see *Auerbach v. Marks*, 10 *Daly*, 171.

plaintiff [or, defendant], and [where value and damages were assessed] assessed the value of the property at dollars, and the damages of the , by reason of the [taking and] detention of the property at dollars; and the costs of the having been duly adjusted [&c.]; Now, on motion [&c.]: It is adjudged [as in following clauses].

1735. — *for possession, or delivery; where delivery has not been had:*¹ that the plaintiff A. B. recover from the defendant Y. Z. the possession of the [describing the property sufficiently to identify it²], being [part of³] the property described in the complaint herein, and that said plaintiff recover also of said defendant damages for the [taking and] detention thereof, and dollars, his costs of this action.⁴

Or, in case the possession of said property is not delivered to plaintiff, that plaintiff recover from defendant the sum of dollars, the value thereof⁵ found by the jury [with interest⁶ thereon from the day of 18], with the costs aforesaid, together amounting⁷ to the sum of dollars.

1736. — [If payment or delivery into court has been made, substitute for last paragraph:] And it is further ordered and adjudged that the clerk of this court [or other depository] with whom the said [certificate] was deposited by the defendant in this action, under and pursuant to the order of this court entered herein the day of , 18 , deliver the said [certificate] to the plaintiff, upon the service of a certified copy of this judgment.

1737. — *for confirmation of possession: after recital of verdict insert:* and the property claimed having been taken into the possession of the plaintiff [or, defendant—continuing with the other recitals]:

It is adjudged, that the plaintiff [or, defendant] have and retain possession of the personal property described in the complaint [and also recover dollars damages], with dollars costs of this action, together amounting to dollars.⁸

¹ In such case the judgment must be on the alternative (*Hammond v. Morgan*, 101 *N. Y.*, 179; s. c., 1 *Central Rep.*, 816; *Stewart v. Taylor*, 68 *Cal.*, 5; s. c., 8 *Pac. Rep.*, 605; *Ward v. Masterson*, 10 *Kans.*, 77; *Berthold v. Fox*, 21 *Minn.*, 51. Compare *Hogue v. Fanning*, (*Cal.*, 1887) 14 *Pac. Rep.*, 560), even though it appear that the property cannot be delivered. *McNamara v. Eisenloff*, 14 *Abb. Pr., N. S.*, 25; *Cochran v. Gottwald*, 41 *Super. Ct. (J. & S.)*, 317. Defendant is entitled to opportunity to return. *Rogers v. Bradford*, 8 *Bush (Ky.)*, 163; *Reavis v. Horner*, 11 *Neb.*, 479; s. c., 9 *Northwestern Rep.*, 643.

The same Form is the proper one for a judgment in favor of the defendant, where the plaintiff has had a delivery of the property, but fails in the action. *Seaman v. Luce*, 23 *Barb.*, 240.

² *Welch v. Smith*, 45 *Cal.*, 230; *Soria v. Davidson*, 53 *Super. Ct. (J. & S.)*, 52.

³ *Emerson v. Bleakley*, 2 *Abb. Ct. App. Dec.*, 22.

⁴ *Clafin v. Davidson*, 53 *Super. Ct. (J. & S.)*, 122. As to costs of both parties where each succeeds as to part, see *Abb. Ann. Dig.* (1885), pp. 77, 78; (1886), p. 88; and p. 831 of this Vol.

⁵ As to fixing value where plaintiff has only a special property, see *Fowler v. Haynes*, 91 *N. Y.*, 346. An absolute judgment for value may be regarded as an adjudication that possession could not be had. *Boley v. Griswold*, 20 *Wall.*, 486. For mode of stating value of separate articles, see EXECUTION.

⁶ According to *Romberg v. Hughes*, 18 *Nebr.*, 579; s. c., 26 *Northw. Rep.*, 351, damages for detention, if found, cover interest. See *Munsell v. Flood*, 46 *Super. Ct. (J. & S.)*, 134.

⁷ Full value and damages also are recoverable. *Miller v. Warden*, 111 *Pa.*, 300; s. c., 1 *Cent. Rep.*, 873.

⁸ Value need not be fixed (*Clafin v. Davidson*, 53 *Super. Ct. (J. & S.)*, 122), unless to fix allowance.

1738. SURRENDER: *of specific property in an equity suit:*¹] that the contract bearing date the day of , 18 , purporting to have been executed between A. B. and Y. Z.—which said contract is set forth as Exhibit A to the complainant's bill of complaint—is null and void and of no effect, and that the said Y. Z., his agents and attorneys, and all others claiming to act in his or their behalf, be perpetually enjoined from asserting any right or claim under the same, and that the plaintiff A. B. is entitled to recover and receive the bonds and coupons mentioned in said contract as having been transferred or sold to the said Y. Z., which at the several times of service of process in this suit were in possession or under the control of the defendant, and any proceeds thereof which have come into such possession or control with notice of the equity of the plaintiff. And that said Y. Z. is hereby perpetually enjoined from setting up any claim or title to any of the bonds and coupons attached which are described in said contract filed as Exhibit A to the bill of complaint, and that the plaintiff A. B. is entitled to restitution of such of the bonds and coupons and proceeds as have come into the possession or control of the said defendant as aforesaid.

1739. SPECIFIC PERFORMANCE: *against vendor. Short Form:*] that on payment by the plaintiff to the defendant Y. Z. of the sum of dollars, with interest from , 18 , less the sum of dollars, costs of the plaintiff, with interest from the date of this judgment, the said defendant Y. Z. execute and deliver to the plaintiff a deed to him, to be approved by a justice of this court, as to form and manner of execution, conveying to the plaintiff, or his assigns [*description*].

2. That all the defendants herein, and all persons claiming under them, or either of them, be forever barred and foreclosed, of and from all interest or claim to the said premises or any part of them.

1740. — *A fuller Form:*] It is ordered and adjudged, 1. That the agreement set forth in the complaint be specifically performed; and that the defendant² [*vendor*] execute and [*may state time and place, and direct it to be before referee*] deliver³ to the plaintiff [*upon his demand in writing*⁴] a good and sufficient conveyance in fee [*free from all incumbrance except—&c.*], with full covenants⁵ [*against the grantor's acts*], the form of the same to be settled and approved by one of the justices of this court [*or, by the referee hereinafter named*], in case the parties differ respecting it, of the following described premises [*description*], * [*and it is further adjudged, that the defendant W. X. is, and all persons claiming under him are hereby barred and foreclosed of all claim to said premises*].

2. That the plaintiff upon the delivery or tender of said conveyance do [*execute and deliver to the defendant Y. Z. the bond and mortgage in the*

¹ This may be enforced by proceedings for contempt. *In re Chiles*, 22 Wall., 157, 160. Compare *Hammond v. Morgan*, 101 N. Y., 179; s. c., 1 Cent. Rep., 816; s. p., N. Y. Code Civ. Pro., § 718.

² A judgment requiring execution of a deed by infant parties should require the master or guardian to execute it for and on behalf of the infant [*defendants*] in this cause and in their names. *Van Schaick v. Stuyvesant*, 2 Edw., 204. See also *Hyatt v. Seeley*, 11 N. Y., 52, as to the form of the deed.

³ The court have power to enforce this by directing the sheriff to convey,

as well as by punishing the defendant for contempt. *Burrall v. Eames*, 5 Wisc., 260; s. p., N. Y. Code Civ. Pro., § 717; *Baker v. St. Louis*, 75 Mo., 671.

⁴ This clause is not usual, but is sometimes inserted. *Morris v. Walsh*, 14 Abb. Pr., 387.

As to the proper direction where there are infants, see *Matter of Ellison*, 5 Johns. Ch., 261; *Sutphen v. Fowler*, 9 Paige, 280; *Hill v. Ressegieu*, 17 Barb., 162.

⁵ The judgment ought to provide for a settlement of the form of the conveyance. *Hilliker v. Hathorne*, 5 Bosw., 710.

complaint mentioned, to be settled and approved as above provided if the parties differ, and] pay to the defendant or his attorney dollars [the residue of] the purchase-money named in the contract set forth in the complaint, with interest ¹ from the day of , with dollars costs of this action amounting together to dollars [*if there is to be deduction for deficiency,*² *add:* subject, however, to a deduction and abatement to which the plaintiff is hereby adjudged to be entitled, for the deficiency in the amount of the land agreed to be conveyed; and it is further ordered, that it be referred to R. F., Esq., of , counselor at law, to compute and ascertain the amount of such abatement, and the amount of purchase-money remaining due after such deduction, and the interest thereon].

3.³ And it is further adjudged, that if the plaintiff upon a tender of said conveyance refuse to pay the sum so found due, † the premises hereinbefore described be sold by said referee [*or, by the sheriff of the county of*], by public auction [*here proceed with directions for sale, and decree over for deficiency; see forms of judgment in foreclosure.*]

[*Or instead of directing a sale, substitute for the above, beginning at the †: the plaintiff be barred of his right to a specific performance of said contract; and that the contract be given up to be cancelled; and that the defendant recover of plaintiff his costs of this action to be taxed.*⁵]

1741. — *against purchaser:* [*As in preceding Form to the *, substituting "plaintiff" for "defendant," and "defendant" for "plaintiff," and continuing:*] 2 That if the defendant refuse to receive said deed, the plaintiff file the same with the clerk of this court.⁶

3. That upon such delivery or filing of said conveyance, the defendant pay to the plaintiff or his attorney dollars, [the residue of] the purchase-money named in the contract set forth in the complaint, with interest from the day of , 18 , ⁷ and the sum of dollars costs of this action; and that plaintiff have execution therefor.

¹ Bostwick v. Beach, 103 N. Y., 414.

² Anthony v. Crippen, 24 Weekly Dig., 86.

³ The following provisions for compelling plaintiff to perform, are sanctioned by Clark v. Hall, 7 Paige, 382; s. r., with provision for treble damages for injuries, Lazarus v. Heilman, 11 Abb. N. C., 93.

If pending the action plaintiff's title has divested by legal proceedings, the judgment for specific performance should recite such fact, and, in place of decreeing a specific performance, should decree a compensation in damages. Pitt v. Davison, 12 Abb. Pr., 385. Compare Parkhurst v. Van Cortlandt, 1 Johns. Ch., 273; Stevenson v. Buxton, 8 Abb. Pr., 414; 15 id., 352.

⁴ Benedict v. Benedict, 85 N. Y., 625; aff'g 9 Weekly Dig., 123; Price v. Palmer, 23 Hun, 504.

⁵ See Fitzpatrick v. Dorland, 27 Hun, 291.

⁶ Abatement, if any, may be provided for as in preceding Form. If plaintiff has collected rents and prof-

its which should be allowed to defendant, a clause may be inserted directing that "the said referee is also to take an account of the rents and profits of the above-described premises which may have come to the hands of the plaintiff, or any person for his use, and to make all just deductions therefrom, and what shall be found upon such account to be justly allowable to the defendant, shall be deducted from the amount found due for principal and interest of said purchase-money."

Where such an account is decreed, the judgment should not be made final until after report.

⁷ This provision is sanctioned by Lowber v. Mayor, &c., of N. Y., 5 Abb. Pr., 484; s. c., 26 Barb., 262, or a provision may be inserted, that if the purchaser will not accept the conveyance and pay the purchase-money, the premises may, on the vendor's application, be sold to raise such purchase-money, with the costs, and the purchaser may be ordered to pay any deficiency. Clark v. Hall, 7 Paige, 382. And if a purchaser in possession having obtained a decree

1742. *WILL: judgment establishing lost will:*¹ *after recitals:*] It is adjudged, that the plaintiff A. B. is the widow of C. B., deceased, late of the town of _____, county of _____, and State of _____.

That said C. B. died in _____, on the _____ day of _____, 18 _____.

That prior to his death, and in the month of _____, 18 _____, he made and published his last will and testament, which was [in substance] as follows [insert copy, or if lost, state substance].

That said will was by the said C. B. declared to be his last will and testament, and was duly subscribed, acknowledged, published and declared in presence of two subscribing witnesses.

That said will was in existence and unrevoked at the time of the testator's death, and was seen as late as the _____ day of _____ last.

That during the time of the riots in July last the said will was lost; and that although careful and diligent search has been made for it, it has not been found, and it is lost and cannot be found.

That the provisions of the said will were clearly and distinctly proved by two witnesses.

And this court doth further adjudge and decree, that the said will is established and proved as a lost will, and that the plaintiff have and receive letters testamentary thereon from the surrogate of the county of _____.

for a specific performance, declines to take advantage of it, he may be required to account for rents during his occupancy, without any allowance for his payments upon the contract. *Clark v. Hale, Clarke*, 349.

¹ *Bowen v. Idley*, 6 *Paige*, 46; *Matter of Roberts*, 8 *id.*, 446; *Sheridan v. Houghton*, 6 *Abb. N. C.*, 234; *aff'd* in 84 *N. Y.*, 643, except as to costs; *N. Y. Code Civ. Pro.*, § 1862.

ARTICLE VIII.

PROCEEDINGS IN PECULIAR ACTIONS.

SECTION I. DIVORCE.	SECTION IV. FORECLOSURE.
II. DOWER.	V. PARTITION.
III. EJECTMENT.	VI. REDEMPTION.

SECTION I.

DIVORCE.

FORMS.	(1753.) Report of referee in divorce.
(1743.) Notice of application for divorce.	(1754.) Notice of motion (or order to show cause) to confirm referee's report, &c.
(1744.) Affidavit to proceedings.	(1755.) Order for judgment on referee's report.
(1745.) — denying cohabitation.	(1756–1768.) Statements of relief suitable to insert in judgments for divorce.
(1746.) — of continued lunacy.	(1769.) Petition to modify divorce by giving leave to marry again.
(1747.) — denying collusion, &c.	(1770.) Order thereon.
(1748.) Order of reference before judgment after default.	(1771.) Petition to revoke final judgment of separation.
(1749.) — — — to try issues.	
(1750.) — for jury trial of issues in divorce.	
(1751.) Petition of alleged paramour for leave to intervene.	
(1752.) Order thereon.	

Form No. 1743.

Notice of application for divorce, on failure to answer, after appearing.

[*Follow Form 1456, ending with the words, "for the relief demanded in the complaint;"—or substitute for those words,—"for the entry of the annexed proposed judgment,"—and annex draft.*]

Form No. 1744.

Affidavit to proceedings in divorce to apply for judgment or reference.¹

[*Title of court and action.*]

[*Venue.*]

A. T., being duly sworn, says :

¹ *N. Y. Code Civ. Pro.*, §§ 1214, 1774 (applicable to all matrimonial actions).

I. That he is the [managing clerk of] plaintiff's attorney herein.

II. That this action is brought for a divorce on account of adultery [*or, for a separation or limited divorce on the ground of cruelty, or state other cause—or, to annul a marriage on account of, here designate briefly the ground, and if brought by leave, or if a guardian ad litem was appointed for plaintiff, allege the facts; see p. 752, par. 2*].

III. That the summons herein, and a copy of the complaint [*or, the summons and inscriptions thereon, copies of which are hereto annexed*] were duly personally served on defendant within this State more than twenty days since, as appears by the annexed affidavit of M. N.¹ [*or, state service in detail if made by deponent; see Vol. I, pp. 627–630*].

[*Or, if service was by publication, state it as in pars. II–IV, on p. 757, of this Vol.*]

[*If summons was served alone or by publication, add:*] The copy of the summons served on defendant [*or, as so published—or, as so delivered to defendant without the State*] contained legibly written or printed upon the face thereof the inscription indicated upon the copy summons hereto annexed, as appears by said affidavits.

IV. *If defendant has not appeared*: That said defendant has failed to appear or plead, although his [*or, her*] time to do so has expired.

[*Or if he has appeared and failed to answer:*] That defendant appeared herein on the day of , 18 , [and a copy of the complaint was duly served on said defendant on the day of , 18 , pursuant to demand therefor], but he [*or, she*] has failed to plead herein, and his [*or, her*] time to plead has expired.

[*If defendant was an infant, allege appointment of guardian ad litem:* and that more than twenty days since then have expired.²]

[*If defendant was arrested, state also:* and that the arrest of the defendant herein was made on the day of , 18 , more than twenty days past.³]

[V. That defendant has not demanded notice of the execution of any order of reference herein.]

VI. That no previous application for a reference in this cause has been made [except, &c.; see p. 2].

[*Jurat.*]

[*Signature.*]

¹ Shetzler v. Shetzler, 2 Edw., 584.

² N. Y. Code Civ. Pro., § 1218.

³ Id., § 566. Appearance does not

dispense with proof of service. N. Y. Gen. Rules, No. 73, of 1888.

Form No. 1745.

Affidavit denying cohabitation in action to annul marriage.¹

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says :

I. That he [*or, she*] is the plaintiff above named * [*or, she* is the wife on whose behalf the above-entitled action is brought].

[*Where nonage is the ground of action.*] II. That this deponent and the defendant Y. Z. have not freely cohabited as husband and wife at any time since deponent attained the age of years,² which age deponent attained on the day of , 18 .

[*Or where force or fraud in effecting marriage is the ground.*] II. That there has been no voluntary cohabitation between the deponent and the defendant as man and wife at any time [since the discovery by the deponent of the fraud alleged in the complaint—*or, since the deponent acquired a full knowledge of the facts constituting the fraud; if such discovery is relied on, then, as a qualification, the particulars should be stated*].

[*Or where lunacy is the ground.*] II. That the parties have not cohabited as husband and wife at any time since the day of , 18 , since which day the deponent was restored to reason.

[*Jurat.*]

[*Signature.*]

Form No. 1746.

Affidavit of continued lunacy in action to annul marriage.³

[*Title of court and action.*]

[*Venue.*]

M. N., of , being duly sworn, says :

¹ Required by *N. Y. Gen. Rule No. 74, of 1888*.

² At common law, at the ages of fourteen and twelve respectively; but by *N. Y. Code Civ. Pro.*, § 1742, as amended in 1887 (*L., c. 22*), the woman may sue if she had not attained the age of sixteen and there was no lawful consent of parents or guardian, &c., and in this case consummation and ratification must each be negatived.

³ Required to obtain order of ref-

erence in action to dissolve marriage for lunacy of plaintiff, by *N. Y. Gen. Rule No. 74, of 1888*. Or may show when plaintiff was restored to reason, and produce plaintiff's affidavit "that this deponent and the defendant Y. Z. have not cohabited as husband and wife since the said was restored to his [*or, her*] reason." *N. Y. Gen. Rule No. 74, of 1888*. But the present statute says "freely cohabited." *N. Y. Code Civ. Pro.*, § 1747.

I. That he is personally acquainted with A. B., above named, the plaintiff herein [*or, on whose behalf this action for a divorce is brought*], and has attended said A. B. for months past as his [*or, her*] physician [*or otherwise relate qualifications as expert*].

II. That he examined said A. B. this day, and finds that he [*or, she*] continues to be, and in deponent's opinion he [*or, she*] has been, ever since the year _____, a lunatic.

[*Jurat.*]

[*Signature.*]

Form No. 1747.

Affidavit denying collusion, &c., in case of adultery.¹

[*As in Form 1745, to the **] II. That the adultery charged in the complaint herein was committed without the consent, connivance, privity, or procurement of deponent. That five years have not elapsed since the plaintiff discovered the fact that such adultery had been committed, and that deponent has not voluntarily cohabited with the defendant since such discovery [*and if defendant was living in adulterous intercourse with the alleged paramour*: and that five years have not elapsed since the commencement of the adulterous intercourse with M., alleged in the complaint, was discovered by deponent].

Form No. 1748.

Order of reference before judgment after default.²

At a special term [*&c., as in Form 493, p. 4*].
[*Title of action.*]

On reading and filing due proof by the affidavit of A. T., verified the _____ day of _____, 18____, that the summons and complaint herein have been duly served on the defendant more than twenty days since, and that no [appearance] and no demurrer, and no answer [denying any allegation of the com-

¹ Required by *N. Y. Gen. Rules*, No. 73, of 1888, unless contained in a verified complaint, might be dispensed with where the adultery is that resulting from another marriage. *Borradaile v. Borradaile*, 1 *Edw.*, 40.

² *N. Y. Code Civ. Pro.*, § 1216. *N.*

Y. Gen. Rules, No 77, of 1888. For a notice of motion and order of reference in cases of physical incapacity, see 2 *Am. L. Reg.*, N. S., 219; *Edwards on Ref.*, 562-3; *Devanbagh v. Devanbagh*, 5 *Paige*, 554.

plaint] has been put in : and, also, upon reading and filing the affidavit of the plaintiff, verified the day of , 18 , denying cohabitation [*or, collusion—or both, &c.*], now, on motion of M. N., and on proof of due notice to the defendant, no one appearing in opposition [*or, and after hearing O. P. for said defendant*] :

ORDERED, that it is hereby referred to R. F., Esq., of , to take proof of the cause of action and facts set forth in the complaint, and of the other matters required by the rules¹ and practice of the court [*and if desired, add: and as to the service of the summons and complaint, and the identity of the person served*²] and to report thereon to this court [with his opinion].

[*If defendant has demanded notice of execution of reference, may add:*] That at least five days' notice of the hearing under this order before said referee be served upon the defendant's attorney [*or, defendant—or, defendant's agent*³].

Enter : [*signature of judge by initials of name and title.*]

Form No. 1749.

Order of reference to try issues.⁴

At a special term [*&c., see Form 493, p. 4.*]
[*Title of action.*]

On reading the pleadings herein, and on reading and filing the affidavit of A. T., verified the day of , 18 , [*if adultery is in issue, add:*] and the written consent⁵ of the parties hereto [*continuing with recitals according to the proceedings ; see p. 5*].

ORDERED, that this action and the issues herein be and the same are hereby referred to R. F., Esq., of , to

¹ *N. Y. Gen. Rules Nos. 73 and 74, of 1888.*

² *Id.*, No. 18.

³ The statute entitles to this notice even if the order omit to direct it. *N. Y. Code Civ. Pro.*, § 1219, subd. 2. Defendant may then appear and cross-examine, &c. *Perry v. Perry*, 2 *Barb. Ch.*, 285.

⁴ On the question of adultery jury trial is of right. *Conderman v. Conderman*, 44 *Hun*, 181; and see *Mor-*

rell v. Morrell, 17 *id.*, 324; *N. Y. Code Civ. Pro.*, § 1753. But upon the parties' consent a reference may, in the discretion of the court, be granted, but if granted the court must designate the referee. *N. Y. Code Civ. Pro.*, § 1012.

⁵ Consent to reference as in Form 1689, except that instead of naming referee, say: "to a referee to be designated by the court." *N. Y. Code Civ. Pro.*, § 1012.

hear and determine,¹ and that he report the evidence² and the other proceedings upon the reference to the court [with his opinion] with all convenient speed.

Enter: [*signature of judge by initials of name and title.*]

[*Motion for jury trial of issues; see Forms 1569-1604.*³]

Form No. 1750.

Order for jury trial of issues in divorce, where previous motion therefor had been denied.⁴

At a special term [*&c., as in Form 493, p. 4, of this Vol.*]

[*Title of action.*]

This cause having been called in its regular order on the calendar, and the trial thereof moved before the court, without a jury [and the proofs of both parties having been produced and the evidence closed, and the cause submitted to the court for decision, on the day of , 18 ; and the court on such trial being under the impression that a motion had theretofore been made to send the issues therein to a jury for trial, and that it had been heard upon its merits and denied: Now, on learning that such motion was not heard upon its merits, but was denied upon the technical ground that it was not made within the time required by the rules of the court; and it appearing satisfactorily to the court that certain questions of fact involved in the issues in this action should be tried by a jury, it is on the court's own motion⁵]:

ORDERED, that the following specific questions of fact involved in the issues in this action be tried by a jury at a circuit

¹ *N. Y. Code Civ. Pro.*, § 1229; *Uhlmann v. Uhlmann*, 17 *Abb. N. C.*, 236, 262; *Anon.*, 3 *id.*, 161; *McCleary v. McCleary*, 30 *Hun*, 154, and *cas. cit.*; *Sullivan v. Sullivan*, 41 *Super. Ct. (J. & S.)*, 519.

This includes incidental questions required by the rules and practice of the court to be determined. *Myers v. Myers*, 41 *Barb.*, 114.

² *N. Y. Code Civ. Pro.*, § 1229.

³ The motion in divorce for adultery need not be made within ten days after issue joined. *Conderman v. Conderman*, 44 *Hun*, 181.

In an action to annul a marriage, unless it is founded on an allegation of physical incapacity, either party

has a right to have issues settled for jury trial. *N. Y. Code Civ. Pro.*, § 1753; but this right appears to rest on the statute, and to secure it as a matter of right application should be made within ten days; but the court have discretionary power to grant it afterward.

If jury trial of any issue is required, an issue taken on matter in bar (*N. Y. General Rule No. 75, of 1888*), or on a question of legitimacy (*id.*, No. 76), must be tried in the same manner and at the same time.

⁴ Sustained in *Brinkley v. Brinkley*, 56 *N. Y.*, 192.

⁵ *N. Y. Code Civ. Pro.*, § 971.

to be held in the county court house in the city of New York, on the day of , 18 , or as soon thereafter as the same may be tried. [*For another Form see 1596, &c.*]

First. Was the plaintiff at the time of the commencement of this action an actual resident of the State of New York? [*And so on. May state which party has the affirmative.*]

And all further questions and directions are reserved until after the trial of such issues.¹

[AND IT IS FURTHER ORDERED, that the defendant be privileged from arrest under any process in this action, except to enforce the payment of alimony which may have accrued up to the time of the trial, while coming to the place of trial, remaining there and returning therefrom, this privilege to extend also to one day before the trial and one day after the same.]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1751.

Petition of alleged paramour for leave to intervene.²

[*Title of court and action.*]

To the Court of .

The petition of M. N. respectfully shows :

I. That your petitioner resides in , and is acquainted with the parties to this action.

II. That she is informed and believes that this action is brought by the plaintiff against the defendant for the purpose of obtaining a divorce or dissolution of the marriage bonds existing between the parties herein, on the ground of certain alleged acts of adultery committed by the defendant. Your petitioner has read the complaint in this action, which she is informed is on file in this court, and to her amazement she learns that the plaintiff in this action charges that the defendant, on the day of , 18 , at , and at various other times and places, committed adultery with your petition-

¹ Galusha v. Galusha, 43 Hun, 181. Where all the issues in the complaint are referred, the order may strike out and direct the disregarding of any allegation not sufficiently definite to allow the admission of proofs. Burr v. Burr, 2 Edw., 448.

² This Form and the next are sustained by Clay v. Clay, 21 Hun, 609, from the proceedings in which they are modified according to that decision. Compare Quigley v. Quigley, 45 Hun, 23; Tilby v. Hayes, 27 id., 251.

er—and on which charges of alleged adultery with your petitioner, and with your petitioner only, this action⁴ is brought.

III. Your petitioner denies, in the most solemn and sacred manner, that she did, at _____, on the _____ day of _____, 18____, or at any other time or in any place whatever, commit adultery with the said defendant, or that at any time or place or under any circumstances, she had any improper or illicit relations with the said defendant, or that she had any relations whatever with said defendant at any time or under any circumstances, except such as were and are wholly consistent with pure womanly dignity and chastity; she therefore repels this vile and filthy charge which the plaintiff in her complaint makes upon the character of your petitioner, who is not a party to the action, and says that such charge is an infamous falsehood and without any shadow of foundation.

IV. [*Here should follow allegations meeting and traversing the charges in detail, sufficiently to show that plaintiff's application is in good faith, and that petitioner will be able to give evidence in support thereof.*]

V. Your petitioner further sheweth, that she is sorely distressed in body and in mind at the false, slanderous and atrocious charges made against her and her character in the complaint herein, based on said affidavits, and that she has not in this action her day in court that she may adequately meet such charges and defend her good name and character, which she has always sustained, from these foul and wicked aspersions, and she therefore feels that great injustice would be done her in not permitting her to show the entire falsehood of such charges.

WHEREFORE your petitioner prays, that an order may be made and entered herein [*continue as in next Form, from the **, adding: and for such other and further relief as may be just].

[*Date.*]

[*Signature.*]

[*Verification as in Form 494.*]

[*Annex affidavit as to the condition of the cause; and, if order to show cause is asked, state as on p. 2.*]

Form No. 1752.

Order allowing alleged paramour to take part on the trial.

[*Title (court order) and recitals; see Form 493, p. 4.*]

ORDERED, that the prayer of the petitioner be granted; *

that notice be given to the counsel for the petitioner of all proceedings to take testimony in the action; that said petitioner [name] be allowed to be present and cross-examine the witnesses produced, and that she be called and sworn as a witness, and be permitted to give her testimony, and that such witnesses as she may name be summoned and examined.

Form No. 1753.

Report of referee in divorce.

[See Form 1700. Whether the reference be to hear and determine, or merely to take proof on default; state, if such examination is required by the rules,¹ that the plaintiff was examined specially under oath before the referee as to the facts of continued cohabitation, time of discovery, continued lunacy, collusion, &c., stated in the finding; also, if required by the order of reference, that the person making service of the summons, &c., was so examined, and due service proved.]

[Also state: that the testimony taken before the referee has been subscribed by the witnesses, and the same and the exhibits, if any, (or copies) are annexed to and filed with the report.]

Form No. 1754.

Notice of motion (or order to show cause) to confirm report of referee and for judgment of divorce.²

[As in Form 1456, p. 751, to the *: for a final hearing of this cause, and for the confirmation of the report of R. F., the referee, filed herein, the day of , 18 , and for judgment for the relief demanded in the complaint [or may say: and for the entry of the judgment, a draft of which is herewith served upon you], with costs, and for such other [&c.].

¹ May be sometimes dispensed with. *Burgess v. Burgess*, 52 *Super. Ct. (J. & S.)*, 545.

² This is not a mere motion to confirm report, but in substance a notice

of trial or hearing. See *Westheimer v. Westheimer*, 1 *Monthly L. Bul.*, 34; *Sparrowhawk v. Sparrowhawk*, 11 *Hun*, 528.

Form No. 1755.

Order for judgment on report of referee.

At a special term [*or*, trial term—*or*, circuit court, &c. ; see Form 493, p. 4].

[*Title of action.*]

This cause coming on regularly to be heard upon the order herein, entered the day of , 18 , and the report of the referee thereby appointed, which was filed the day of , 18 ; [*if defendant appeared in the cause, but not on this hearing, add:* and due notice of plaintiff's application for final hearing and judgment having been given to defendant¹] and satisfactory evidence having been produced to the court on the part of the plaintiff, proving the material allegations of the complaint² [*in divorce for adultery, add:* and showing also that there is no judgment or decree of any court of the State of competent jurisdiction against plaintiff in favor of defendant for a divorce upon the ground of adultery³—*continue with recital of appearances and motion, &c.*].

ORDERED, that said report be confirmed, and that judgment be entered in conformity therewith [*or may state terms of judgment; see Forms 1756–1768, below*].

[*Or if judgment be denied:*⁴] ORDERED, that said application to confirm said report and for judgment thereon be and the same is hereby denied on the ground that [*stating it as thus:* the facts proved in relation to the adultery are not sufficient to justify the court in finding or assuming that the adultery charged had been committed, and that such evidence does not satisfy the rule of law which requires such proof to be of the most full and explicit character].

STATEMENTS OF RELIEF SUITABLE TO INSERT IN JUDGMENTS FOR DIVORCE.

1756. *Original nullity of marriage:*] That the alleged marriage between the plaintiff and the said defendant, the ceremony or supposed contracting of which took place on the day of , 18 at , was, and is,

¹ *N. Y. Code Civ. Pro.*, § 1219.

² *Id.*, §§ 1216, 1762–7.

³ *Id.*, § 1757.

⁴ Sustained by *Merrill v. Merrill*, 11 *Abb. Pr.*, *N. S.*, 74; *Moore v. Moore*, 14 *Weekly Dig.*, 255. But in

such case the court cannot direct judgment for defendant. *Uhlmann v. Uhlmann*, 17 *Abb. N. C.*, 236; *Rice v. Rice*, 22 *Weekly Dig.*, 258. Except in case of default to plead. *Merrill v. Merrill* (*above*).

void, and that the same be, and it hereby is declared annulled, and that said defendant was not, at the time of the commencement of this action, the [wife] of the said plaintiff [*state ground unless already recited or adjudged*].

1757. *Nullity from date of judgment* :] that the marriage mentioned in the complaint herein, entered into between the plaintiff and the defendant [*naming them respectively*], is wholly null and void from the date of this judgment, upon the ground of [*here designate the cause of divorce as in the statute*].

[*Where the ground was a previous marriage, but the rights of children are saved under the statute,¹ add:*] And it appearing to the court that the marriage hereby annulled was contracted on the part of _____ in good faith, and with the full belief that the former husband of said wife [*or, wife of said husband*] was dead [*or, and without any knowledge on the part of said _____ of said former marriage*], it is further ADJUDGED and declared so to have been, and that the issue of said marriage hereby annulled, heretofore born or begotten, to wit, C. B. and D. B. are for all purposes legitimate,² and shall be entitled to succeed in the same manner as legitimate children to the real and personal estate of said [*designate the parent who at the time of the marriage was competent to contract*]; and that said [*name*] is entitled to the custody of said children and to appoint a testamentary guardian for them.

[*Where the ground of dissolution was lunacy or idiocy, and there are children, substitute for the foregoing paragraph :*]

And it is further ADJUDGED, that C. B. and D. B., children of said marriage, are entitled to succeed to the real and personal estate [*designating parent who was of sound mind*].

[*For direction as to custody of child, see Form 1761, below.*]

1758. *Dissolution of marriage for adultery* :] that the marriage between the said plaintiff, A. B., and the defendant, Z. B., be dissolved, and the same is hereby dissolved accordingly; and the said parties are, and each of them is, freed from the obligations thereof.

That it shall be lawful for the said A. B., the plaintiff [to resume her maiden—*or, former*—name of A. M., and] to marry again, in the same manner as if the said Z. B., the defendant, was actually dead; but it shall not be lawful for the said Z. B., the defendant, to marry any other person³ until the said plaintiff shall be actually dead.

1759. *Legitimacy or illegitimacy of child* :⁴] that C. B., the child of the defendant, Z. B., is not the issue of said marriage of the parties hereto, nor the child of said plaintiff [*or, is the lawful issue of said plaintiff and defendant in said marriage*].

1760. *Separation or limited divorce* :] that the plaintiff, A. B. (who is and has been since the _____ day of _____, 18____, the lawful wife of the defendant, Z. B.), be and is hereby forever separated from said defendant, his bed and board, upon the ground that [*concisely indicating it*], provided, however, that the parties hereto may at any time hereafter by their joint petition apply to this court to have this judgment modified or discharged.

It is further ORDERED and ADJUDGED, that neither of said parties is at liberty to marry any other person during the life of the other party.

1761. *Custody of child* :⁵] that the custody of C. B., the child of said mar-

¹ The judgment is not conclusive except as against the parties, and those claiming under them, unless both parties were living at the date of pronouncing judgment. *N. Y. Code Civ. Pro.*, § 1754.

² For another Form see 1759.

³ *N. Y. Code Civ. Pro.*, § 1761.

⁴ *N. Y. Code Civ. Pro.*, §§ 1745, 1760. For another Form see 1757.

⁵ See Forms 1757 and 955; *Erkenbrach v. Erkenbrach*, 96 *N. Y.*, 456; *Washburn v. Catlin*, 97 *id.* 623; *Matter of Ensign*, 103 *N. Y.*, 284; *s. c.*, 4 *Centr. Rep.*, 376; *Campbell v. Campbell*, 37 *Wisc.*, 206; *Hockheimer Cus-*

riage, is hereby awarded to said [designating innocent parent]; [but such child shall not be removed from _____ without leave of court;—and said defendant shall, until the further order of the court, be permitted to see said child, at _____, for the space of _____, between the hours of _____ and _____, on _____ of each week.]

1762. *Wife's separate property*¹ protected:] that the clothing and wearing apparel of the plaintiff, and ornaments of her person, and all goods and personal effects which have been left with the plaintiff by the defendant, and all goods, property and effects which have been acquired by the plaintiff, by her own industry, since the _____ day of _____, 18____, and all goods, lands, tenements, effects and property which she may have acquired by gift, grant, devise, bequest or otherwise, or to which she may be or become entitled by the decease of any relative intestate, shall be her sole and separate estate and property.

1763. *Permanent alimony*.:] that the said defendant² pay to the said plaintiff the sum of _____ dollars per annum, from the date of this judgment, in equal semi-annual payments [or, in monthly payments of _____ dollars per month], for the support and maintenance of said plaintiff during her natural life⁴ [or, until she shall again marry; ⁵—may provide for payment, as thus:] said sums to be paid on the _____ day of [each month], at the _____ bank, in _____, to the credit of the plaintiff [or, at _____, into the hands of or upon the order of said plaintiff, or her attorney of record in this action], such payment not to be in lieu of her right of dower⁶ in the defendant's real estate or interest in his personal estate in case of his death intestate. [Security, see Form 1767, below.]

1764. *Support of child*.:] that said [designating the other parent] do pay

tody of Infants, 183; *Holt v. Holt*, 19 *Centr. L. J.*, 24; *Crimmins v. Crimmins*, 28 *Hun.*, 200; *Welch v. Welch*, 33 *Wisc.*, 534; *N. Y. Code Civ. Pro.*, §§ 1745–51, 1759, 1766, 1769, 1771.

¹ See *Delafield v. Brady*, 108 *N. Y.*, 524; *N. Y. Code Civ. Pro.*, §§ 1759–62. Unnecessary under present New York statutes, unless, perhaps, where the marriage was contracted before the Married Women's Act.

² A fresh provision is necessary in the judgment. *Gardner v. Gardner*, 87 *N. Y.*, 14; *Erkenbrach v. Erkenbrach*, 96 *id.*, 456.

This will sustain an action in another State. *Anon.*, 12 *Abb. N. C.*, 160.

The court may award a gross sum. *Burrows v. Purple*, 107 *Mass.*, 428; *s. p.*, *Brick v. Brick*, (*Mich.*, 1887) 10 *Western Rep.*, 572.

Retrospective allowance of expenses, *pendente lite*, is not proper, unless necessary for future proceedings. *Beadleston v. Beadleston*, 103 *N. Y.*, 402; *s. c.*, 4 *Centr. Rep.*, 537; *Wagner v. Wagner*, 34 *Minn.*, 441; *s. c.*, 26 *Northwestern Rep.*, 450.

The right to dispose by will of any arrears unpaid may be given. *Burr*

v. Burr, 7 *Hill*, 207; *aff'g* 10 *Paige*, 20.

³ The estate or heir of defendant will not be charged unless express words to that effect are inserted. *Lennahan v. O'Keeffe*, 107 *Ill.*, 620; *abst. s. c.*, 12 *Am. L. Rec.*, 560; *s. p.*, *Field v. Field*, 15 *Abb. N. C.*, 434. Whether it can be so charged, compare *Galusha v. Galusha*, 43 *Hun.*, 181.

⁴ This is the usual form. Compare *Deweese v. Dewees*, 55 *Miss.*, 315, holding that the provision should be for alimony until a dissolution of the marriage by the death of either party, not "during the natural life of wife."

⁵ Compare *Shepherd v. Shepherd*, 1 *Hun.*, 240; *s. c.*, 3 *Supm. Ct. (T. & C.)*, 715; *Stillman v. Stillman*, 99 *Ill.*, 196; *s. c.*, 24 *Abb. L. J.*, 68; 39 *Am. R.*, 21; *Olney v. Watts*, 43 *Ohio*, 499; *s. c.*, 3 *Northeastern Rep.*, 354.

⁶ *Forest v. Forest*, 6 *Duer*, 102; *s. c.*, 3 *Abb. Pr.*, 144; *N. Y. Code Civ. Pro.*, §§ 1759–63.

If there has been a separation agreement, declare in the judgment whether it is superseded or not. *Galusha v. Galusha*, 43 *Hun.*, 181.

⁷ See *N. Y. Code Civ. Pro.*, §§ 1751, 1759, 1766, 1769.

the said [*innocent parent*] the annual sum of _____ dollars, in equal semi-annual payments, for the education and maintenance of said C. B. so long as he shall live, and until he attains the age of twenty-one years [*may direct payment as in 1763*].

1765. *Execution* :] that the plaintiff may, from time to time, have execution for the collection of said costs, and the moneys ordered to be paid for support and maintenance [and education] as aforesaid.

1766. *Another method* :] that from time to time, as any sum or sums of money shall become payable by the terms of this order and judgment, the said plaintiff, upon the allowance of any justice of this court, to be made on presenting and filing an affidavit that such sum or sums have not been paid, after _____ days may have an order entered as of course on the foot of this order and judgment, that an execution issue, in such form as said justice may direct, against the defendant, Z. B., for the sum or sums so unpaid, with interest thereon, from the time the same became payable.

1767. *Security for alimony*,¹ &c. :] that the said defendant give security to the clerk of this court [or, of the county of _____], to be approved by one of the justices of this court, for the payment of the allowance for support and maintenance [and education] hereinbefore awarded.

1768. *Leave to apply for further directions* :² that in case the said plaintiff, A. B., shall survive the said defendant, Z. B., or any other event shall occur, materially changing the circumstances of the said parties, or either of them, an application may be made on the foot of this judgment, by any party in interest, for such modification of the said judgment, touching the said allowance for support, as may be just.

Form No. 1769.

Petition to modify divorce by giving leave to marry again.³

[*Name of*] Court.

In the Matter of the Petition of
Z. B. to Modify the Judgment
of Divorce between A. B.,
Plaintiff, and Z. B., Defendant.

To the Court of :

¹ See *N. Y. Code Civ. Pro.*, § 1772.

As to enforcing payment by proceedings for contempt, see *Park v. Park*, 80 *N. Y.*, 156; *Pritchard v. Pritchard*, 4 *Abb. N. C.*, 298; *Ryckman v. Ryckman*, 20 *Weekly Dig.*, 129.

As to charging on specific property, see *Holmes v. Holmes*, 29 *N. J. Eq.*, 9; *Carpenter v. Osborne*, 102 *N. Y.*, 552; s. c., 7 *Northeastern Rep.*, 823.

Whether security is discharged by death, compare *Miller v. Miller*, 64 *Me.*, 484, and note.

² *Forest v. Forest*, 3 *Abb. Pr.*, 144; *Kamp v. Kamp*, 59 *N. Y.*, 212; rev'g

37 *Super. Ct. (J. & S.)*, 241; *Sammis v. Medbury*, 14 *R. I.*, 214; *Kerr v. Kerr*, 9 *Daly*, 517.

Compare *Halstead v. Halstead*, 5 *Duer*, 659; *Forrest v. Forrest*, 3 *Bosw.*, 661; s. c., 9 *Abb. Pr.*, 289; *Olney v. Watts*, 43 *Ohio*, 499; s. c., 3 *Northeastern Rep.*, 354; *Semrow v. Semrow*, 23 *Minn.*, 214; *Blake v. Blake*, 68 *Wis.*, 303; s. c., 32 *Northwestern Rep.*, 48, and cas. cit.; *Mildeberger v. Mildeberger*, 12 *Daly*, 195.

³ This and the following Form are from *Greene's Case*, 8 *Abb. N. C.*, 450. Affidavits of witnesses to the ap-

The petition of Z. B. respectfully shows :

I. That on the day of , 18 , he was married to the said plaintiff A. B.

II. That on or about the day of , 18 , said plaintiff commenced this action for an absolute divorce against your petitioner, and on the day of , 18 , a judgment of divorce was duly rendered therein by this court against your petitioner, and in favor of the plaintiff A. B., dissolving the said marriage between them, and it was further adjudged, that it should be lawful for the said plaintiff A. B. to marry again, as though your petitioner were actually dead, but it should not be lawful for your petitioner to marry again until the said plaintiff should be actually dead ; as appears by the certified copy of the judgment-roll hereto annexed.

III. That the said plaintiff A. B. has married again, as appears by the affidavits hereto annexed ; and that five years have elapsed since the decree of divorce was granted.

IV. That since the dissolution of the said marriage your petitioner has resided at , and his conduct has been uniformly good [*annex affidavits of witnesses*].

V. That no previous application for an order such as is asked below has been made.

WHEREFORE, your petitioner prays that the judgment of divorce rendered by this court on the day of , 18 , dissolving the marriage between the said plaintiff A. B. and your petitioner, be modified so that it shall be lawful for your petitioner to marry again as though the said A. B. were dead.

[*Signature of*], Petitioner.

[*Date*].

[*Signature and office address of*],

Counsel for Petitioner.

[*Verification as in Form 494.*]

Form No. 1770.

Order allowing defendant in divorce leave to marry again.

At a special term [*dec.*; see *Form*
493, p. 4].

[*Title of action.*]

In the Matter of [*dec.*, as in last *Form*].

plicant's good conduct should be annexed. *Waas v. Waas*, 5 *Monthly L. Bul.*, 59. For the New York statute see *N. Y. Code Civ. Pro.*, § 1761; *L.* 1879, p. 231, c. 164; p. 405, c. 321; 3 *R. S.*, 6th ed., 157, § 62 (49); and note in 8 *Abb. N. C.*, 171.

On reading [*and if not already filed, add: and filing*] the petition of the above-named Z. B., verified the day of , 18 , filed the day of , 18 , and the affidavit of M. N., verified the day of , 18 [*and if reference has been had, add: and the report of R. F., the referee to whom said petition was referred, and which was filed herein the day of , 18 —and if exceptions were filed: and the exceptions thereto filed on behalf of A. B. the day of , 18 ,*] and the court being satisfied thereby that the said A. B., now A. M., has married again, and that five years have elapsed since the judgment of divorce herein was granted, and that since the dissolution of the said marriage the conduct of the said petitioner has been uniformly good; and after hearing Z. T., of counsel for said petitioner, and A. T., of counsel for plaintiff in opposition, and due deliberation being had; Now, on motion of Z. T., attorney for said petitioner:

It is ORDERED AND ADJUDGED, [that said exceptions are overruled, and said report is hereby confirmed, and] that the judgment of divorce entered herein on the day of , 18 , be modified so that it shall be lawful for the said petitioner Z. B. to marry again, in the same manner as though the said A. B., now A. M., were actually dead.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1771.

Petition to revoke final judgment of separation.

[*Title of court and action.*]

To the Court of :

The joint petition of the above-named plaintiff and defendant respectfully shows:

I. That final judgment for a limited divorce and separation between the petitioners was entered in this action on the day of , 18 , in the office of the clerk of the county of .

II. That your petitioners have since become reconciled to each other, and desire to end the separation and to resume their marital relations, and to have said judgment revoked [*may state evidence, and grounds for any special directions desired*].

WHEREFORE, your petitioners pray that, by an order of this court, the said judgment may be declared revoked, pursuant to the statute, and that it be cancelled and discharged of record.

[*Date.*]

[*Signatures.*]

[*Verification by both petitioners; see Form 494.*]

SECTION II.

PROCEEDINGS PECULIAR TO DOWER.

FORMS.

- | | |
|--|---|
| (1772.) Order of reference. | (1778.) Order confirming report. |
| (1773.) Order for interlocutory judgment to admeasure dower. | (1779.) Final judgment admeasuring dower. |
| (1774.) Interlocutory judgment to admeasure dower. | (1780.) Consent of widow to accept gross sum. |
| (1775.) Oath of referee or commissioner. | (1781.) Notice of motion (or order to show cause) for leave to pay widow, &c. |
| (1776.) Report of referee or commissioners admeasuring dower. | (1782.) Interlocutory judgment for sale to pay dower. |
| (1777.) Notice of motion (or order to show cause) to confirm report. | (1783.) Order for final judgment upon sale to pay dower. |

Form No. 1772.

Order of reference, before interlocutory judgment for dower.¹

[*Title (court order) and recitals, according to the proceedings; see next Form and Nos. 1470, 1621.*]

ORDERED, that it be referred to R. F., Esq., of _____, as referee :

1. To take proof of the plaintiff's title and interest in and to the premises in the said complaint mentioned, and of the several matters set forth in said complaint [*and if a sale is sought, may add:* and to ascertain and report what share or part of said premises belongs to each of the parties to this suit, so far as the same can be ascertained, and the nature and extent of their respective rights and interests therein, and an abstract of the conveyances by which the same are held].²

[*Where sale is sought:*] 2. That said referee inquire and report whether a distinct parcel of the property can be admeasured and laid off to the plaintiff as tenant in dower, without material injury to the interests of the parties.³ And if the said referee concludes that the sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary, and in such case that he also ascertain and report whether any person has a lien upon the property or any part thereof which it is necessary to sell.⁴

Enter : [*signature of judge by initials of name and title.*]

¹ Or may refer the issues to hear and determine. Compare *O'Dougherty v. Remington Paper Co.*, 42 *Hun*, 192; and *Brown v. Brown*, 4 *Robt.*, 688; s. c., 31 *How. Pr.*, 481.

² This inquiry may be postponed till confirming the sale. *N. Y. Code Civ. Pro.*, § 1624.

³ *Id.*, § 1619.

⁴ *Id.*, § 1621.

Form No. 1773.

Order for interlocutory judgment (after hearing by the court) to admeasure dower.¹

At a circuit court [or, special term—&c., as in Form 493, p. 4].

[Title of action.]

[Recite service of summons, or, as to adults voluntary appearance; and appointment of guardian ad litem for any infants and trial of issues, according to the mode;—if on default to appear or plead, after appropriate recitals say: and the court having heard the allegations and proof of the plaintiff²—concluding recitals as in other cases.]

ORDERED, that an interlocutory judgment be entered herein which shall direct as follows [take in directions in next Form].

Enter: [signature of judge by initials of name and title.]

Form No. 1774.

Interlocutory judgment to admeasure dower.³

[Title of court and action. Recitals as in preceding Form, adding: and the court having heard the allegations and proofs of the parties, and directed judgment as follows:]

IT IS ADJUDGED, 1. That said [plaintiff] is entitled to dower in the real property of her late husband [naming him], which is hereinafter particularly described.

2. That said dower be admeasured by R. F., Esq., of , as referee [or, M. N., O. P. and Q. R., of , three reputable and disinterested freeholders,⁴ hereby appointed commissioners to make such admeasurement].⁵

[Where it is apprehended that sale may be necessary, may add: If it is not practicable, or if, in the opinion of such referee, it is not for the best interests of all the parties concerned, to admeasure and lay off to the plaintiff a distinct parcel of the property as above described, that he report that

¹ N. Y. Code Civ. Pro., §§ 1607, 1617.

² Dwyer v. Dwyer, 13 Abb. Pr., N. S., 269.

³ N. Y. Code Civ. Pro., § 1607. As to what is interlocutory, see Raynor v. Raynor, 94 N. Y., 248.

⁴ James v. Fields, 5 Heisk. (Tenn.), 394.

⁵ As to preference of lands not conveyed with warranty, see Price v. Price, 41 Hun, 486, and cases cited.

fact to this court, with the reasons for that opinion, and all the facts relating thereto.]

3. That said referee report his [*or*, commissioners report their] proceedings to the court on the day of next [*or*, with all convenient speed].

[*If damages are awarded:*] 4. That it is hereby referred to R. F., Esq., of , to [take an account of the rents and profits from the said property for the six years last past, and ascertain who has received the same, and to ascertain the plaintiff's share thereof, and to] ascertain the damages which plaintiff is entitled to recover for the withholding of her dower [*may state which rule of computation; see N. Y. Code Civ. Pro., §§ 1600, 1601*], and report with all convenient speed.

5. [*May direct as to costs, in final judgment, and on what property to be charged.*] The property above mentioned is bounded and described as follows: [*full description.*]

[*Authentication by clerk.*]

Form No. 1775.

Oath of referee or commissioner, in dower.¹

[*Title of court and action.*]

[*Venue.*]

R. F., the referee [*or*, M. N., O. P. and Q. R., commissioners], appointed to admeasure dower herein, by an interlocutory judgment dated the day of , 18 , being duly sworn [each for himself], says: that he will faithfully, honestly and impartially discharge the trust reposed in him [*if by a referee, directed to determine any other question, or to hear and determine the issues,*² *add*], and will faithfully and fairly [try the issues and] determine the questions referred to him, and make a just and true report according to the best of his understanding.

[*Jurat.*]

[*Signature.*]

[*File with the clerk before commencing duty.*]

Form No. 1776.

Report of referee or commissioners admeasuring dower.³

[*Title of court and action.*]

To the Court of [*or*, to Hon. J. K., county judge of county of].

The undersigned R. F., the referee [*or*, M. N., O. P. and

¹ *N. Y. Code Civ. Pro., § 1608.*

² *Id.*, § 1015.

³ *Id.*, § 1610.

Q. R., the commissioners—*or*, M. N. and O. P., a majority of the commissioners] appointed by an interlocutory judgment herein, dated the day of , 18 , to admeasure the plaintiff's dower in the property therein described, respectfully report :

I. Before entering upon my duties I took and filed the oath prescribed by law.

[Or if the report is by commissioners:]

I. The undersigned [*or*, said M. N. and O. P., together with Q. R., also a commissioner appointed by said interlocutory judgment] met together in the performance of all their duties under said judgment; and before entering upon their duties took and filed the oath prescribed by law.

II. On the day of , 18 , I appeared [*or*, we met] on the premises described in the said interlocutory judgment, at the ; and A. B. by his attorney A. T., and Y. Z. by his guardian G. H., then and there appeared before me [*or*, us—*or annex and refer to proof of notice to appear*].

III. Thereupon I [*or*, we] caused a survey of the premises described in said interlocutory judgment, to be made in the presence of said parties, a map of which is hereto annexed, and marked Exhibit A.

IV. I [*or*, we] thereupon admeasured and laid off as dower of the plaintiff a distinct parcel containing the one-third part of the said premises, being the part designated on said map by the word "Dower," which said parcel is bounded and described as follows: [*description by posts, stones, or other permanent monuments.*] In making said admeasurement, I [*or*, we] took into consideration all permanent improvements made upon the premises in the judgment described, after the death of the plaintiff's husband, or after alienation thereof by him, and those improvements I [*or*, we] awarded [so far as practicable] within the part not laid off as above to the plaintiff [and for such of said permanent improvements as could not practically be so awarded I [*or*, we] made a deduction from the part which otherwise would have been laid off to the plaintiff, of acres, which, in my [*or*, our] judgment, is a deduction proportionate to the benefit which she will derive from so much of those improvements as is included in the part laid off to her.

[Or if not practicable, or not for the best interests of the parties to lay off a distinct parcel, state the reasons for that opinion, and all the facts relating thereto. See Forms in Partition.]

V. The items of my [*or*, our] charges herein are :

[Ten] days' service of the referee at \$6 per day¹ [or, of each commissioner, at \$5 per day]² \$——
 Cash paid to R. S., surveyor, for days actually and necessarily occupied in surveying, laying out, marking and mapping the premises, at \$5 per day, ———
 Cash paid S. S. and T. S., assistants employed as chain and flag bearers, days each, actually and necessarily occupied in surveying under said surveyor's direction, at \$2 per day each ———
 Traveling expenses of ———
 Fees for administering oath or affirmation to .. ———

The testimony taken by us in reference to the said permanent improvements, signed by the witnesses [and the documentary evidence], is hereto annexed.

[Date.]

[Signatures.]

[Acknowledgment or proof; see Form 495.]

[File with clerk.]

Form No. 1777.

Notice of motion (or order to show cause) to confirm report admeasuring dower.

[*Move the court; see Forms 488, 491, for an order:*] confirming the report of R. F., referee [or, of M. N., O. P. and Q. R., commissioners], appointed by the interlocutory judgment herein to admeasure the plaintiff's dower in the premises therein mentioned, and overruling the exceptions thereto, and for such other [etc.].

Form No. 1778.

Order confirming report admeasuring dower.

At a circuit court [or, special term—etc.; see Form 493, p. 4].

[Title of action.]

On reading and filing the report of R. F., the referee [or, M. N., O. P. and Q. R., commissioners] appointed to admeasure plaintiff's dower herein, filed the day of , 18 [and on proof of due service of notice of this motion on attorney for Y. Z.], and on motion of A. T., attorney for said

¹ N. Y. Code Civ. Pro., § 3296.

² Id., § 3299.

plaintiff, and after hearing for the defendant Y. Z. [*or*,
no one appearing] in opposition :

ORDERED, that said report [and admeasurement] be, and the same is, in all respects confirmed; and that the fees and expenses of the referee [*or*, commissioners] are taxed at dollars [*or*, be taxed by the clerk on notice to]; and that final judgment may be entered accordingly [on days' notice of settlement].

Enter : [*signature of judge by initials of name and title.*]

Form No. 1779.

Final judgment admeasuring dower,¹ or fixing annual charge therefor.¹

[*Title of court and action.*]

[*Recitals according to the mode of trial, or default, &c., continuing as thus:*] And the report of the referee [*or*, commissioners] appointed by an interlocutory judgment duly made and entered herein on the day of , 18 , having been filed on the day of , 18 , whereby it appears that the property mentioned in the complaint has been surveyed and a map annexed to said report as a part thereof,² and that a distinct parcel thereof, hereinafter described, has been duly admeasured and laid off to the plaintiff as her dower [*if damages have been recovered or reported, recite the fact*], and the costs of the plaintiff having been duly adjusted at dollars; Now, after hearing A. T., of counsel for plaintiff, and T. Z., of counsel [*or*, and on proof of due notice of said report and this application for judgment, and no one appearing] for defendant in opposition, and on motion of A. T., attorney for plaintiff:

IT IS ADJUDGED, 1. That said report and admeasurement stand confirmed.

2. That the premises hereinafter described have been and are admeasured and laid off to the plaintiff, for her dower as the widow of , and she is hereby awarded possession of the same during her natural life,³ subject to the payment of all

¹ N. Y. Code Civ. Pro., § 1613. As to judgment for an annual sum when admeasurement cannot be made, see *McIntyre v. Clark*, 43 Hun, 352.

made. *James v. Fields*, 5 Heisk. (Tenn.), 394.

² *Agnew v. Lichten*, (Ill., 1887) 8 Western Rep., 344; *Fisher v. Clements* (Va., 1887); s. c., 11 Va. Law Journal, 372.

³ Such a map should always be

taxes, assessments and other charges accruing thereupon after she takes possession.¹ Said premises hereby awarded are bounded and described as follows: [*full description.*]

[*Or if it has been reported not practicable, or not for the interests of all the parties, to admeasure and lay off a distinct parcel, specify sum to be paid.*²]

3. That the plaintiff do recover from the defendant [*naming him if one of several*³—*if damages are awarded*: the sum of dollars damages for withholding her dower, with] dollars costs⁴ of this action [amounting together to dollars].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1780.

Consent of widow to accept gross sum.⁵

[*As in partition, Form 1837 or 1838, except that if it be desired that the value shall not be fixed except by sale, substitute in last line, for "ascertained pursuant to law," the words "ascertained after sale pursuant to law."*]

Form No. 1781.

Notice of motion (or order to show cause) for leave to pay widow a gross sum.⁶

[*Title and recitals (motion before the court) as in other cases; see Forms 488 and 491, pp. 1 and 3 of this Vol., stating relief, as thus:*] for an order [*or, why an order should not be made*]

¹ As to exception in case of mortgage assumed by husband's grantee, see *Bartlett v. Musliner*, 28 *Hun*, 235.

² *N. Y. Code Civ. Pro.*, § 1613.

³ *Reeves v. Reeves*, 54 *Ill.*, 332.

⁴ As to when costs are discretionary, compare *McKeen v. Fish*, 33 *Hun*, 28; *Everson v. McMullen*, 45 *id.*, 578.

⁵ File before interlocutory judgment on default, or before commencement of trial; and serve copy with notice of filing on each adverse party who has appeared or who appears after filing. *N. Y. Code Civ. Pro.*, § 1617.

Not applicable where the estate is not for life, but for widowhood only. *Scheu v. Lehning*, 31 *Hun*, 183. But

compare *Bond v. McNiff*, 38 *Super. Ct. (J. & S.)*, 83, as to tenancy during minority of another person.

For effect of widow's death after consent, see *Fulton v. Fulton*, 8 *Abb. N. C.*, 210; *McKeen v. Fish*, 33 *Hun*, 28.

⁶ *N. Y. Code Civ. Pro.*, § 1618. An order granting this motion will terminate plaintiff's case. The affidavit will state the object of action and the proceedings, including filing of *lis pendens*, sufficiently to show that application for sale is not premature, and the fact of consent annexing copy, and, unless reference is to be had, evidence of age of widow, on which the court can compute the sum.

granting this defendant leave, in case a sale of said premises be directed, to pay to plaintiff a gross sum to be ascertained pursuant to law under said consent, in full satisfaction and discharge of her dower right claimed in this action, and for such other and further relief as may be just.

Form No. 1782.

Interlocutory judgment¹ for sale to pay dower.

[Title and recitals, as in other cases; reciting also that plaintiff's consent to accept a gross sum in lieu of dower to be ascertained (after sale), pursuant to law, has been filed; and that the referee has reported that a distinct parcel of the property cannot be admeasured and laid off to the plaintiff without material injury to the interest of the parties; and that the referee has reported as to liens.]

It is ADJUDGED, 1. That said report stand confirmed.

2. That the plaintiff, as widow of C. B., is entitled to dower in the premises hereinafter described.

3. *[May recite title as thus:]* That W. Z. and Y. Z., children of C. B., deceased, mentioned in said complaint and report, are seized of said premises, with the appurtenances, as tenants in common, subject to the dower aforesaid [and also subject to have their estate and interest in said premises divested by the execution of the power of sale in the will of the said C. B., deceased, to carry out the trusts in the said will mentioned].

4. That the said children of the said C. B. are each seized of one undivided part thereof, subject as aforesaid.

[5. That the executors, upon the sale of said premises and the payment of costs and expenses of sale and satisfaction of dower, are entitled to receive the whole residue of the proceeds of said sale for the purposes of the trusts created in and by said will.]

[As to direction for sale,² see Partition, Form 1840.]

6. That upon the confirmation of the sale so to be made, each party to the action and every person deriving title from, through or under a party after the filing of the judgment-roll in

¹ *N. Y. Code Civ. Pro.*, §§ 1619-1622. The order for interlocutory judgment may be adapted from this and Form 1773. Final judgment will confirm the

sale and direct as to distribution of proceeds. § 1624.

² As to direction concerning a prior lien, if any, see *N. Y. Code Civ. Pro.*, § 1622.

[*or*, of the notice of the pendency of] this action, be barred of and from any right, title or interest in or to the property sold.

7. The premises so to be sold are bounded and described as follows: [*full description.*]

[*Report of sale by referee; see Chapter XVI.*]

Form No. 1783.

Order for final judgment upon sale to pay dower.

At a special term [*or*, circuit—
&c.; see Form 493, p. 4].

[*Title of action.*]

This cause having been regularly brought on for final hearing and judgment upon the pleadings, interlocutory judgment and report of sale by R. F., the referee [*or*, sheriff], pursuant thereto, filed the day of , 18 [*and recite any other papers used*—and on reading and filing proof of due notice of this application given to Z. T., attorney for defendant], and after hearing A. T., of counsel for plaintiff, and Z. T. [*or*, no one appearing], for defendant in opposition, and due deliberation being had; Now, on motion of A. T., attorney for plaintiff:

IT IS ORDERED AND ADJUDGED, 1. That said report be and the same hereby is confirmed.

2. That the said referee [*or*, sheriff] pay and distribute said proceeds of sale as follows: [*direct in detail.*]

3. That each party to this action, and every person deriving title from, through or under a party after the filing of the judgment-roll [*or*, after the filing of the notice of the pendency of this action hereinbefore mentioned], be and hereby is barred of and from all estate, right, title or interest in or to the property sold.

SECTION III

PROCEEDINGS PECULIAR TO EJECTMENT, &c.

FORMS.

- (1784.) Affidavit to move for new trial in ejectment.
(1785.) Order thereon.

- (1786.) Entry of verdict in an action for land (ejectment).
(1787.) Judgment in ejectment.
(1788.) The same—where plaintiff's title expired before trial.

Form No. 1784.

Affidavit to move for new trial in ejectment.¹

[Title of court and action.]

[Venue.]

Y. Z., being duly sworn, says:

I. That he is the defendant² above named.

II. That this action is ejectment for [*here briefly designate the premises*], but is not founded on a right of entry for non-payment of rent, nor an allegation of rent in arrear.³ And this defendant was personally served with the summons within the State [*or, appeared*] and answered.⁴

III. *State mode of trial, &c., as thus:*] That the issues raised by said answer were tried [at circuit] in the county of _____, on the _____ day of _____, 18____, before Mr. Justice J. K. and a jury; and a verdict rendered for _____, upon which judgment in this action was first entered⁵ in the office of _____, on the _____ day of _____, 18____. Said judgment was against deponent, and the judgment-roll was filed in said office on the _____ day of _____, and within [three] years past.

IV. That all costs and damages included in said judgment have been paid to plaintiff.

[*Or, if unpaid, state as thus:*] IV. That said judgment included _____ dollars costs; but no damages for withholding the premises other than the value of rents and profits or use and occupation [except the sum of _____ dollars], which costs [*or, which damages and costs, amounting together to _____ dollars*] deponent is ready and willing to pay on obtaining a new trial.⁶

V. That no previous application for a new trial herein has

¹ Not applicable in an equitable or statutory action to test the validity of a will. *Marvin v. Marvin*, 11 *Abb. Pr.*, N. S., 102; s. P., *Truitt v. Truitt*, 37 *Ind.*, 514 (specific performance or creditor's action); *Over v. Moss*, 41 *id.*, 463 (summary proceedings).

The first application, being matter of right, is *ex parte*. *Whitlock v. Vancleave*, 39 *Ind.*, 511. On the second, give notice. *N. Y. Code Civ. Pro.*, §§ 1525, 1526. If practicable, serve the party. See Vol. I, p. 409, &c. The order may still, as formerly, be made before judgment. *Post v. Moran*, 61 *How. Pr.*, 122.

² If heir, devisee or assignee, state the fact, and when and how he became such. See *Howell v. Leavitt*, 90 *N. Y.*, 238.

³ Compare *Christie v. Bloomingdale*, 18 *How. Pr.*, 12, with *N. Y. Code Civ. Pro.*, §§ 1525, 1528.

⁴ *N. Y. Code Civ. Pro.*, §§ 1528, 445.

⁵ *Chautauqua Co. Bk. v. White*, 23 *N. Y.*, 347.

⁶ This is a strict condition. *Davidson v. Lamprey*, 16 *Minn.*, 445; *Setzke v. Setzke*, 121 *Ill.*, 30; s. c., 11 *North-eastern Rep.*, 915.

been made [*or if made, state what, and if previous application was granted, state facts showing that justice will be promoted and the rights of the parties more satisfactorily ascertained and established by a second new trial*].¹

[*Jurat.*]

[*Signature.*]

Form No. 1785.

Order for new trial in ejectment.

[*Title (court order) and recitals according to the case.*]

ORDERED, that the judgment herein, entered in the office of the clerk of _____, be and the same is hereby vacated [*or, the judgment to be entered herein shall be vacated at any time within three years from the _____ day of _____, 18 _____*], and the motion for a new trial, as of course under the statute, be granted, upon the payment by Y. Z. to the plaintiff [*or, his attorney—unless made before judgment, add: within _____ days after the date of this order*], of the sum of _____ dollars, being all the costs and all damages, other than for rents and profits or for use and occupation, awarded by said judgment, together with interest thereon from the _____ day of _____, 18 _____, until such payment.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1786.

Entry of verdict in an action for land (ejectment).

This action being brought to trial before a jury, they find a verdict upon all the issues of fact in favor of the plaintiff, for the premises claimed in the complaint² [*or if for a part only, describe the land; or, for one equal undivided half of the premises, &c.*], to hold in fee [*or otherwise, specifying the nature of the tenure*]; [*if damages are awarded, add:*] and they assess the damages which the plaintiff is entitled to re-

¹ *Phyfe v. Masterson*, 45 *Super. Ct. (J. & S.)*, 338.

² Under the Florida statute, requiring the verdict to state the quantity of the estate, and describe the land by metes, bounds, and number of lot, or other certain description, judgment was reversed for omission to do so in

Pensacola Ice Co. v. Perry, 120 *U. S.*, 318.

If the verdict is excessive, plaintiff may remit as to part, as in case of a money judgment. *Keen v. Schnedler*, 6 *West. Rep.*, 851.

³ *N. Y. Code Civ. Pro.*, § 1519; *Reformed Ch. v. Schoolcraft*, 65 *N. Y.*, 134; *rev'd* 5 *Lans.*, 206.

cover from the defendant Y. Z., by reason of the withholding of the same, at dollars [*if recovery was by reason of non-payment of rent, add: and they find that the amount of rent in arrears to the plaintiff is dollars*¹].

Form No. 1787.

Judgment in ejectment (or equitable action for real property).

[*Title and recitals. See other Forms.*]

IT IS ADJUDGED that plaintiff² [*or in case of an intervenor,*³ the defendant W. X.] is, and at and before the commencement of this action was, the owner in fee [*or, for his own life—or, for the life of M. N. of , —or, possessed of a term of years from the day of , 18*], in the hereinafter described premises [*or, of an undivided share in the hereinafter described premises*], and is entitled to recover possession thereof from the defendant Y. Z., together with dollars⁴ [*or, and to recover dollars from the defendant W. X.*] as damages⁵ for the withholding thereof, together with dollars, his costs⁶ of this action, amounting in all to dollars. The premises above mentioned are bounded and described as follows: [*full description,*⁷ *mentioning any existing qualifications, such as easements, &c.*]

[*The description should be adequate to enable the sheriff to identify the premises without reference to other papers.*]

¹ *N. Y. Code Civ. Pro.*, § 1507.

² *N. Y. Code Civ. Pro.*, §§ 1519, 1524; *Koon v. Nichols*, 63 *Ill.*, 163.

³ *Donner v. Palmer*, 45 *Cal.*, 180.

⁴ In the absence of statute this award of possession is, in itself, without the preceding declaration of title, sufficient as establishing the title in issue in the pleadings. *Cagger v. Lansing*, 64 *N. Y.*, 417.

The old form included an award of a writ of possession, but this it is no longer necessary to insert, for the statute gives execution.

⁵ This includes rents and profits and use and occupation, if any are recoverable. *N. Y. Code Civ. Pro.*, §§ 1497, 1531. Compare *Wallace v. Berdell*, 101 *N. Y.*, 13. If there is a deduction for improvements it should be

made from this sum before entry of the judgment. *Scott v. Reese*, 38 *Wisc.*, 636. See *Clute v. Emmerich*, 26 *Hun.*, 10; *Smith v. Robertson*, 89 *N. Y.*, 555.

⁶ Costs are of right if the action was triable by jury as of right. *N. Y. Code Civ. Pro.*, § 3228. If the action was equitable they are discretionary. *Law v. McDonald*, 9 *Hun.*, 23.

⁷ Metes and bounds are not always essential. A description by name, where the property is well known, may in some cases be sufficient. *Glacier Mountain Silver Mining Co. v. Willis*, 127 *U. S.*, 471. As to description of unexpired term, see *Carroll v. Carroll*, 16 *How. U. S.*, 275.

Form No. 1788.

The same—where plaintiff's title expired before trial.¹

IT IS ADJUDGED that plaintiff recover of the defendant dollars damages for the withholding of the premises described in the complaint prior to the day of , when the plaintiff's title expired, and dollars costs of this action, amounting in all to dollars. And as to possession of said premises:

IT IS ADJUDGED, that the defendant go without day.

SECTION IV.

PROCEEDINGS PECULIAR TO FORECLOSURE.

FORMS.

- | | |
|--|---|
| (1789.) Judgment for foreclosure and sale. | (1799.) Certificate by clerk to the appearances and claims. |
| (1790-1795.) Statements suitable to insert in foregoing Form. | (1800.) Order of reference of claims. |
| (1796.) Notice of claim to surplus in foreclosure. | (1801.) Report of referee. |
| (1797.) Affidavit to move for reference. | (1802.) Notice of motion for payment out of surplus. |
| (1798.) Notice of motion (or order to show cause) for reference. | (1803.) Order (final) as to surplus. |
| | (1804.) Request to clerk to docket judgment for deficiency. |

Form No. 1789.

Judgment for foreclosure and sale.²

[*Title of court and action, naming all the parties.*]

Upon the summons and complaint [and answer] duly filed

¹ *N. Y. Code Civ. Pro.*, § 1520, formerly 2 *N. Y. R. S.*, 308, § 31. This applies wherever plaintiff's title ceases to exist before trial, by its own limitation, or otherwise. And it is not necessary to file a supplemental answer to enable defendant to avail himself of this provision. *Lang v. Wilbraham*, 2 *Duer*, 171.

² If entered on default, an order for judgment will be made with substantially the same recitals as in this Form, except, of course, the recital that an order for judgment has been made.

If rendered on a trial of issues, a decision by the judge or report by

the referee will be made, stating the findings of fact and law and directing judgment. In each case, where there is nothing special in the judgment, it is usual to state the conclusion of law and direction in these words: "That the plaintiff is entitled to the usual judgment of foreclosure and sale of the said mortgaged premises, with judgment for deficiency, if any there shall be, against the defendant W. X. And I direct judgment accordingly, with costs to the plaintiff."

For recitals of judgment on decision after trial of the issues, see Form 1621.

in this action, and on reading [and if not already filed, add: and filing] the affidavit of M. N., verified the day of 18 , and notices of appearance showing that each and all of the defendants herein [except Y. Z.] have been duly personally served with the summons in this action within this State, or have voluntarily appeared therein [and, if any are excepted, state service by publication or substitution; see Form 1621]. And on reading and filing the affidavit of A. T., attorney for the plaintiff, verified the day of , 18 , showing that more than twenty days have elapsed since said defendants were so served and appeared, and their time to answer has expired and no demurrer or answer has been put in [except the answer of the defendant U. V., who is an infant, and whose answer by his guardian does not deny any material allegation of the complaint]; and showing that the summons and complaint in this action, and due notice of the pendency of this action, were duly filed in the office of the clerk of the county of , on the day of , 18 ;* and an order of reference having been made to compute the amount due to the plaintiff upon the bond and mortgage set forth in the complaint [and if any of defendants are infants, having put in general answer, or are absentees, add: and to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments made, and which ought to be credited on said bond and mortgage], † and on reading and filing the report of the referee named in the order of reference, by which report, bearing date the day of , 18 , it appears that dollars was due thereon at the date of said report. ‡ Now, on motion of O. P., attorney for the plaintiff:

IT IS ADJUDGED, that [the report of said referee be and the same is hereby confirmed, and that] the mortgaged premises described in the complaint in this action as hereinafter set forth,¹ or so much thereof as may be sufficient² to raise the

¹ The premises and the interest to be sold, if a partial interest, should be described or designated. *Kibbe v. Thompson*, 5 Biss., 226; *Hurt v. Crane*, 36 Md., 29; *Cromwell v. Hull*, 97 N. Y., 209.

The judgment should contain a description without relying on a mere reference to the description in the pleadings. *Pumphrey v. Rafferty*, (Mch. 5, 1884) 5 Ky. L. Rep. & J., 772, 773; *N. Y. Gen. Rules*, No. 61,

of 1884. That this is not essential. See, *contra*, *Barger v. Buckland*, 28 Gratt. (Va.), 850.

If a party desires an easement or other claim superior to the mortgage protected, he should ask to have the decree framed accordingly. *Rector, &c., of Christ Church v. Mack*, 93 N. Y., 488; rev'g 25 Hun, 418.

² *Kirby v. Childs*, 10 Kans., 639 (holding omission of this qualification not ground of reversal).

amount so found and reported due¹ to the plaintiff² for principal, interest, and costs, together with the expenses of sale [and if taxes, insurance, &c., are recovered, may add: taxes, assessments, insurance premiums, and interest thereon³], and which may be sold separately⁴ without material injury to the parties interested, be sold by public auction, in _____, in the county of _____, by or under the direction of the sheriff of said _____ county [or, by or under the direction of R. F., who is hereby appointed referee for that purpose]; that the said sheriff [or, referee] give public notice of the time and place of such sale, according to law, and the practice of this court;⁵ that the plaintiff or any other party to this action may become a purchaser on such sale;⁶ that the said sheriff [or, referee] execute to the purchaser or purchasers a deed or deeds of the premises sold; || that out of the proceeds of the sale, after deducting the amount of his fees and expenses⁷ on such sale, and any lien or liens upon said premises so sold,⁸ at the time of

¹ In order to constitute a final judgment or decree, the sum due must be found. *Burlington, &c., Co. v. Simmons*, 123 *U. S.*, 52, and *cas. cit.*; *Tompkins v. Wiltberger*, 56 *Ill.*, 385.

As to sums falling due pending the suit, see *Howe v. Lemon*, 37 *Mich.*, 164.

² That the court may in a proper case apportion the amount between several plaintiffs, see *Gorham v. Farson*, 119 *Ill.*, 425; *s. c.*, 8 *West. Rep.*, 697.

³ *Sidenberg v. Ely*, 11 *Abb. N. C.*, 354; *s. c.*, 90 *N. Y.*, 257.

⁴ Where the rights of the defendants are not set out in the pleadings, and the plaintiff's right to foreclose is not questioned, the court cannot, upon the answer of one defendant, and without notice to others who own other parcels, settle the order of sale. *Rathbone v. Clark*, 9 *Paige*, 648; *s. r.*, *N. Y. Life Ins. & Trust Co. v. Cutler*, 3 *Sandf. Ch.*, 176.

⁵ Directions as to order of sale the court have power to give in the judgment. The usual course is either to direct the sale to be in the inverse order of alienation and according to equity, as between the parties (see Form 1795); or to appoint a referee to sell, and he may apply the rules of equity; or to order a reference to determine the equitable order for selling. *Erie County Bk. v. Roop*, 80 *N. Y.*, 591; *Zabriskie v. Salter*, 80 *id.*,

555; *Coles v. Appleby*, 87 *id.*, 114; *Bernhardt v. Lymburner*, 85 *id.*, 172; *Bowne v. Lynde*, 91 *id.*, 92; *Kirby v. Childs*, 10 *Kan.*, 639; *Knickerbacker v. Eggleston*, 3 *How. Pr.*, 130; *Winans v. James*, 11 *Rep.*, 586.

⁶ This usual clause does not protect a trustee who purchases for his own benefit. *Fulton v. Whitney*, 66 *N. Y.*, 548; *aff'g* 5 *Hun.*, 16. See, also, *N. Y. Code Civ. Pro.*, § 1679; and *James v. Cowing*, 83 *N. Y.*, 449; *rev'g* 17 *Hun.*, 256.

For form of direction, allowing sale on credit, see *Brush v. Shuster*, 3 *Abb. N. C.*, 73.

⁷ By *N. Y. Code Civ. Pro.*, § 1676, this phrase includes taxes, assessments, &c.

⁸ Judgment in foreclosure must specify all the liens, if any, prior to the mortgage, which the referee is to provide for. *Bache v. Doscher*, 67 *N. Y.*, 429; *aff'g* 41 *Super. Ct. (J. & S.)*, 150. Compare, as to testing such liens, *Friedrich v. Brewster*, 26 *Hun.*, 236; *Simms v. Voght*, 94 *N. Y.*, 654; *Browning v. O'Connell*, 4 *Month. L. Bul.*, 9. That the judgment may also provide for payment of insurance premiums until sale, see *Northwestern Mut. Life Ins. Co. v. Drown*, 51 *Wis.*, 419; *s. c.*, 10 *Ins. Law J.*, 377.

Correction of error in these directions must be sought before sale. *Fleishhauer v. Doellner*, 9 *Abb. N. C.*, 372.

such sale, for taxes or assessments, he pay to the plaintiff or his attorney, the sum of dollars adjudged to the plaintiff for costs and charges in this action, with interest from the date hereof; and, also, the amount so reported due § as aforesaid, together with the legal interest thereon, from the date of the said report; or so much thereof as the purchase-money of the mortgaged premises will pay of the same; and that he take a receipt of the plaintiff or his attorney for the amount so paid, and file the same with his report of sale; and that the purchaser or purchasers at such sale be let into possession¹ of the premises on production of the deed [and a certified copy of the order confirming the report of sale²]. That the said sheriff [*or, referee*] deposit the surplus money (if any) within five days after the same shall be received and be ascertainable, [*in the city of New York, say: with the chamberlain of the said city; and in other counties, say: with the treasurer of said county, subject to the further order of the court,*³ and take a receipt therefor, and file the same with his report;⁴ that he make a report of such sale, and file it with the clerk of this court with all convenient speed.

And it is further ADJUDGED, that if the proceeds of such sale be insufficient to pay the amount so reported due § to the plaintiff, with the interest and costs as aforesaid, the said sheriff [*or, referee*] specify the amount of such deficiency in his report of sale; and that the defendant Y. Z. pay the same

As to waiver of the enforcement of this provision, see *Mutual Life Ins. Co. v. Sage*, 28 *Hun*, 595; 41 *id.*, 535.

¹ *Stimson v. Arnold*, 5 *Abb. N. C.*, 377; *Murphy v. Abbott*, (June, 1883) 16 *Chicago Legal News*, 68; *Sheehan v. Mayer*, 41 *Hun*, 609; *Myers v. Manny*, 63 *Ill.*, 211.

Under this clause, without any direction as to rents and profits meanwhile, the owner of the equity of redemption continues entitled thereto up to the time of delivery of deed (*Mitchell v. Bartlett*, 51 *N. Y.*, 447; *Gilman v. Illinois, &c., Tel. Co.*, 91 *U. S.* (1 *Otto*), 603), if no receiver has been appointed (*Nealis v. Bussing*, 9 *Daly*, 305); but subject to apportionment under the statute. *Matter of Eddy*, 10 *Abb. N. C.*, 396.

² The words in brackets are usual, but the direction prescribed by the rule of court contemplates possession on production of the deed.

The usual form of decrees as to this point was that the purchaser or

purchasers of said mortgaged premises at such sale be let into possession of such parts thereof as shall be purchased by them respectively, and that any of the parties in this action who may be in possession of said premises, or any part thereof, which may be sold, and any person who, since the commencement of this action, has come into possession of them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the sheriff's deed for such premises, and a certified copy of the order confirming the report of such sale, after such order has become absolute.

³ For direction, on foreclosure after owner's death, to pay to the surrogate, under *N. Y. L.*, 1867, c. 658. *N. Y. Code Civ. Pro.*, § 2798, see *White v. Poillon*, 25 *Hun*, 69.

⁴ For these directions as to the sale, see *N. Y. Gen. Rules*, No. 61, of 1888; but the court may specially direct otherwise.

to the plaintiff, with interest from the date of such report;¹ and that plaintiff have execution therefor.²

¶ And it is further ADJUDGED, that the defendants, and all persons claiming under them, or any or either of them, after the filing of the aforesaid notice of pendency of this action, be forever barred and foreclosed³ of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof.

The following is a description and the particular boundaries of the premises to be sold, as hereinbefore directed: [*insert description*.⁴]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1790. *Where part only is due, and the premises can be sold in parcels*; ⁵ as in last Form on p. 931, substituting for the words between the † and ‡: and also to ascertain the situation of said mortgaged premises, and whether the same can be sold in parcels without injury to the interests of the parties; and if such referee would be of the opinion that the premises cannot be sold in parcels without injury to the interests of the parties, then that he report his reasons for such opinion.

On reading and filing said report, from which it appears that there was actually due to the said plaintiff, at the date of said report, for said principal and interest, the sum of dollars, and the whole amount secured by and unpaid upon said bond and mortgage, with interest thereon, to the date of said report, is the sum of dollars; and that said premises can be sold in

¹ Sustained by *Springsteene v. Gillett*, 30 *Hun*, 262; *McCarthy v. Graham*, 8 *Paige*, 480.

The power to give judgment over for deficiency is purely statutory. *Dunkley v. Van Buren*, 3 *Johns. Ch.*, 330; 2 *N. Y. R. S.*, 191, § 152; *N. Y. Code Civ. Pro.*, § 1627.

² Where the judgment is in this form, and there proves to be a deficiency, no application to the court is necessary, either for confirmation of the report or for leave to issue execution. *Bicknell v. Byrnes*, 23 *How. Pr.*, 486; *Moore v. Shaw*, 15 *Hun*, 428.

The court is not bound to make the decree over for deficiency, but in doubtful cases often leaves the complainant to sue for his deficiency. *Withers v. Morrell*, 3 *Edw.*, 560; *North American Fire Ins. Co. v. Handy*, 2 *Sandf. Ch.*, 492.

It was held, in *Rhodes v. Evans, Clarke*, 169, that where one of two joint mortgagors dies before bill filed

there cannot be a decree over against his heirs, or personal representatives for a deficiency, because such decree was authorized only when the balance was recoverable at law.

Express award of execution is usual, and is proper (*Leary v. Leary*, 68 *Wisc.*, 662; s. c., 32 *Northw. Rep.*, 623), but not essential, because the statute gives the right to issue execution on a money judgment.

³ As to the effect of this, see *Hefner v. Northwestern Mut. Life Ins. Co.*, 123 *U. S.*, 747; *Simmons v. Taylor*, 23 *Fed. Rep.*, 849. The declaration of foreclosure properly follows, instead of precedes, the direction for sale. *Short v. Nooner*, 16 *Kan.*, 220.

⁴ See note 1, p. 931.

⁵ *N. Y. Code Civ. Pro.*, § 1613; *Skelton v. Ward*, 51 *Ind.*, 46; *Smith v. Osborn*, 33 *Mich.*, 410; *Wisner v. Chamberlin*, 117 *Ill.*, 368; s. c., 7 *Northeast. Rep.*, 68.

parcels without injury to the interests of the parties [*here add, briefly, reasons controlling the order of sale if any are stated in the report*].

[*And insert at the ¶ on p. 934 :*]

And it is further ADJUDGED, that said plaintiff be at liberty at any time hereafter, as any installment of principal or interest shall become due on said bond and mortgage, to apply to this court on the foot of this judgment for a further judgment [*or, to apply to the aforesaid referee, who is hereby continued referee for that purpose, on the foot of this judgment, and procure a report of the amount which shall then be due, to the end, that on the coming in and confirmation of such report a judgment may be made*], for a sale of the residue of said premises not sold under this judgment, to satisfy the amount which shall then be due, with interest, and the costs of such [report and] sale.

And in case said premises shall all be sold under this judgment to satisfy the amount now actually due, with interest and costs, it is then further ORDERED, that the said plaintiff be at liberty at any time thereafter, when any future installment of principal or interest shall fall due upon said bond and mortgage, to apply to this court for an execution against said defendant Y. Z., who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall then be due, with interest and the costs of such application.

1791. *Where part only is due, but the whole property is to be sold; as in Form 1789, substituting for the words between the † and the ‡ on p. 931:]* and also to ascertain the situation of said mortgaged premises, and whether the same can be sold in parcels without injury to the interests of the parties; and if such referee would be of the opinion that the premises cannot be sold in parcels without injury to the interests of the parties, then that he report his reasons for such opinion. On reading and filing said report, from which it appears that there was actually due to the said plaintiff, at the date of said report, for said principal and interest, the sum of dollars, and the whole amount secured by and unpaid upon said bond and mortgage, with interest thereon, to the date of said report, is the sum of dollars; and that said premises cannot be sold in parcels without injury to the interests of the parties:

[*And substituting at each § on p. 939, in place of the word "due," the words:]* "to be secured by and unpaid upon said bond and mortgage."

[*And insert at the end, immediately before the last paragraph, which gives description of the premises, the following:]*

And in case the amount reported as actually due, with interest and the costs of this action, shall be paid before such sale, it is further ADJUDGED, that said plaintiff be at liberty, at any time hereafter when any principal sum or interest secured by said bond and mortgage shall become due, according to the condition of the said bond, to apply to the court on the foot of this judgment for a further judgment [*or, to apply to the aforesaid referee, who is hereby continued referee for that purpose, on the foot of this judgment, and procure a report of the amount which shall then be due thereon, to the end, that upon the coming in and confirmation of such report, a judgment may be made*] for a sale of the said premises to satisfy the amount which shall then be due, with interest, and the costs of such [report and] sale.

And it is further ADJUDGED, that in case the said premises shall be sold under this judgment, and shall not produce sufficient to satisfy the amount so reported as secured and unpaid, with interest, and the costs of this action and of such sale, the said plaintiff may, at any time thereafter, when any such deficiency of principal or interest shall have become due according to the condition of the said bond, apply to this court for an execution against said defendant Y. Z., who is personally liable for the payment of the debt secured by the said mortgage, to collect the amount which shall be then due thereon.

1792. *Recital, where the amount is computed by the court without a referee; substitute for the words between the * and the ‡ on p. 931:]* and the plaintiff hav-

ing produced to the court satisfactory proof that there is due upon the bond and mortgage mentioned and set forth in the said complaint, the sum of dollars, including interest to this day of , 18 :

1793. *If desired that the purchaser pay taxes, &c., insert at || on p. 933:* that the purchaser be allowed to retain out of the purchase-money the amount of all taxes and assessments which at the time of said sale may be a lien on the lands so purchased, provided they shall be paid by the purchaser, and satisfactory receipts for the payment thereof be delivered to the said referee [or, sheriff].

1794. *Decree for deficiency against a mere surety:*¹ And it is further ADJUDGED, that if the plaintiff is not able to collect the amount of such deficiency out of the estate of the said [mortgagor, &c.], upon the issuing of an execution against his property, to the sheriff of the county in which he resides, or of the county where he last resided in this State, the defendants [the sureties], upon the return of such execution unsatisfied, pay so much of such deficiency as the proceeds of the sale hereinbefore directed, and the amount, if any, which shall have been collected of the said [mortgagor, &c.], personally [subsequent to the assignment by said sureties to the plaintiff], exclusive of the costs and expenses of the foreclosure and sale, shall be less than the principal [or other limit of sureties' liability] and the interest thereon from the time of the commencement of this action to the time of such sale; with the interest on that part of the deficiency from the time of the said sale until it shall be so paid by them.

And it is further ADJUDGED, that if they pay the amount thus decreed against them personally, or if the same is collected out of their property, they shall have the benefit of this judgment against the said [mortgagor, &c.], for the purpose of enabling them to obtain remuneration from him to the same extent, with interest, but no further; either by a new execution against his property, or by bringing an action thereon, as they may think proper.²

1795. *Direction that property be sold in separate parcels in the inverse order of alienation.* Insert at end before description of premises:] that the said referee summon before him all of the parties who have appeared in this action, and that he then take proof of the order and manner of alienation of the mortgaged premises, and that if it shall appear to the said referee that separate parcels of the said mortgaged premises have been conveyed or incumbered by the mortgagor, or by those claiming under him, subsequent to the lien of the plaintiff's mortgage, the said referee shall sell the said mortgaged premises in parcels in the inverse order of alienation, according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to such referee.

[Sale, see Chapter XVI.]

¹ This form is sustained by Jones v. Stienbergh, 1 Barb. Ch., 250; Luce v. Hinds, Clarke, 453; and see Curtis v. Tyler, 9 Paige, 432.

A mere guarantor of "collection" is held not to be a proper party-defendant. Baxter v. Smack, 17 How. Pr., 183. But it is otherwise in case of an ordinary guarantor of a mortgage. Rushmore v. Miller, 4 Edw., 84.

² So, too, the decree may direct that a defendant who has made payments for his co-defendant, towards satisfying the mortgage, and beyond his proportion of the burden, shall be deemed substituted for the plaintiff on the sale, and be awarded satisfaction out of the surplus. Lawrence v. Cornell, 4 Johns. Ch., 545; s. p., Wel- ling v. Ryerson, 94 N. Y., 98.

Form No. 1796.

Notice of claim to surplus in foreclosure.¹[*Title of court and action.*]

Take notice, that the undersigned is entitled to the surplus moneys, or a part thereof, arising on the sale made in this action, on the day of , instant. [*Here state the nature and extent of the claim, e. g., thus:*] The claim of the undersigned is for dollars, and interest thereon, from the day of , 18 , by virtue of a lien under a judgment against [*or, mortgage given by*] the defendant Y. Z., while the said Y. Z. was the owner of the equity of redemption in the mortgaged premises, and before the commencement of this action [*or, by virtue of his being the owner of the equity of redemption in the mortgaged premises*], which lien is next in priority after the mortgage of the plaintiff in this action.

[*Date.*][*Signature and office address.*][*Address to clerk.*]

Form No. 1797.

Affidavit to move for reference of claim to surplus in foreclosure.

[*Title of court and action.*][*Venue.*]

W. X., being duly sworn, says:

I. That he is [one of the defendants²] in this action.

II. That this action was brought to foreclose a mortgage on real property; that judgment has been entered in said action, as this deponent is informed and believes, and that a sale has been made of the mortgaged premises under the direction of the court, and that the claim of the plaintiff in the action has been paid; and there remains a surplus of about dollars over and above the money due on said mortgage and costs of this action, which surplus has been brought into this court subject to the order thereof.

III. That deponent has a claim on the said surplus moneys amounting to dollars, which claim is stated in the

¹ *N. Y. Gen. Rules*, No. 64, of 1888. File with the clerk with whom report of sale is filed. subsequent incumbrance held by him and not mentioned in his complaint. Mutual Life Ins. Co. of N. Y. v. Truchtnicht, 3 *Abb. N. C.* 135.

² The plaintiff may claim under a

Form No. 1800.

Order of reference of claims to surplus moneys.¹

At a special term [*dec., as in*
Form 493, p. 4].

[*Title of action.*]

On reading and filing an affidavit of M. N., verified the day of _____, 18____, and notice of claim, by W. X., to surplus moneys in this action, and on motion of M. N. for the said W. X., and O. P. having been heard for [*or, and on reading and filing proof of due service of notice of this application on*] all the parties who have appeared or who have served notice of claim of such moneys, in opposition :

ORDERED, that it be referred to R. F., Esq., of _____, to ascertain and report the amount due the said W. X., or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon, and to report with all convenient speed.

Enter ; [*signature of judge by initials of name and title.*]

Form No. 1801.

Report of referee as to surplus in foreclosure.

[*Formal part as in other cases, including oath; continuing:*]

I. All the parties who have appeared in this action, and all persons having filed notice of claim upon such surplus moneys, appeared before me [*or, I caused to be summoned to appear before me, as appears by the certificate of the clerk, showing what notices of claim have been filed, and by the summons and proof of service, which are annexed and marked Schedule A²*]. And on the hearing, I was attended by M. N. for W. X., and by O. P. for the defendant Y. Z., and I heard

¹ Under this the validity of claims may be litigated. *Bergen v. Snedeker*, 8 *Abb. N. C.*, 50; s. c., as *Bergen v. Carman*, 79 *N. Y.*, 146; *Raht v. Attrill*, 106 *N. Y.*, 423; s. c., 20 *Abb. N. C.*, 26, modifying 42 *Hun*, 414. The surplus stands in the place of the land. *Delafield v. White*, 19 *Abb. N. C.*, 104. As to equitable principles applicable, see *Crombie v. Rosenstock*, 19 *id.*, 312. As to legal liens, *N. Y. Life Ins. Co. v. Mayer*, *id.*, 92.

² The report should show that the parties attended, or that evidence was produced to him that they were duly summoned; and show the whole amount of the surplus moneys, and who is entitled thereto; so that, upon his report, the court may dispose of the whole fund. *Franklin v. Van Cott*, 11 *Paige*, 129; s. c., 3 *N. Y. Leg. Obs.*, 162; *Hulbert v. McKay*, 8 *Paige*, 651.

the allegations and proofs of said parties and claimants, and the testimony taken before me, subscribed by the witnesses, together with copies of the documentary evidence, is hereto annexed.

II. The amount of such surplus moneys is dollars, as appears by the certificate of the treasurer of the county of , hereto annexed as Schedule B.

[Then set forth the claims, the evidence or facts proved, and any objections interposed, and then the conclusion of the referee, e. g., thus:]

And I find the foregoing facts, and from the facts so found, I report that said W. X., under and by virtue of [the sheriff's deed to him, is the owner of the equity of redemption of said premises, and as such owner, he is entitled to the whole of said surplus moneys, and that there is no lien or claim thereon prior to the lien and claim of said W. X.].

[Date.]

[Signature of], Referee.

Form No. 1802.

Notice of motion for payment out of surplus.

[Move the court on the report, a copy of which has been or is now served, for an order:] [confirming said report, and]¹ that the city chamberlain *[or, treasurer of the county]* of pay to the defendant W. X., or his attorney, the whole *[or, dollars]* of the surplus moneys in this cause deposited with him *[with the interest accrued thereon]*, and for such further *[&c.]*².

Form No. 1803.

Order (final) as to surplus.³

[Title (court order) and recitals, according to the case.]

ORDERED, that [said exceptions are overruled and said report hereby is confirmed and] the chamberlain of the city

¹ The words confirming said report are not necessary unless exceptions have been filed to the report.

² Motion costs only can be granted. *Dudgeon v. Smith*, 23 *Weekly Dig.*, 400.

³ The court has power, in its discretion, to confirm or set aside the

report of a referee appointed to ascertain the rights of claimants to surplus moneys on foreclosure, and is not restricted, in the exercise of it, by the rules governing a motion for a new trial. *Mutual Life Ins. Co. of N. Y. v. Salem*, 3 *Hun.* 117; s. c., 5 *Supm. Ct. (T. & C.)*, 246.

of New York [*or*, the county treasurer of], is hereby directed upon the service on him of a certified copy of this order, to pay out of the moneys remaining in his hands to the credit of this action to the persons below named, the sums set opposite their respective names [*names and sums*].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1804.

Request to clerk to docket judgment for deficiency.¹

[*Title of court and action.*]

Please enter up and docket judgment for deficiency in favor of the above-named plaintiff and against the above-named defendant for the sum of dollars, and interest thereon from , 18 , pursuant to the referee's report of sale herein, filed , 18 [and the order of the court entered the day of , 18 , confirming said report of sale].

[*Signature and office address of*],

[*Date.*]

Attorney for plaintiff.

[*Address*] To

Clerk of ,

SECTION V.

PROCEEDINGS PECULIAR TO PARTITION.

FORMS.

- (1805.) Affidavit to move for judgment, or for preliminary reference.
- (1806.) — of desire to enjoy shares in common.
- (1807.) Notice of motion for interlocutory judgment, or for reference.
- (1808.) Order of reference.

- (1809–1814.) Statements suitable to insert in foregoing Form.
- (1815.) Report of referee.
- (1816, 1817.) Statements to be substituted in last Form when sale is recommended.
- (1818.) Notice of filing report.
- (1819.) Notice of hearing after report.
- (1820.) Interlocutory judgment for actual partition.

Following this decision—*held*, that the court may direct a different disposition to be made of the fund from that reported by the referee, or it may refer the case back for a further hearing, as justice may appear to require. *Dold v. Haggerty*, 11 *Reporter*, 746. See *Thomas on M.*, 381, and *Bergen v.*

Snedeker, 8 *Abb. N. C.*, 50; s. c., as *Bergen v. Carman*, 79 *N. Y.*, 146.

¹ Entry of an additional judgment in the judgment book is not necessary. *Whitman v. Norton*, 1 *Monthly Law Bul.*, 69; *Moore v. Shaw*, 15 *Hun*, 428.

- | | |
|---|--|
| (1821-1823.) Statements suitable to insert in foregoing Form. | (1834.) Modification of interlocutory judgment. |
| (1824.) Oath of referee or commissioner to make partition. | (1835.) Order to make creditors parties, so as to proceed to sale. |
| (1825.) Report of commissioners making actual partition. | (1836.) Advertisement for liens. |
| (1825a-1826.) Statements suitable to insert in foregoing Form. | (1837.) Consent of widow, &c., to sale. |
| (1827.) Notice of motion to confirm report of actual partition. | (1838.) — to accept gross sum. |
| (1828.) Order thereon. | (1839.) Release by married woman of inchoate right of dower. |
| (1829.) Final judgment for actual partition. | (1840.) Interlocutory judgment for sale. |
| (1830-1832.) Statements suitable to insert in foregoing Form. | (1841-1854.) Statements suitable to insert in foregoing Form. |
| (1833.) Report of commissioners that partition cannot be made. | (1855.) Release by dowress. |
| | (1855a.) Report of sale. |
| | (1856.) Final judgment after sale. |
| | (1857.) Order confirming report of distribution. |

Form No. 1805.

Affidavit to move for judgment, or for preliminary reference, where no material issue is raised.¹

[*Title of court and action.*]

[*Venue.*]

A. T., being duly sworn, says :

I. That he is [the managing clerk for] the attorney for the plaintiff herein [*or otherwise state relation to the cause*].

II. That this action is brought [by leave of the Court of _____, given by an order entered the _____ day of _____, 18 ____²] for a partition [*or, for a partition or sale*] of real property situate in the town of _____, and county of _____, owned by the plaintiff and the defendants W. X. and Y. Z. as tenants in common, and in which the defendant U. V. has an estate of dower [*or otherwise briefly indicate nature of property and ownership*].

[*State service, defaults, filing of lis pendens, &c., as in Form 1472, paragraphs IV to IX.*]

[*Where a sale is asked, add:*] That [one of the several parcels of] the land mentioned in the complaint, and of which partition is sought herein [to wit—*designating one*—and which

¹ If issue has been joined, the cause is to be tried by jury (for Form see p. 774, &c.), unless the court direct the issues to be stated as special questions for trial by jury (for Form see pp. 837 and 862), or unless jury trial is waived by consent to reference or to

trial by the court. *N. Y. Code Civ. Pro.*, § 1544; *Hewlett v. Wood*, 63 *N. Y.*, 75 (dismissing appeal from decision in 3 *Hun.* 736); *Cassedy v. Wallace*, 61 *How. Pr.*, 240.

² See Volume I, p. 566.

is of the value of at least dollars, and exceeds in value the share to which either of the parties hereto will be entitled], consists of [*describing it to show impracticability of actual partition*], and [as deponent is advised and believes] is so circumstanced that actual partition thereof cannot be made without great prejudice to the owners, after due regard being had to the power of the court to decree compensation for equality of partition, and to the ability of the parties to pay reasonable compensation to produce such equality [*may add facts substantiating this*¹].

[*If several plaintiffs desire their shares set off in common, it may be alleged here, as in next Form.*]

[*If desired to dispense with advertising for liens, allege that there are none, and refer to and annex searches; see Form 1810a.*]

[*If application is ex parte, state as on p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1806.

Affidavit of desire to enjoy shares in common.*

[*Title of court and action.*]

[*Venue.*]

W. X. and Y. Z., being duly sworn, say :

I. That they are respectively the [defendants] hereinbefore so named.

II. That this action is brought for the partition of real estate situated in , in the county of , which is owned in fee simple by the plaintiff and defendants, as tenants in common [*or otherwise*].

III. That the deponents are each seized, in fee simple, of the equal undivided one- part of said premises, and desire to enjoy their shares in common, and to have the same set off to them in common, without partition or allotment as between themselves, and as deponents believe, this can be done without injury to the interests of any of the parties.

[*Jurat.*]

[*Signatures.*]

¹ Van Arsdale v. Drake, 2 Barb., 599. as to persons non sui juris, § 1592, as am'd by L. 1886, p. 374, c. 208.

² N. Y. Code Civ. Pro., § 1548, and

Form No. 1807.

Notice of motion for interlocutory judgment, or for reference, where no material issue is raised.

[*Title of the cause.*]

Please take notice, that upon the affidavit, a copy of which is herewith served upon you, and upon the summons and pleadings and proof of service thereof, and notice of pendency of action and proof of filing, and [*here specify any other proceedings which are relied on*] the undersigned will apply to this court at a special term thereof, to be held at the city hall [*or, county court house*] in the _____ of _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard for the relief demanded in the complaint [*and for a reference to determine the rights, shares and interests of the several parties—if sale is asked, add: and to ascertain whether the property, or any part thereof, is so circumstanced as to require a sale—if setting off shares in common is asked, add: and whether the premises are so situated that the shares of A. B. and C. D. may be set off in common to them without injury to the interests of the other parties*], and for such other or further relief as may be just.

[*Date, signature and addresses, as on p. 1.*]

Form No. 1808.

Order of reference preliminary to judgment for partition, or sale.¹

[*Title of action.*] At a special term [*dec., as in Form 493, p. 4.*]

On reading and filing due proof by the affidavit of A. T.,

¹ Reference is necessary (unless the court determine these questions) whenever there is a party in default, or an infant party. *N. Y. Code Civ. Pro.*, § 1545; *N. Y. Gen. Rules*, No. 66, of 1888.

The better opinion is that if all the defendants plead without controverting any allegation of the complaint, and there is no infant party, the plaintiff's case is admitted. *N. Y. Code Civ. Pro.*, § 1545; *Avery v. Woodin*, 44 *Hun*, 266. But the practice and the safer course is to take a

reference or to produce proof before the court in all cases.

The case of *O'Dougherty v. Remington Paper Co.*, 42 *Hun*, 192, suggests a doubt whether the possibility of actual partition should not be determined separately by reference or appointment of commissioners, ordered after the determination of the rights of the parties; but neither the practice nor the statute appears to require a separate proceeding, at least in partition, except where trial by jury is required of issues of fact not

verified the day of , 18 , that the summons [and complaint] herein has been duly personally served within this State on all the defendants [except the unknown owners and the defendant U. V., a non-resident, on each of whom it has been duly served by publication], and that all of the defendants, other than said unknown minors, are of full age [except the defendant W. X.], and that the time of each and all of the defendants to answer has elapsed, and that none of them have demurred or put in any answer controverting any material allegation of the complaint,* and that a proper notice of the pendency of this action was duly filed in the office of the clerk of , more than twenty days since, and at or after the time of filing the complaint as required by law; Now, on motion of A. T., for the plaintiff, and on proof of due notice of this motion to the defendants who have appeared in the action, and after hearing Z. T. [or, no one appearing], for , in opposition:

ORDERED, that it be referred to R. F., Esq., of , counselor at law, to take proof of the title and the interests of the several parties in the premises mentioned in the complaint, and of the allegations of the complaint, and to ascertain and report what share or part of the premises belongs to each of the parties to this action, so far as the same can be ascertained, and the nature and extent of their respective rights and interests therein, and an abstract of the conveyances by which the same are held. [*For other directions see following Forms.*]

[It is further directed that the referee report the facts and his conclusions of law, with his opinion thereon.]

Enter: [*signature of judge by initials of name and title.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1809. *If plaintiff is an infant, insert:*] To ascertain and report whether the interests of the infant plaintiff will be promoted by a partition.¹

1810. *If sale is asked, add:*] To inquire and report whether the property or any part thereof is so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners;² and if he arrives at the conclusion that a sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, then to specify the same in his report, together with the reasons which render a sale necessary; † and in such case that he also ascertain and report whether any creditor, not a party to this action, has a specific lien³ by mortgage, devise, or otherwise upon the undivided share or

involving the question of necessity of sale.

² *Id.*, § 1546.

³ *Id.*, § 1578. Liens of all kinds are included, such as a charge by will.

¹ *N. Y. Code Civ. Pro.*, § 1534.

interest of any of the parties in the premises [or, in that portion of the premises which it is necessary to sell], and also whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance by judgment or decree, or otherwise; and that he ascertain and report the amount due to any party to the action who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor not a party, who has a general lien on any undivided share or interest therein by judgment, decree, or otherwise, and who shall appear and establish his claim on such reference.

1810a. *Or in lieu of the last clause, beginning at the †, as to liens, may say:]* and the court being satisfied by the production of duly certified searches, and the affidavit of M. N., verified the day of , 18 , that there is no outstanding lien upon the interest of any party, hereby dispenses with inquiry for liens.¹

1811. *Inquiry for incumbrance on title:²]* And said referee, if requested by any of the parties who appear before him on such reference, shall also ascertain and report all incumbrances on the title, and the amount due by reason of any incumbrance which is either a specific or general lien upon all the shares or interests of the parties in the premises to be sold, and which would remain an incumbrance thereon in the hands of the purchaser.

1812. *Where some parties wish shares set off in common, add:]* To inquire and ascertain whether the premises are so situated that the shares of A. B. and C. D. can be set off to be held by them in common without partition as between them, and without injury to the interests of any of the parties.³

1813. *If widow's consent is given, not fixing the sum:]* To inquire and take proof and report on the consent of said defendant W. B. to a sale of said premises, and of her life interest in the whole thereof, and to accept a gross sum in lieu of said estate [*if life tenant may be in arrears as to charges she ought to have kept down, may add:* and also as to any incumbrances, deductions or charges on or from said gross sum].

1814. *Where there is a question as to parties:]* 1. To take proof and ascertain, and report the persons who are, under this judgment, entitled to the property described in the complaint.

2. To take proof of the rights, shares and interests of the several parties hereto in the property, and to ascertain and report the rights and interest therein of the several parties hereto.

3. To ascertain and report whether any persons, not now parties to the action, have interests or claims which require them to be made parties, and if any such, then to report their names and residences.

Hibbard v. Dayton, 32 Hun, 220; and see Platt v. Platt, 105 N. Y., 488; aff'g 42 Hun, 592.

Under the direction to ascertain and report the amount due for any lien the referee may determine the validity of the alleged lien. Halsted v. Halsted, 55 N. Y., 442.

¹ N. Y. Code Civ. Pro., § 1561.

The old distinction between general and specific liens, ignored in ch. 15 of Code Civ. Pro. as first enacted, was restored by the amendment of

1883 to § 1578. See Wilde v. Jenkins, 4 Paige, 481; Hall v. Partridge, 10 How. Pr., 188; Halstead v. Halstead, 55 N. Y., 442.

² This direction is not usual, but is convenient for the purpose of making the terms of sale explicit and clear to intending purchasers.

³ This inquiry may properly be made upon this reference. It must be made, if at all, before final judgment. Northrop v. Anderson, 8 How. Pr., 351.

Form No. 1815.

Report of referee preliminary to applying for judgment for partition.¹

[*Title and recitals according to the case; see Form 1700, omitting the words, "to hear and determine the issues."*]

I find that the material facts alleged in the complaint are true.

1. The following is an abstract of the conveyances and instruments by which the premises described in said complaint are held [*stating them, for instance, thus*]:

JOHN SMITH to RICHARD DOWS,	{	Deed dated	th, 18 .
		Acknowledged	th, 18 .
		Recorded	th, 18 , at
		m., in the office of Clerk of	,
		Lib. of Conv's, p.	.
		Consideration,	dollars.

Conveyed the premises in question.

Richard Dows, being seized of said premises, died on the day of , 18 , intestate, leaving surviving him five sons, James, John [*&c.*], and no other children or issue of deceased children, and no widow.

JAMES DOWS, and ELLEN, his wife, to ALBERT BROWN.	{	Deed dated	th, 18 .
		Acknowledged	th, 18 .
		Recorded	th, 18 , at
		m., in Clerk's office,	County,
		Lib. , p.	of Conv's.
		Consideration,	dollars.

Quit-claim deed conveying the equal undivided one-fifth part of said premises. [*And so on, giving an abstract of the transfers of the several undivided shares or interests of the parties, tracing the title of all from a common source.*]

2. The rights and interests of the parties in the premises are as follows:

Albert Brown, the plaintiff, as grantee of James Dows, is entitled to one undivided fifth part thereof.

The defendants, John [*&c.*], are each entitled to one undivided fifth thereof, as the heirs at law of Richard Dows, late of [*&c.*], deceased.

¹ If cause is referred to hear and determine, the report of the referee will state findings of fact and conclusions of law, and direct judgment.

[Where there are unknown owners:] The remaining undivided fifth part of said premises was formerly owned by one C. D., who derived title thereto as aforesaid, but he died on or about the day of , 18 , and the share of said C. D. is now owned by some person or persons unknown. *

[If partition can be made:] 3. In my opinion the premises described in said complaint are so circumstanced that a partition thereof can be made without prejudice to the owners thereof, and that a partition of such premises would be more advantageous to such owners than a sale thereof.

[For clause to substitute where sale is necessary, see next Forms.]

[Where some of the parties desire to enjoy their shares in common:] 4. That J. D. and R. D., two of the parties to this action, desire to enjoy their several shares in common with each other, and that a partition of said premises can be made in such manner as to set off to the said J. D. and R. D. the two undivided fifth parts of said premises, to be enjoyed by them in common, without prejudice to the interests of the parties, or any of them.

Annexed is the testimony [and copies of the documentary evidence] taken by me [and the searches above mentioned].

[Date.]

[Signature of], Referee.

STATEMENTS TO BE SUBSTITUTED IN LAST FORM, WHEN SALE IS RECOMMENDED.

1816. *Substitute for paragraph 3, or for paragraphs 3 and 4:* The [or, a part of the] property described in said complaint is so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners thereof, and for the following reasons¹—*stating the facts*. I am of opinion, therefore, that a sale of the whole of [the aforesaid part of] said premises is necessary and expedient. [Said part is bounded and described as follows—*describing it*.]

1817. *If advertisement was not dispensed with by the court:* I caused a notice to be published, as required by law, requiring each person not a party to the action who, on the day of , 18 [date of the order of reference], had a lien or incumbrance on any undivided share or interest in the property described in said complaint, to appear before me at the place and within the time in said notice specified, to prove his lien and the true amount due or to become due to him by reason thereof.

I have made inquiry and taken proof after notice as above stated,² and I find that no person not a party to the action has any lien, by mortgage or otherwise, upon the undivided share or interest of any of the parties in the premises, except as follows: * The undivided one-fifth part of said premises

¹ The reason why a sale is necessary must be stated. The referee's opinion is not enough. *Tucker v. Tucker*, 19 *Wend.*, 226.

² The referee is not now required to make searches.

owned by J. D., aforesaid, is incumbered by mortgage, executed by J. D., aforesaid, to M. N., of [&c.], previous to the sale thereof to said J. K., as aforesaid, which mortgage was dated the day of , 18 , and was given to secure the said M. N., his heirs and assigns, the sum of one thousand dollars, in five years from the date thereof, with interest annually; and that the said sum of one thousand dollars, with interest thereon from the day of , 18 [*describing the mortgage, and stating aggregate sum due, and what is to become due thereon*], and that said M. N., who is not a party to this action, is still the owner and holder of said mortgage. †

No creditor, not a party to this action, having a lien on any undivided share or interest in the premises, by judgment, or otherwise, appeared before me, on the said reference, to establish his claim, in pursuance of the aforesaid notice published by me [except such as above stated].

Form No. 1818.

Notice of filing report.

[*Title of court and action.*]

Please take notice, that on the day of , 18 , the report of M. N., referee appointed herein to [*state object concisely*], dated the day of , 18 , was duly filed with the clerk of the court on the day of , 18 , and the same will become absolute and stand confirmed unless exceptions thereto are filed and served within eight days after the service of this notice on you.

[*Date, signatures, and addresses, as on p. 1.*]

Form No. 1819.

Notice of hearing, after report, as to rights and interests.

[*Title of court and action.*]

Please take notice, that upon the pleadings [*if other papers are relied on, specify them*], and the order of reference herein entered the day of , 18 , and the report of the referee filed the day of , 18 [*if exceptions have been filed, add: and the exceptions filed thereto by on the day of , 18*], this action will be brought on for hearing, and application will be made for an interlocutory judgment for the relief demanded in the complaint, and a partition [*or, partition or sale*] of the premises described therein, at the next special term¹ of this court appointed to be

¹ Special equity term or circuit and v. Stevens, 8 *Hun*, 515. See also special term. Empire B., &c., Asso. Volume I, p. 105, note 1.

held at the county court house [*or, city hall*], in _____, on the _____ day of _____, 18____, at the opening of the court on that day, or as soon thereafter as counsel can be heard [and a motion will then and there be made for the appointment of commissioners to make partition of the premises described in the complaint, according to the respective rights and interests of the parties to be adjudged by the court], and for such other relief as may be just.

[*Date, signatures, and addresses, as on p. 1.*]

Form No. 1820.

Interlocutory judgment for actual partition.¹

[*Title and recital of proceedings, according to the case, and reciting date of filing lis pendens; see Form 1621; but if an infant is in default, insert: and that twenty days have expired since the appointment of M. N. as guardian ad litem for said Y. Z. was perfected.*] [*Add recital as to trial, reference, and report.*]

IT IS ORDERED, ADJUDGED AND DECREED:

1. [*If title was in issue, state adjudication.*]

2. That the rights, shares and interests of the parties in the property mentioned in the complaint are as follows:

The [defendant C. D., as widow of J. D., is entitled to dower in all of the premises described in the complaint, and] said plaintiff _____, as the [grantee] of _____, in said complaint named, is seized of and entitled in fee to an equal undivided _____ part [of said premises, subject to the dower aforesaid—and so on as to each].*

3. That partition be made of the premises mentioned in the complaint herein, which said premises are described as follows [*full description—or, That partition be made of all of said premises except the house and lot in _____, hereinafter described. The said premises, with that exception, are described as follows—description*].

4. That C. D., E. F. and G. H., of _____, three reputable and disinterested² freeholders of the county of _____, be, and they are hereby appointed commissioners to make the partition herein directed, and to proceed and report according to law.³

¹ Part may be allotted and part sold, if equity require. *Warfield v. Crane*, 4 *Abb. Ct. App. Dec.*, 525. Or allotment may be made merely be-

tween the plaintiffs on the one side and the defendants on the other.

² *N. Y. Code Civ. Pro.*, § 1549.

³ It is unnecessary to repeat the statute directions as to oath, &c.

5. That the said commissioners shall divide the said premises into equal parts, quantity and quality relatively considered, and that they allot to the plaintiff A. B. one of the said equal parts of said premises; to the said Y. Z., another of [*&c., proceeding thus as to the shares of the other parties*], to be held and enjoyed by the said parties in severalty, according to their rights and interests therein so ascertained, determined or declared as aforesaid.¹

6. That each party to this action is hereby required to produce to and leave with the said commissioners, or a majority of them, for such time as they shall deem reasonable, all deeds, writings, surveys or maps in his or her possession or control relating to the said premises or any part thereof.

7. That in case partition of said premises cannot be made with perfect equality between the said parties, according to their respective rights and interests therein, unless compensation be made by one or more of them to other of them for equality of partition, then said commissioners shall ascertain and report the proper compensation which ought to be made for equality of partition; and by whom it should be paid, and to whom it ought to be allowed. [*If any party is an infant, add: but said commissioners shall not report such compensation to be paid by the infant U. V. unless it satisfactorily appears to them that such infant has personal property sufficient to pay the same, and his portion of the costs and expenses of the proceedings, and all other liens on his share of the premises, and that his interest will be promoted thereby.*]²

8. That said commissioners ascertain and report the value of the property partitioned by them.³

9. [*Where rents and profits are to be accounted for,*⁴ *direct accounting.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1821. *Shares of unknown owners:*] That one [fourth] of the premises herein above described be allotted and remain undivided for the unknown owners aforesaid.

1822. *Where several parties desire to hold in common:*] That the aforesaid partition be made in such manner that the shares of J. D. and R. D., two of

¹ The usual direction as to boundaries and monuments cannot modify the statute, and therefore are covered by clause 3 (*above*), and need not be inserted, unless it is desired to add judicial directions beyond those given in the statute.

² *N. Y. Code Civ. Pro.*, § 1587.

³ Commissioners' reports should find value in case of actual partition as a basis for application for allowance. *Id.*, § 3262.

⁴ *Id.*, § 1589; *McCabe v. McCabe*, 18 *Hun*, 153; *Taggart v. Hurlburt*, 66 *Barb.*, 553.

the parties to this action, who desire to enjoy their several shares in common with each other, be allotted together and remain without partition to be enjoyed by them in common.

1823. *Where sale of part is necessary.*] And it is further ordered and adjudged, that the residue of said premises, with all and singular the hereditaments and appurtenances thereto belonging, be sold by public auction in the county of _____, under the direction of the sheriff of _____ [or, of R. F., Esq., of _____, who is hereby appointed referee herein for that purpose—*continue as in Form 1840, from the **].

Form No. 1824.

Oath of referee or commissioner to make partition.

[*As in Form 1773, but substituting, make partition, for the words, admeasure dower.*]

Form No. 1825.

Report of commissioners making actual partition.

[*Title of court and action.*]

To the _____ Court of _____.

The undersigned, M. N., O. P., and Q. R., commissioners appointed by an interlocutory judgment of this court, entered herein in the office of _____, on the _____ day of _____, 18____, to make partition of the property described in the complaint in this action, respectfully report: that, after our appointment, and before entering on our duties as such commissioners, as aforesaid, we subscribed, took and filed, the oath required by law: and that we all met together in the performance of all our duties.

2. That we went upon and examined ¹ the said premises for the purpose of making division and partition thereof, agreeably to said judgment, * and caused said premises to be surveyed, and have made partition thereof, between the said parties, according to their respective rights and interests therein, as the same have been ascertained, adjudged and determined by the court, as follows, viz.:

3. We have divided the whole of said premises into distinct parcels [being _____ equal parts, quality and quantity

¹ Going upon the premises essential. *Tibbs v. Allen*, 27 *Ill.*, 119.

As to view by two only, see *Townsend v. Hazard*, 9 *R. I.*, 436.

As to signature of report by two only, see *Simpson v. Simpson*, (*Mich.*, 1886) 26 *Northwestern Rep.*, 285; 2 *N. Y. R. S.*, 555, § 27.

relatively considered], which are designated, on the map hereto annexed, by the letters "A," "B," "C" [*&c.*]. And the division thus made, in our judgment, is the most beneficial one, under all the circumstances, that could be made of such premises.

4. We have allotted the several parcels to the respective parties, quality and quantity being relatively considered, according to the respective rights and interests of the parties, as fixed by the interlocutory judgment, and have designated said parcels by posts, stones, or other permanent monuments mentioned in the descriptions hereinafter contained.

5. We, so as aforesaid, have set off in severalty to the plaintiff A. B., all that certain piece or parcel of said premises designated on the said map by the letter "A," and which is bounded and described as follows: [*description in full.*]

6. We have, so as aforesaid, set off in severalty to the defendant Y. Z. [*&c., as above.*]

6. [*Where there are unknown owners:*] We have set off all that certain piece or parcel of said premises, being the one-part thereof, designated on the said map by the letter "C," to remain undivided, for the owner or owners whose interests are unknown, and not yet ascertained; which piece or parcel of land, last aforesaid, is bounded and described as follows: [*description.*]

7. The items of the expenses and charges, attending the said partition, including our fees as commissioners, are as follows: [*as in Form 1776, p. 922.*]

8. The value of the property, of which we have thus made partition, is dollars.

[*Date.*]

[*Signatures.*]

[*Acknowledgment, or proof, as in Form 495.*]

STATEMENTS SUITABLE TO BE INSERTED IN FOREGOING FORM:

1825a. *Impracticability of partition as to a part.*] [*See Form 1816.*]

1826. *Reservation of right of way.*] The right of way or passage is reserved to the said heirs respectively, and to their heirs and assigns, from the highway, near the west line of lot No. [*describing extent of said way*], to enable them to pass to and from their respective wood lots, for the purpose of obtaining wood and timber therefrom, or for any other purpose. [*It is well to define manner of enjoyment.*¹]

Form No. 1827.

Notice of motion to confirm report of actual partition.

[*Title of court and action.*]

Please take notice, that on the pleadings, interlocutory judgment [*and mention other papers relied on*], and the report of the commissioners appointed by said judgment, which report was filed the day of , 18 [*or, a copy of which report is herewith served on you*], and the exceptions filed by on the day of , 18 , I shall move the court, at a special term to be held at the county court house [*or, city hall*], in the city of , on the day of , 18 , at o'clock m., or as soon thereafter as counsel can be heard, that said exceptions be overruled and said report be confirmed, and final judgment rendered thereon, and for such other relief as may be just.

[*Date; signature; and addresses; as on p. 1.*]

Form No. 1828.

Order confirming report of partition.

At a special term [*&c., as in Form 493, p. 4*].
[*Title of action*].

On reading and filing the affidavit of A. T., verified the day of , 18 , making proof of due service of the annexed notice, and on reading the report, filed on the day of , 18 , by M. N., O. P., and Q. R., commissioners appointed by interlocutory judgment, entered the day of , 18 ; and the exceptions filed by on motion of A. T., attorney for plaintiff herein, and after hearing Z. T. [*or, no one appearing*] in opposition, and due deliberation having been had:

ORDERED, that said report be and hereby is confirmed [and said exceptions overruled], and that final judgment thereon and decreeing that the * partition * reported therein be firm and effectual forever, be rendered according to said interlocutory judgment and report [the judgment to be settled¹ on days' notice to the attorneys of].

Form No. 1829.

Final judgment for actual partition.²[*Title of court and action.*]

This action having been brought on to be heard upon the

¹ May insert direction, first to tax fees, &c.

² *N. Y. Code Civ. Pro.*, § 1557.

report made and filed on the day of , 18 , oy
[*names*], commissioners appointed by an order of this court,
entered herein the day of , 18 , by which it
appears that the said commissioners have made partition of
the premises described in the complaint in this action between
the parties, according to their respective rights and interests
therein, as the same have been ascertained, declared, and de-
termined by this court, and by which said partition the said
commissioners have divided the whole of said premises into
allotments of equal value, and have set off in severalty
to the said W. X., one of the said allotments, bounded and
described as follows: [*description*] as will more fully appear
by a map of said partition therein annexed; and, also, by
which partition the said commissioners have set off in severalty
to [*proceeding in like manner to state each allotment*]; Now,
on motion of A. T., for the plaintiff, and after hearing T. Z.
for the defendant, and due deliberation having been had, and
the court having ordered judgment as hereinafter stated:

It is ORDERED and ADJUDGED, 1. That the said report, and all
things therein contained, do stand ratified and confirmed, and
that the partition so made be firm and effectual forever.

2. That the several lots and parcels hereinbefore described
as constituting the allotment [*colored brown on said map, and*]
set apart to said W. X., being one equal part of said prem-
ises, shall be and the same hereby are vested in him, the said
W. X., in severalty, to be held and enjoyed by him, his heirs
and assigns forever, and that he be let into possession [*immediate-
ly—or stating when. Proceeding in like manner to state each*].*

That the plaintiff recover his costs¹ in this action, taxed at
the sum of \$ [*or, to be taxed—and also the sum of \$*
now awarded to him as an additional allowance herein]. That
the defendant W. X. pay to the plaintiff or his attorney one
part of said costs and allowances [*and so on*].

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1830. *Where compensation is to be made for equality. Insert in last Form
after the *.*] And it appearing from the said report that the share of W. X.
is worth more in proportion than the respective shares allotted to the other
parties.

It is further ADJUDGED, that the said W. X. make compensation for
equality of partition to the other parties entitled to share in the land [*or, its
proceeds*], and pay to each of them therefor dollars, together with dol-
lars, his share of the costs and charges of this action heretofore taxed at
dollars, said share being one [*fourth*] part of said costs and charges, with the
additional ratable increase; and that each of the said other parties have ex-

¹ Henderson v. Scott, 43 Hun, 22; Davis v. Davis, 3 N. Y. State Rep., 163.

ecution for the sum so adjudged against said W. X.; and that the same is hereby declared to be a lien upon the share so allotted to said W. X.

1831. *Direction for actual conveyance; substitute for clause 2 in last Form but one:*] that the said [*naming the parties*] do each execute, under their hands and seals, and acknowledge and deliver to the other, a deed of release and quit-claim of the parcels of land set off to each in severalty as aforesaid.¹

1831a. *Where a tenancy in, or lien on, the entire property is reserved:*²] The right and interest of the defendant U. W. not having been awarded or allotted to him, his entire right and interest, hereby adjudged to be a tenancy for his life [*or otherwise*] is reserved and left unaffected in said partition and by this judgment.

1832. *Direction as to costs in complex case:*] That the costs and disbursements of the several parties herein, to be taxed by the clerk of this court on notice, shall be borne and paid by the respective parties as follows: By said A. B., the one part thereof; by said W. X. and Y. Z. each, one part thereof [*and so on*]*; and that the parties entitled to such costs and expenses have execution therefor according to the course and practice of the court; that is to say, that each party whose bill, as taxed, exceeds the sum of the portions of the costs and expenses to be borne and paid by him, as above provided, have execution for such excess against the other parties respectively for the amount which the respective taxed bills of such other parties are less than the amount of the respective portions of the whole costs and expenses hereinbefore charged upon them. That the costs of the guardian *ad litem* of the infant defendants respectively, to the extent of their several shares or portions of the whole costs of the action, are declared to be liens in favor of such guardian *ad litem*, upon the infant's respective shares of the premises, which costs the general guardians of the infants are authorized and directed to pay out of the rents and profits of such shares, or out of any other moneys which may come to their hands belonging to the said infants respectively. And the guardian *ad litem* may apply to the court for further direction, if necessary, as to the payment of such costs.

Form No. 1833.

Report of commissioners that partition cannot be made.

[*As in Form 1825 to the *, continuing:*] and find that [*state impracticability of actual partition, as in Form 1816*].
[*State fees and expenses.*]

¹ This is not necessary, and not usual under the modern statutes empowering the court to fasten the title by the decree. See *Smith v. Crawford*, 81 Ill., 296; *Wadhams v. Gay*, 73 id., 415.

Where there are more than two parties, each conveyance to be made may be described separately, thus, "that the said [*naming all but one*]

execute under their hands and seals, and acknowledge and deliver to [*naming that one*] a deed, &c., as above. If any are infants, the direction will be that the guardian *ad litem* unite with the other grantors and convey his ward's interest.

² See *Hughes v. Hughes*, 11 Abb. N. C., 37.

Form No. 1834.

Modification of interlocutory judgment.

[Where commissioners recommend sale of part or all;¹ after appropriate recitals:] ORDERED, that the interlocutory judgment herein entered on the day of , 18 , be modified by inserting the following clauses: It is further ordered, adjudged and decreed, that instead of making partition of the whole of said premises, the lot hereinafter described be sold [*proceeding as in interlocutory judgment for sale*].

[And that partition be made as aforesaid of the residue of the premises mentioned in the complaint.] And the clerk is hereby directed to enter on the margin of said interlocutory judgment, after clause , a memorandum, referring to the entry of this order, substantially as follows: "Modified by directing sale of lot , street, instead of actual partition thereof, by order entered the day of , 18 ."

Form No. 1835.

Order in partition to make creditors parties so as to proceed to sale.¹

At a special term [*&c.*; see
Form 493, p. 4].

[*Title of action.*]

It appearing to the court by the report filed herein the day of , 18 , by the commissioners appointed by interlocutory judgment to make partition of the premises described in the complaint in this cause, that such partition cannot be made without great prejudice to the owners of said premises, and that a sale thereof is necessary and expedient; and it appearing to the court that there are creditors having liens on said premises who are not parties to the action [*recite other appearances, or notice, according to the case*]; now, on motion of A. T., attorney for the plaintiff:

ORDERED, 1. That the plaintiff may [within days after the entry of this order] amend his summons, complaint and proceedings, by making a party to the proceedings every creditor having a lien or incumbrance, by mortgage, judgment, or

¹ Compare *Waring v. Waring*, 3 *Abb. Pr.*, 246; *Patterson v. McCunn*, 17 *Weekly Dig.*, 186.

otherwise, on the entire property or on the undivided interest or estate of any of the parties to this suit.

2. That it be referred to R. F., Esq., of _____, to ascertain and report whether said premises, or any shares or interests therein of any party to this proceeding, are subject to any lien or incumbrance, by mortgage, judgment, or otherwise.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1836.

Advertisement for liens.

[*Title of court and action.*]

I, the undersigned, duly appointed referee, by order of this court, dated on the _____ day of _____, 18____, and entered herein on the same day [*or, the _____ day of _____, 18____*], hereby require each person not a party to the action, who at the said date of the order, had a lien upon any undivided share or interest in the property sought to be partitioned herein, and which is hereinafter described, to appear before me on or before the _____ day of _____ next, at my office, No. _____, street, in the village of _____, in the county of _____, to prove his lien and the true amount due or to become due to him by reason thereof.

The premises are described in the complaint in the above cause as follows: [*description.*]

[*Date.*]

[*Signature of*], Referee.

[*Name and address of*],

Plaintiff's attorney.

[*Under N. Y. Code Civ. Pro., § 1562, as amended in 1887, publish in county designated as place of trial, and in county where property is situated.*]

Form No. 1837.

Consent of widow or other tenant for life or for years to sale.¹

[*Title of court and action.*]

I, the undersigned, M. N., one of the defendants herein,

¹ *N. Y. Code Civ. Pro.*, § 1533, as rule in *Scheu v. Lehning*, 31 *Hun*, amended in 1877, superseding the 183.

entitled to a particular estate in the premises of which partition is sought, hereby consent that a sale of said premises be made herein pursuant to law.¹

[Date.]

[Signature.]

[Acknowledgment as in Form 495.]

Form No. 1838.

Consent of widow, or other tenant for life or years, to accept gross sum in case of sale.²

[Title of court and action.]

I, the undersigned, M. N., hereby consent to accept, in full satisfaction and discharge of my right [of dower—*or*, my right as tenant for the life of —*or*, as owner of a term of years] in the [in the individual share of Y. Z. in the] real property described in the complaint, a gross sum, to wit, dollars [or, a gross sum, the amount of which shall be ascertained pursuant to law].

[Date.]

[Signature.]

[Acknowledgment as in Form 495.]

Form No. 1839.

Release by married woman of inchoate right of dower.

[Title, authentication and acknowledgment as in last Form.]

I, the undersigned, D. B., defendant above named, and wife of the defendant Y. B., hereby, pursuant to section 1571 of the Code of Civil Procedure, release to my said husband, Y. B., my inchoate right of dower in the property directed to be sold by the interlocutory judgment herein, entered the day of , and request that the share of the proceeds arising from the sale of my contingent interest be paid to him.

Form No. 1840.

Interlocutory judgment for sale in partition.

[Title and recitals according to the proceedings in the

¹ If consent, such as in the next Form, is not added, a share of the principal will be invested and income for life paid to the life-tenant.

² File with report of sale, or previously (*N. Y. Code Civ. Pro.*, § 1569),

and deliver certified copy to referee; and for greater caution serve copy with notice of filing upon each adverse party who has appeared, or who thereafter, and up to the time of filing report of sale appears.

cause; see *Form 1820, p. 950, to the *.*] And the said referee's [or, said commissioners'] report, having stated that the said premises are [or, the portion of said premises which is herein-after described is] so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners thereof; and the court being satisfied that such report is just and correct, and that a sale thereof is necessary:

[Where there is an existing right of dower, add:] And it appearing that C. B. has an existing right of dower in the entire premises; and the court having considered the interests of all the parties hereto, and determined that said interests require that said right of dower should be sold ¹[or, should be excepted from the sale]. [And continue as in *Form 1820 to the *.*]

[For various special clauses occasionally required, see *Forms 1843 to 1854 (below), and 20 Abb. N. C., 102.*]

That the said premises hereinafter described [or, the right, title and interest² of said A. B., U. V. and Y. Z. in the said premises hereinafter described], be sold at public auction in the [city and] county of _____, where the said premises are situated, by the sheriff of said county [or, by R. F., of _____, who is hereby appointed a referee for that purpose].*

That said sheriff [or, referee] give public notice of the time and place of such sale, according to law³ and the practice of this court;⁴ and that any of the parties hereto may purchase at such sale.⁵ The premises so to be sold are bounded and described as follows: [full description.]

[For special clauses as to mapping, advertising, selling on credit, &c., see *Forms 1841, 1842 (below), and 20 Abb. N. C., 102.*]

That immediately after completing the sale, said referee [or, sheriff], according to law,⁶ file with the clerk of county [or, of this court] his report thereof and of his proceedings; and that after said sale shall have been confirmed he execute a deed or deeds of the premises sold to the purchaser or purchasers at said sale, on their complying with the conditions upon which the said deeds were to be delivered, and that such sale be valid and effectual forever.

That out of the proceeds of the sale he pay [here direct payment of costs to the respective parties or their attorneys], and that he also pay the expenses of the sale,⁷ and all taxes,

¹ *N. Y. Code Civ. Pro.*, § 1557.

² *N. Y. Code Civ. Pro.*, § 1244.

³ *Id.*, §§ 1434, 1678.

⁴ *N. Y. Gen. Rules, No. 62, of 1888.*

⁵ See p. 932 of this Volume.

⁶ *N. Y. Code Civ. Pro.*, § 1576.

⁷ For another form see judgment on foreclosure. Expenses of the sale will include unpaid taxes, &c., unless the judgment otherwise directs. *Id.*, § 1676.

assessments and water rates a lien on said premises,¹ and redeem from all sales for such liens, or, if any thereof were or are a lien upon any part only, that he pay the same out of the proceeds of such part.²

That the said referee [*or, sheriff*] pay to the said plaintiff, or bring into court³ for his use, the one part of the residue of the proceeds arising from said sale [*and so on*].

[*For other clauses as to distribution occasionally useful, see Forms 1843 to 1854 (below), and 20 Abb. N. C., 102.*]

It is further ORDERED, ADJUDGED, and DECREED: That each party to this action is hereby required, on demand of the purchaser of said premises, or any parcel thereof, to deliver to such purchaser all title deeds or writings under the control of such party, that relate wholly to the premises bought by such purchaser, or to any part thereof; and that all other title deeds or writings relating wholly to the premises mentioned in the complaint shall be deposited with the clerk of the county of , there to remain for the benefit of all persons interested.

That the purchaser or purchasers of said premises, or any part thereof, at such sale, be let into possession; and that each party or other person upon whom this judgment is binding,⁴ who may be in possession of the premises purchased, or any part thereof, is hereby directed to deliver possession of the same to the purchaser or purchasers on production of the referee's [*or, sheriff's*] deed.⁵

That said referee [*or, sheriff*] take receipts for all the payments hereinbefore directed to be made, and file them with his report thereof.⁶

That the said referee [*or, sheriff*] report to the court his proceedings subsequent to those included in his report of sale hereinbefore required.

That any party to this action may apply to the court on the foot of this judgment for further directions.

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1841. *To direct laying out in lots.*] That the same be sold separately and in such parcels, lots or pieces, as to the said may seem most for the interest of the parties interested therein; and for that purpose, that the said shall and may procure to be made such surveys, maps and diagrams of all the lands and premises above described as he may think necessary for

¹ *Weeseman v. Wingrove*, 85 *N. Y. C.*, 102; *s. c.*, 80 *N. Y.*, 320; *Fleming v. Burnham*, 18 *Weekly Dig.*, 559.

² *N. Y. Code Civ. Pro.*, § 1563.

⁴ *Code Civ. Pro.*, §§ 1557, 1577.

³ *Rockwell v. Decker*, 33 *Hun.*, 343; *Monarque v. Monarque*, 8 *Abb. N.*

⁵ *Id.*, § 1675.

⁶ *Id.*, § 1557, last clause; and § 1539.

the purposes of the said sale, and may lay down and designate upon said maps or diagrams such road or roads, street or streets, avenues or places to be used as streets, and may also upon the said maps, by such lines and marks as may be necessary, lay out the remaining part of the said land and premises fronting upon such roads, streets, avenues or places, or otherwise, and in such plots, lots, pieces or parcels as he may deem advisable, with a view to increase the amount of the proceeds of said sale, and that the title of the purchasers of such parts of the said lands as shall be laid down upon said maps or diagrams fronting upon such roads, streets, avenues or places, shall extend to the center of such roads, streets, avenues or places, subject to the easement and right of way of all the purchasers of any part of the said lands and premises.

1842. *Where credit is to be given for purchase-money:*¹ And said referee [or, sheriff] shall, upon such sale, allow to the purchaser, if he wish it, a credit of years at per cent. interest per annum, for one-half or less of the purchase-money bid upon any separate lot or parcel, to be secured by the bond of the purchaser and his mortgage of such parcel, with the usual interest, insurance and tax clauses; such bond and mortgage to be taken in the name of ² [and describing additional security, if any].

1843. *Dowress to receive gross sum:* that the right of dower of the defendant E. B. in [designate premises] be included in the sale, and the purchaser, his heirs and assigns, shall hold the property free and discharged of any claim by virtue of said right; and said E. B., her executors, administrators and assigns, are entitled to receive from the proceeds of the sale of the said [last-mentioned] premises, in satisfaction of said dower, the gross sum of dollars, heretofore fixed and consented to by her [or, a gross sum to be fixed by said referee according to the principles of law applicable to annuities].

1844. *Dowress to have one-third proceeds invested:* That the right of dower of the defendant F. B. in [designate premises] be included in the sale, and the purchaser, his heirs and assigns, shall hold the property free and discharged of any claim by virtue of said right; and said F. B. is entitled to have one-third of the proceeds paid into court according to the rules and practice of the court, for the purpose of being invested for her benefit for life, according to law.

1845. *Dowress to elect whether to take gross sum or income of one-third:*³ that the right of dower of the defendant C. B. in [designate premises] be included in the sale, and the purchaser, his heirs and assigns, shall hold the property free and discharged of any claim by virtue of said right; and said C. B., or her executors, administrators and assigns,⁴ are entitled to receive from the proceeds of the sale of the said premises, at her election to be signified by filing a request and consent therefor, and delivering a certified copy thereof to said referee [or, sheriff] within [ten] days after entry and service of notice of entry of this judgment, a gross sum in satisfaction of said dower, to be fixed by said referee according to the principles of law applicable to annuities, or in default of her signifying her election, then said C. B. is entitled to have one third of the proceeds paid into court, according to the rules and practice of the court, for the purpose of being invested for her benefit for life according to law.

1846. *Dowress who has released, barred:* that the defendant D. B. has released her right of dower [or, inchoate right of dower] in and to all the

¹ N. Y. Code Civ. Pro., §§ 1573, 1574.

² *Id.*, §§ 1575, 747.

³ *Id.*, §§ 1567, 1570, 1583.

⁴ *Fulton v. Fulton*, 8 Abb. N. C., 210.

premises described in the complaint and in this judgment, and is hereby forever effectually barred from any and all interest in the said premises or any part thereof.

1847. *Where a tenant for life of a share will take a larger share on death of another tenant for life:*¹] That the defendant H. W., as tenant by the curtesy, is entitled during his natural life and the joint lives of himself and the said G. W. to the one equal undivided [twelfth] part of premises above described, or a like proportion of the rents and profits thereof, and in case he shall outlive the said G. W., then, from and after her decease for and during the remaining part of his natural life, he is entitled to one equal undivided [eighth] part of the said land and premises last mentioned, or the like proportion of the rents and profits thereof.

1848. *Where a share is charged with a bequest:*²] That the several estates, rights and interests of the said plaintiffs [naming them], are subject to the payment and satisfaction of the sum of dollars, with the interest accrued and remaining unpaid thereon, from the day of , 18 , under and by virtue of the last will and testament of M. D., as will more fully appear by reference to the first above-mentioned report of the said referee, and which said last-mentioned sum of money is now due and payable to the legatees or legal representatives of the said above-named M. D.

1849. *Where shares are subject to powers of sale, &c.:*³] The said several and respective shares, estates, and interests of the said defendants [naming them], of, in, and to the land and premises last above described, are subject to the powers, conditions and provisions of the last will and testament of the said M. D., deceased. [See also Form 1782.]

[Where the share of a party is subject to a lien, state it, as, for instance, in Form 1817, p. 948, from the * to the †.]

1850. *Where any parcel is set off for some parties:*] That the defendant Y. Z. hereinbefore adjudged to be entitled to immediate possession of a distinct parcel allotted to him⁴ [and the defendants U. V. and W. X. hereinbefore adjudged to be entitled to a distinct parcel to be enjoyed by them in common⁵] be respectively let into possession thereof immediately.

1851. *Where the share of a party has been adjudged subject to an existing lien:*] That said referee [or, sheriff] pay into court according to law,⁶ and the rules and practice of the court, the portion of the money arising from the sale of the share or interest of the above-mentioned , after deducting the portion of the costs and expenses for which it is as herein adjudged to be liable.

1852. *Where all the unsatisfied liens on a share have been ascertained, direct payment into court of the share after deducting costs, &c., as above, and continue:*] And that the same be thereafter paid to and distributed among the creditors having liens on that share, established by the report of the referee herein, confirmed the day of , 18 [according to the priority of each as therein ascertained], so far as necessary to satisfy said claims and extinguish said liens, as follows: to F. G., dollars, with interest from the day of , 18 [and so on], and that the balance of the portion of proceeds paid into court on account of that share shall be paid to said on due application therefor.

¹ N. Y. Code Civ. Pro., § 1244.

² *Id.*, §§ 1434, 1678.

³ Rule 65.

⁴ N. Y. Code Civ. Pro., § 1558.

⁵ *Id.*, § 1548.

⁶ Compare with N. Y. Code Civ. Pro., §§ 1563-1585, 744-754.

1853. *Where there are unknown owners:*] That said referee [or, sheriff] pay into court according to law, and the rules and practice of the court, the portion of the purchase-money arising from the sale of the share or interest of said unknown owner, to wit, one part of the residue, after deducting [&c.], and that the same be invested by in for the benefit of said unknown owners, subject, however, to any liens which may be duly established against said share.¹

1854. *Where a question as to a gross sum for a future, &c., estate is reserved:*² And said referee is further directed to inquire into the present proportional value of the inchoate right of dower of the defendant C. C. [or other future estate] according to the principles of law applicable to annuities and survivorships, and report the facts [and testimony], with his opinion thereon, to the court, to the end that further direction may be given as to the disposition of a share of the proceeds equal thereto.

Form No. 1855.

Release by dowress.

[*Title of court and action.*]

I, U. V., one of the defendants in the above-entitled action, hereby acknowledge to have received from R. F., the referee who sold the real estate of M. N., deceased, under the judgment herein, the sum of dollars and cents, being my share of the proceeds of the sale under said judgment in this action, and in consideration thereof I hereby release and quit-claim to [G. H.], the purchaser at such sale, all my estate, right, title, interest, dower and right of dower, in and to the premises sold as aforesaid.

WITNESS my hand and seal this day of , in the year 18 . [Signature.] [Seal.]

Sealed and delivered in the presence of [Signature of witness].

[*Acknowledgment as in Form 495.*]

Form No. 1855a.

Report of sale.

[*See Chapter XVI.*]

Form No. 1856.

Final judgment after sale.

[*Title of the cause; and recital of the proceedings according*

¹ *N. Y. Code Civ. Pro.*, § 1572.

² *Id.*, § 1570; *Jordan v. Van Epps*, 19 *Hun*, 526.

to the circumstances of the case (see Forms 1621–1820); including recital of report of sale verified and filed, and order confirming it entered.]

IT IS ORDERED, ADJUDGED AND DECREED, as follows:

1. That said report and sale be, and the same hereby is confirmed, and that the same be firm and effectual forever.

2. That said referee [*or, sheriff*] execute the proper conveyances pursuant to the sale [and take the proper securities pursuant to the sale upon the terms reported, and deliver such securities to].

3. That he pay [*here direct as to costs if unpaid; see clause 2, on p. 955, and Form 1832, on p. 956*].¹

4. That he pay to , or into court for their use [*here award payment to parties entitled to receive proceeds*].

5. That he pay to G. F., the general guardian of W. V., an infant, to the use of said infant, one part of the said residue [*or, the sum of—&c.*]. And the said general guardian is hereby directed to invest the said moneys on bond and mortgage, in the name of such infant [*or, general guardian*], upon unincumbered [improved] real estate in , of at least double the value of the moneys so invested.

6. That he pay into court according to [*&c., here direct as to shares to be paid into court,*² &c.; *see Interlocutory Decree, Forms 1840–1854; with any further directions awarded as to securities*].

7. That the purchaser [*naming him*] be let into possession [*see Form 1840, p. 961*].

8. That the said referee [*or, sheriff*] take receipts for all moneys which he shall pay under and in pursuance of this decree, and file the same with his report of the proceedings subsequent to the confirmation of his report of sale, and that he bring into this court according to law and the course and practice of this court all the proceeds of the said sales of the lands and premises above mentioned, which shall not be retained or paid out by him as hereinabove directed, together with the bond or bonds and mortgage or mortgages which shall be taken by him as hereinabove directed to be invested or disposed of in pursuance of the rules of this court, or otherwise as this court may order and direct.

9. That the said referee [*or, sheriff*] report his proceedings to this court.

¹ Compare *N. Y. Code Civ. Pro.*, § 1579.

² See *Wiggins v. Howard*, 83 *N. Y.*, 613.

Form No. 1857.

Order confirming report of distribution.

[*Title of action.*]At a special term [*dec., as in*
Form 493, p. 4].

On reading and filing the report of R. F., a referee duly appointed by an order of this court entered the day of , 18 , by which report it appears that the said referee has executed, acknowledged and delivered to J. K., the purchaser of the premises sold by the said referee, a deed thereof, and that he has distributed the proceeds of the sale of the said premises in the manner directed by the order of the court, and that the said referee has annexed to his report the receipts of the several persons to whom the said proceeds were required to be paid; Now, on motion of A. T., attorney for the plaintiff, it is

ORDERED, that the said report be, and the same is hereby approved and confirmed.

Enter: [*signature of judge by initials of name and title.*]

SECTION VI

PROCEEDINGS PECULIAR TO ACTIONS TO REDEEM.

FORMS.

(1858.) Judgment allowing plaintiff to redeem.

(1859.) Affidavit by mortgagee of non-payment of money.

(1860.) Final order dismissing action for redemption.

Form No. 1858.

Judgment allowing plaintiff to redeem.

[*After recitals:*] IT IS ORDERED AND ADJUDGED, that the defendant Y. Z. pay to the plaintiff dollars, the amount as aforesaid found due to him for principal and interest [with dollars for the said value of his improvements], and with dollars costs¹ hereby adjudged to the plaintiff, within six months² after the entry of this judgment, and service of notice

¹ Parker v. Austin, 15 Weekly Dig., 474. And allowance. Burke v. Can-dee, 63 Barb., 532.

² The decree on a bill to redeem should limit a time for redemption, and direct a bill to be dismissed with

thereof [with interest thereon from the date of the above-mentioned report, until the time of such payment]¹ at [*specifying place and hours for paying*], and that the said defendant do surrender the said mortgaged premises, described in the complaint, unto the said plaintiff, or unto such person or persons as he shall direct, free and clear of all incumbrances, done or suffered by him, or any person claiming by, from, or under him, and shall release and discharge said mortgaged premises from the mortgage in said complaint described,² and deliver unto the said plaintiff on oath, under the direction of the court [*or may appoint a referee*] if the parties cannot agree in respect thereto, all deeds and writings in his custody or power relating to the said mortgaged premises. But in default of the said plaintiff's paying unto the said defendant what is so reported to be due to him for principal, interest [improvements], and costs as aforesaid, this action do from thenceforth stand dismissed out of this court with costs [*if strict foreclosure is adjudged, may add*: and the defendant shall hold and retain the premises described in said mortgage as foreclosed, wholly free, clear and discharged of said mortgage³].

Form No. 1859.

Affidavit by mortgagee of non-payment of money.

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says: That he is the defendant herein. That he has not, nor has any other person or persons on his behalf, at any time heretofore, received or been paid or tendered the sum of dollars, or any part thereof, which by the judgment entered herein on the day of , 18 [and the referee's report dated , made in this cause pursuant to the said judgment], was ordered and appointed to be paid to this deponent, but that the said sum of dollars, with inter-

costs, if the money is not paid by that time. *Waller v. Harris*, 7 *Paige*, 167.

Where a decree of the Court of Errors gave a certain time to redeem, but did not declare the effect of an omission to redeem, the chancellor, on petition, made an order declaring its construction to be to bar redemption, unless made within the time, and extending the time. *Sherwood v. Hooker*, 1 *Barb. Ch.*, 650.

¹ As to this clause, see *Waller v. Harris*, 7 *Paige*, 167.

² *Decker v. Patton*, (III., 1887) 11 *Northeastern Rep.*, 897.

³ Not suitable in an action to declare an apparent deed to be a mortgage. *Smidt v. Jackson*, 11 *Hun*, 361. Adapted from *Gerrish v. Black*, 109 *Mass.*, 474.

est, now remains due and owing to this deponent upon the mortgage in the said judgment mentioned. [Signature.]

[*Jurat.*]

Form No. 1860.

Final order dismissing action for redemption.

[*Title of action.*]

Upon the judgment entered herein on the day of , 18 , and on reading and filing due proof of service upon the said plaintiff more than [six months] since, of a certified copy thereof, with notice of the entry of the same [and of a copy of the bill of costs as taxed]; and on reading and filing the affidavit of the said defendant, showing that the amount thereby required to be paid has not been paid, but that the whole of the said sum of dollars still remains due and owing from the plaintiff to the said defendant for his principal, interest and costs; Now, on motion of T. Z., of counsel for the defendant, and on hearing A. T., of counsel for the plaintiff, in opposition :

It is ORDERED and ADJUDGED, that this action be and hereby is dismissed, with costs to be taxed [*and may add allowance, if not previously awarded*].

Enter : [*signature of judge by initials of name and title.*]

[*On this, final judgment may be entered.*]

ARTICLE IX.

AMENDING OR CONFIRMING JUDGMENT AND LIMITING TIME TO REVIEW, &c.

FORMS.

I. AMENDING OR CONFIRMING JUDGMENT.

- (1861.) Order confirming irregular judgment against infant.
- (1862.) Notice of motion (or order to show cause) for order amending judgment or correcting record.
- (1863.) Order amending judgment.
- (1864-1870.) Statements suitable to insert in foregoing form.

(1871.) Affidavit to move on behalf of third person, &c., to re-settle judgment, &c.

(1872.) Order vacating a judgment and resettling findings.

II. LIMITING TIME TO REVIEW OR MOVE.

(1873.) Notice of judgment, &c., to limit time to move to be relieved therefrom.

(1873a.) Notice, &c., to limit time to appeal.

I. AMENDING OR CONFIRMING JUDGMENT.

Form No. 1861.

Order confirming irregular judgment against infant.¹

[See *Forms* 453-455, *Vol. I*, pp. 837-839.]

Form No. 1862.

Notice of motion (or order to show cause) for order amending judgment or correcting record.²

[*Move the court; see Forms 488 and 491, pp. 1, 3, of this Vol., and asking an order:*] that the judgment herein

¹ After judgment and sale, a defect of parties may be cured by getting leave to file a supplemental summons and complaint against the omitted parties. Decision of General Term in *Rice v. Barrett*, 99 *N. Y.*, 403.

To amend a judgment and confirm a sale thereunder, questioned on the ground of alleged irregularity in an order for substituted service on certain of the defendants, move to set aside the judgment, sale, and the deed thereunder; and take an order so doing, without prejudice to any proceedings had prior to the application for judgment, as against all of the defendants who were then adults, and with leave to the plaintiff or his grantee to take such further proceed-

ings as he might be advised against the infant defendants.

Under this another service may be made without superseding or abandoning the original service, and the action will thereupon be deemed to be still pending, and may be carried to regular judgment afresh. *Wood v. Kroll*, 43 *Hun*, 328.

Or open the judgment only as against those not bound.

² The motion, if by a party, will be on affidavit; if by a stranger, it is usual, though not essential, to present a petition supported by affidavits. See *Vol. I*, p. 331.

Notice is necessary to any party who has appeared. *Allen v. Swan*, 32 *Hun*, 363 (justice's judgment).

[and the findings¹ on which it was entered, *or otherwise indicate all papers necessary to be corrected*] be amended [*nunc pro tunc*²] by striking out [etc.] and by inserting [etc.—or, be amended in the following respects: *enumerating them*; see *Forms* 1864, 1870 (*below*)].

[*If the motion is in any part founded on irregularity, add:*] This amendment being sought on the ground [among others] of irregularity, in that [*specifying each irregularity*].
[*Stay, if desired, as in Forms 204–206, Vol. I, p. 446.*]

Form No. 1863.

Order amending judgment.³

[*Title (court order) and recitals; see Form 493, p. 4, of this Vol.*]

ORDERED AND ADJUDGED, 1. That the judgment herein [and the findings on which it was entered—*or otherwise indicate all papers necessary to be corrected*] be and the same are hereby amended [*nunc pro tunc*] by striking out [etc.] and by inserting [etc.], or be amended in the following respects [*enumerating them; see other Forms below*].

2. That the clerk of this court correct the judgment record [and the docket of the judgment] in this action, to conform herewith, and attach this order to the judgment-roll filed herein, so modified. [*For another form of correction, see Vol. I, p. 60, Form 24.*]

3. That pay to , or his attorney, ten dollars costs of this motion.

[*Or may impose costs on moving party, thus:*] This motion is granted on condition of payment by to , of \$ costs, within from the date of this order.

Enter: [*signature of judge by initials of name and title.*]

STATEMENTS SUITABLE TO INSERT OR SUBSTITUTE IN FOREGOING FORM.

1864. *To insert a paper in judgment-roll:*⁴ That the [plaintiff] be and hereby is required to file the [bill of particulars⁵ of his claim in this action

¹ See *Rockwell v. Carpenter*, 25 *Reg.*, 607; *Borer v. Chapman*, 119 *U. S.*, 529.

² As to power to enter *nunc pro tunc*, see *Tuomy v. Dunn*, 77 *N. Y.*, 515; *Long v. Stafford*, 103 *id.*, 274;

Fawcett v. Vary, 59 *id.*, 597; *Mitchell v. Overmann*, 103 *U. S.*, 62; s. c., with

note by Prof. Tiedeman, 20 *Am. L.*

³ For other Forms see Vol. I, pp. 837–839.

⁴ *Renouil v. Harris*, 2 *Sandf.*, 641; s. c., 1 *Code R.*, 125.

⁵ One object of a bill of particulars of items of demand is to make it

furnished by him], and the clerk is hereby directed to annex said [bill of particulars] to and make it part of the judgment-roll in this action.

1865. *To reduce excessive recovery.*¹] That the said judgment in this action in favor of the plaintiff and against the defendants, for the sum of \$ entered on the day of , 18 , be and the same is hereby amended and corrected, by reducing the amount thereof to the sum of \$; and the clerk of this court is hereby directed to correct the docket of said judgment accordingly.

1866. *To insert costs in judgment-roll and perfect judgment nunc pro tunc, notwithstanding lapse of years.*²] That the amount of costs and disbursements, as adjusted in the bill of costs herein, taxed on the day of , 18 , to wit, \$, be inserted in the judgment annexed to and a part of the judgment-roll herein, and that said judgment-roll be perfected and said judgment docketed in said county of , as of the date of , 18 , and that the plaintiff have leave to issue execution in this action for the collection of the costs and disbursements entered in said judgment and the amount of alimony granted in said decree, with interest on each installment thereof from the day when the same became due to the time of the issuing of said execution.

1867. *To charge costs on the fund.*³] that the judgment entered herein the day of , 18 , be and the same is hereby corrected and modified so as to charge the collection or payment of such judgment solely upon any property of said S. H. R. in the hands of the plaintiff, T. S. H., as receiver of the property, &c., of said R.

1868. *To save time for appeal.*⁴ &c.:] The direction herein that said amendment is made *nunc pro tunc* shall not abridge the time within which the [defendant] may appeal from the judgment or file his exceptions or make a case, or move for a new trial; such time to begin to run from the time the [plaintiff] shall serve upon the defendant or his attorneys a copy of the judgment as amended, with notice of entry.

1869. *To save appeal already taken.*] That the notice of appeal heretofore filed and served in this action stand as the notice of appeal from the judgment as amended [or, as entered] under this order, the [defendant], by accepting this order, waiving [or, having in open court waived] all questions as to the sufficiency of such notice.

1870. *Saving right to bring new action;*⁵ by inserting after the word "dismissed," and instead of the words "upon the merits," the following clause:]

clear, after judgment, what is covered by the recovery.

This motion will not be granted if the particulars adequately appear in the pleadings on file.

¹ See *Rockwell v. Carpenter*, 25 *Hun*, 529.

² This order was made in *Park v. Park*, *ex parte*, after the lapse of nine years, on affidavits showing excuse for the neglect; and the provisions of the judgment granting alimony were enforced by process for contempt, in 80 *N. Y.*, 156, 161.

³ The power of the court held by same judge before whom the trial

took place to make this order was sustained in *Henry v. Randall*, 15 *Weekly Dig.*, 106; citing 8 *Hun*, 362; *aff'd*, 73 *N. Y.*, 12.

So the court may revoke allowance of discretionary costs. *Hammond v. Slocum*, 50 *How. Pr.*, 415.

⁴ See *Matter of Beckwith*, 87 *N. Y.*, 503; *United States v. Gomez*, 1 *Wall.*, 690; *Whitney v. Townsend*, 7 *Hun*, 233.

⁵ *Mechanics' Banking Asso. v. Mariposa Co.*, 7 *Robt.*, 225; *Williams v. Hayes*, 68 *Wis.*, 248; *s. c.*, 32 *Northw. Rep.*, 44; *Swift v. Allen*, 55 *Ill.*, 303.

as unsustained by the evidence, but without prejudice to the right of the [plaintiff] in a proper action to recover from the [defendant]. [*May add words defining the cause of action saved.*]

Form No. 1871.

Affidavit to move on behalf of third person, claiming as a creditor of the parties, to resettle judgment by striking out extravagant allowances.¹

[*Title of court and action.*]

[*Venue.*]

E. P. W., being duly sworn, says :

I. That he is the attorney for one J. M. F., the largest and only creditor of any consequence of the firm lately composed of the parties to this action.

II. That on the day of , 18 , deponent, as attorney for said F., commenced an action in the court of against said S. and T., both the parties to the above entitled action, who were then engaged in business in this city as copartners, in which action said F. is seeking to recover the sum of \$, the value of certain goods sold and delivered by him to them. Said defendants in that action have put in an answer, sham in its nature, but which is barely sufficient to raise an issue, and said cause has been placed on the calendar and noticed for trial.

III. That meanwhile, and on the day of last, after the commencement of said action, one of said partners, the parties hereto, commenced the above entitled action ostensibly against the other for a dissolution of the copartnership and an accounting, but really, as deponent believes, for the purpose of hindering and delaying creditors. And deponent is informed and verily believes that J. E. N., Esq., has been appointed receiver of the copartnership assets herein ; and that said business, and its stock, fixtures, &c., have been sold by said receiver at public auction, as deponent is informed and verily believes, and that such sale has realized a sum not sufficient to pay creditors.

IV. Deponent has just been informed and has discovered

¹ In an unreported case (*Spitz v. Tousey*) it was held by the General Term of the First Department error to refuse to grant this motion made on this and a corroboratory affidavit; and the order refusing was reversed, and the creditor brought in as a party *nunc pro tunc*. (Mere mem., 38 *Hun*, 639.) Compare *Lilly v. Shaw*, 59 *Ill.*, 72.

by inspection of the records and files of this court, that the parties hereto have procured, on the day of , inst., an interlocutory judgment or decree to be entered, awarding allowanees to the respective attorneys for the plaintiff and defendant, amounting to the sum of \$, and that in pursuance thereof said receiver is liable at any time to pay them said money.

V. Deponent verily believes that said allowances are grossly in excess of the value of the services rendered by said attorneys and counsel, and in excess of the power of the court, and that the payment thereof will so deplete the fund as to result practically in defeating *pro tanto* the claim of said F. as a creditor.

VI. Deponent therefore prays that an order be granted in the action staying and restraining said receiver from paying out any moneys under said decree until said F., creditor, can be heard on a resettlement thereof, and avers that no previous application has been made for such order.

[*Jurat.*]

[*Signature.*]

Form No. 1872.

Order vacating a judgment and resettling findings.¹

[*Title (court order) and recitals ; see Form 493, p. 4.*]

ORDERED, 1. That the judgment entered in this action on the day of , 18 , be and the same is hereby vacated and set aside.

2. That the several findings of fact and conclusions of law herein be resettled before Mr. Justice J. K. upon [two] days' notice, to be given by either party.

Enter : [*signature of judge by initials of name and title.*]

II. LIMITING TIME TO REVIEW OR MOVE.

Form No. 1873.

Notice of judgment or other proceeding to limit time to move to be relieved therefrom.²

[*Title of court and action.*]

Please take notice, that on the day of , 18 ,

¹ The court has power before the time to appeal has expired, to resettle its findings in any respect necessary to correct inadvertent error (as, for instance, where findings are inconsistent), though not to find differently

on new evidence. *Coffin v. Lester* 36 *Hun*, 347.

² Under *N. Y. Code Civ. Pro.*, § 724, this should be personally served on the party. Service on the attorney of record is not enough. *O'Neil v.*

judgment in this action was entered against you in the office of the clerk of _____, for [the relief demanded in the complaint, viz.,—*indicating what, or may annex a copy of the judgment*].

[Date.] [Signature and office address of],
To _____, [defendant]. Attorney for [plaintiff].

Form No. 1873a.

Notice of judgment or order, to limit time to appeal.¹

[Entitle, unless indorsed on copy.]

Please take notice, that within is a copy of the judgment [or, an order] entered in this action, on the _____ day of _____, 18____, in the office of the clerk of the _____ Court [or, the clerk of the county of _____].

[Date.] [Signature and office address of],
[Address] To _____ Attorney for _____
Attorney for _____

Hoover, 17 *Weekly Dig.*, 354; *contra*,
Jex v. Jacob, 7 *Abb. N. C.*, 452, 460.

Service of transcript is sufficient
notice of a money judgment. Jex v.
Jacob (*above cited*).

¹ See also Form 1612, and notes,
p. 848 of this Vol. Not needed to
limit time to appeal from a judgment
to the Court of Appeals.

ARTICLE X.

VACATING OR OPENING JUDGMENT.

FORMS.

(1874.) Affidavit to move to vacate judgment, &c.

(1874a.) Leave to heir, executor, &c., to move against final judgment, &c.

(1875.) Affidavit to move for leave to defend, after judgment, &c. (in divorce).

(1876.) — — — to set aside judgment against infant, &c.

(1877.) Notice of motion (or order to

show cause) to move to open default, &c.

(1878.) Order thereon.

(1879–1889.) Statements suitable to insert in foregoing Form.

(1890.) Order vacating judgment of divorce, &c.

(1891.) — setting aside judgment at the instance of a subsequent *bona fide* purchaser or mortgagee.

Form No. 1874.

Affidavit to move to vacate judgment entered on false affidavit of service of summons.¹

[*Title of court and action.*]

[*Venue.*]

A. C., being duly sworn, says :

I. That she is one of the defendants in the above entitled action, and the wife of her co-defendant, J. E. C.

II. That she has been informed that one C. E. B. heretofore, and on the day of , 18 , made an affidavit in the above action, in which he, among other things, stated that on the said day of , 18 , he served a copy of the summons in the above action, together with a notice of the object of the action, on this defendant, at , in the county of aforesaid. The judgment against deponent in this action was entered on the day of , 18 , on said affidavit.

III. Deponent further says, that said affidavit of C. E. B., so far as it affects this deponent, is false and untrue in each and every particular; that no summons or any other paper, nor any process of whatsoever kind or description in the above action was ever served on this deponent by said B., or by any other person or persons whomsoever.

¹Sustained by *White v. Coulter*, affidavits were annexed, one of them 59 N. Y., 629. Three corroborating being made by the process server.

IV. That since the entry of the judgment in the above action, this deponent has been informed and verily believes that the said summons and notice of object of action was served upon a servant in the employ of this deponent, instead of being served upon this deponent herself.

[*Jurat.*]

[*Signature.*]

Form No. 1874a.

Leave to heir, executor, &c., to move against a final judgment for error in fact.¹

[*For proper allegations as to death or disability of party, see Forms in Chapter XI. For order, see p. 995.*]

Form No. 1875.

Affidavit to move for leave to defend, after judgment, on service by publication² (in divorce).

[*Title of court and action.*]

[*Venue.*]

H. B., being duly sworn, says :

I. That he is the person named as the defendant in the above entitled action.

II. That he never was served with any papers in this action at the commencement thereof, nor at any time since.

III. That he first learned of the existence of the action on the day of , 18 , after the alleged judgment had been entered, and immediately thereupon he consulted his counsel hereinafter named as to the best manner of making defense therein [*or otherwise state in what mode the proceedings were first brought to his notice, and his prompt action thereon*], and deponent has prepared for service the annexed [verified] answer.

¹ *N. Y. Code Civ. Pro.*, § 785.

² From *Brown v. Brown*, 58 *N. Y.*, 609, modified by alleging ignorance of the action till after judgment; see 2 *Hun.*, 677; and by referring to answer annexed, see *Johnson v. Lindsay*,

14 *Central Law J.*, 393; *Merriam v. Gordon*, 22 *N. W. Rep.*, 563; *Pope v. Pollock*, 15 *Weekly Law Bul.*, 347; and for the New York statutes, see *N. Y. Code Civ. Pro.*, § 445; *Duchè v. Voisin*, 18 *Abb. N. C.*, 358.

IV. That all the allegations in the complaint with reference to [acts of adultery] by deponent are untrue; and that had deponent been advised of said action, he would at once have taken steps to defend it.

[*In divorce, may add as bearing on alimony:*] V. That deponent has no means or property whatever, either real or personal, and is not in any business; but on the contrary, in consequence of the acts of plaintiff, deponent has expended upon her and for her all the means and property he had; and deponent is now living with and dependent upon his relatives for support.

VI. That [*here insert oath to merits as in next Form*].
[*Jurat.*] [Signature.]

[*Annex proposed answer, and if not duly verified according to § 524, or privileged (see 21 Abb. N. C., 211), allege positively in the affidavit its truth.*]

Form No. 1876.

Affidavit to move to set aside judgment against infant without appointment of guardian ad litem.¹

W. N. C., being duly sworn, says:

I. That he is one of the defendants herein.

II. That this action was duly commenced on or about , 18 , C. P. S., Esq., appearing as attorney for plaintiff.

III. That the action was brought [*state nature, as thus:*] on a promissory note alleged to have been made by the defendants as copartners.

IV. That on , 18 , judgment for \$ was entered by default in the office of the clerk of this court against said defendants. *

V. That at the times aforesaid, and up to , 18 , this defendant was an infant, and no guardian *ad litem* was appointed or appeared in said action for him.

VI. That deponent has fully and fairly stated the case to

¹ Upon the allegations of this affidavit it was held error to refuse to vacate the judgment, in *Peck v. Coler*, 20 *Hun*, 534; and see *McMurray v. McMurray*, 9 *Abb. Pr., N. S.*, 315, 323.

J. S., Esq., his counsel, who resides at No. , street, in the city of , and that he has a good and substantial defense on the merits to the action, as he is advised by said counsel, after such statement, and verily believes.

[*Jurat.*]

[*Signature.*]

Form No. 1877.

Notice of motion (or order to show cause¹) to move to open default, inquest, or dismissal.²

[*Move the court; see Forms 488, 491, and pp. 1, 3, of this Vol., asking an order:*] directing that the default [*or, inquest—or, dismissal of complaint*] taken herein on the day of , 18 , be opened [*and the judgment thereon, if entered, and all proceedings founded thereon—or if needed, all subsequent proceedings on the part of in this action*], be vacated and set aside [*as to the defendant Y. Z.*].

[*If leave to plead or amend is asked, may add:*] and the said defendant be permitted to serve, as an answer to the complaint herein, the answer [*or, amended—or, supplemental answer*] annexed to said affidavit, with the same effect in every respect as if said defendant had served the same within the time allowed by law.

[*If cause is in readiness for trial, may substitute for last clause:*] and that the cause be restored to the calendar.

¹ If an order to show cause is granted by the court or a judge thereof, direction as to mode of serving a person who cannot be found may be inserted. *N. Y. Code Civ. Pro.*, § 1289.

As to the necessity of personal service and on whom, and the mode of making it, see §§ 1286–1289.

If the judgment has been assigned, give notice to the assignee, if known. *Robinson v. Am. Chem. Co.*, 9 *Civ. Pro. R. (Browne)*, 78.

On moving to open a judgment which established the title to real property, if it be desired to prevent the successful party in the judgment from conveying meanwhile, file the motion papers, and give personal notice to the party having apparent power to convey, so as to be able to invoke the doctrine of *lis pendens*.

See *Scudder v. Sargent*, 15 *Nebr.*, 102.

² If judgment has been entered,

observe that the statute prescribes a limit of one year, from the filing of the roll on final judgment, in which to move for irregularity. *Cook v. Dickerson*, 1 *Duer*, 679; *N. Y. Code Civ. Pro.*, § 1282.

And one year from notice of judgment, as the limit for moving for relief in case of mistake, inadvertence, surprise, or excusable neglect. § 724; *Jex v. Jacob*, 7 *Abb. N. C.*, 452, 460.

Laches may result in denial of a motion made within that time. *Orleans Co. Nat. Bank v. Spencer*, 19 *Hun*, 569.

And the statute prescribes two years as the limit for a motion founded on error in fact not arising on the trial. *N. Y. Code Civ. Pro.*, § 1292.

But these restrictions do not take away the equitable control of the court over its own judgments. *Brown v. Brown*, 58 *N. Y.*, 609; rev'g 1 *Hun*, 443; s. p., 78 *N. Y.*, 362.

[*If restitution is asked, add:*] and that the property taken and moneys levied on thereunder be restored to the defendant.

[*If on the ground of irregularity, add:*] with costs, upon the grounds among others that said default [*or, inquest*] was irregularly taken in this; that [*specifying each irregularity*].

[*If not on grounds of irregularity, nor as matter of right, substitute for last clause:*] upon such terms as may be just [*in either case add: and for such other—&c.*].

Form No. 1878.

Order granting or denying motion to open default, inquest, &c.

[*Title (court order) and recitals; see Form 493, p. 4.*]

ORDERED, that the said motion be denied, with dollars costs [*or, be granted, and the said judgment—describing it—* is hereby set aside, * and the default—*or, inquest*—opened,—and the judgment entered thereon, and all proceedings founded thereon, are vacated—as to the defendant Y. Z., *naming which, if not all the defendants,*—and said defendant let in to defend the action—*or, to serve his proposed answer herein. For other clauses, see Forms 1879, 1886 (below)*].

[*If terms are imposed, add:*] This order is made upon condition that [*stating it as in Forms 1885, 1889 (below), and add:* ORDERED FURTHER, that in default of compliance with any of the terms of this order, the defendant's motion be denied, with \$10 costs to plaintiff].

Enter: [*signature of judge by initials of name and title.*]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1879. *Vacating judgment for irregular taxation of costs:*² That the bill of costs filed in the judgment-roll herein, on , 18 , be stricken from the roll, and the judgment for the costs thus irregularly taxed and irregularly entered in the judgment-roll, set aside, together with dollars motion costs,

¹ Notice or order to show cause must, under the New York rule, specify the irregularity, if one be relied on. § 1282; *Lewis v. Graham*, 16 *Abb. Pr.*, 126.

For other authorities, see p. 154 of Vol. I.

² In *Wakefield v. Am. Surety Co.* (MS.), it was held by the N. Y. Com-

mon Pleas at general term, that it was in the discretion of the court, in an action founded on the judgment hereby opened, to refuse to allow a supplemental answer to be put in pleading this as a *vacatur*. Citing *Holyoke v. Adams*, 59 *N. Y.*, 233, 237; *Wilson v. Palmer*, 75 *id.*, 250.

without prejudice to a regular application to tax the costs of the action, and to enter a judgment for the amount of the costs upon such retaxation.

1880. *If mode of trial is to be changed, state it, as thus:*] That the order of reference herein be set aside, and the issues joined herein be tried by a jury.

1881. *Allowing specific additional proofs only:*¹] that the report herein be sent back to the referee for the purpose [only] of allowing defendant to put in his exhibits and records;

1882. *DIRECTION: That issue or special questions be framed for trial by jury:*] that an issue be granted to try the validity of the said judgment, and that all further proceedings on said judgment or upon any execution which may have been issued thereon be stayed until the further order of this court. That the attorney of the said defendant prepare the record for the trial of said issue in the county of _____, and furnish a copy thereof to the attorney for the plaintiff, and the said defendant to be the plaintiff therein; and if the said attorney for the plaintiff in this suit shall object to the form thereof, he shall signify it by a notice in writing to the attorney for the defendant in this suit, who gave notice of this motion in behalf of said defendant, in ten days after said copy shall be so furnished, and in that event the same shall be settled by a judge of this court on notice given to the attorney for the plaintiff in this suit within ten days thereafter. It is further ordered, that said issue may be tried at the next circuit court, to be held in the county of _____, after said issue shall be made and settled [*may add special directions as to trial, as thus:* and that on such trial the said A. B. be in the first instance required to prove the several items of his demand which made up the sum of the condition of the bond upon which the judgment was confessed, with the particular time and times when, and also how such indebtedness accrued, and shall also be required to produce on such trial the said bond upon which said judgment was so confessed]. The costs to abide the event of this suit.

1883. — *For restitution:*] that plaintiff make restitution to defendant of the amount collected by execution upon said judgment, with interest thereon from the _____ day of _____, 18 [to be ascertained and determined by R. F., Esq., of _____, who is hereby appointed a referee for that purpose].

1884. — *that judgment stand as security:*] but said judgment hereby opened [and the execution issued thereon, and the levy thereof] to stand as security for the plaintiff's claim, to abide the event of the action.²

1885. — *Opening default without staying collection of judgment:*] that the judgment and levy in this action stand as security, and that plaintiff have leave to secure the amount of the judgment by any proceedings to enforce its collection; and that the defendants have leave to serve their answer within [five] days, upon payment of _____ costs of opposing this motion, and stipulating, if the plaintiff so elect, to refer the issues to a referee, to be agreed on, or in case they cannot agree, to be named by the court; the trial to proceed on _____ days' notice from either party. When a trial has been had and a judgment obtained, the defendants may, if the judgment shall be in their favor, apply to the court for further relief.

¹ From *Stephens v. Fox*, 83 N. Y., 313, where it was held, even without the word "only," that on the rehearing in pursuance of this order, oral evidence of a new defense, offered by defendant to sustain a counter-claim, was properly excluded.

² As to the practice on final recovery, see *Dows v. Boughton*, 3 Hill, 452, holding that a second judgment is unnecessary. The court may now doubtless enter a second judgment, which shall not vacate but merge the first.

1886. — *Leave to plaintiff to amend or discontinue:*] that in case the defendant shall serve an answer herein and set up as a defense to this action the [counter claim mentioned in his affidavit], that then the plaintiff may have leave to amend the summons and complaint as he may be advised [or, to discontinue his action without costs—or, upon payment of costs].

1887. *CONDITION: of consent to reference:*] that the defendant serve his answer on plaintiff's attorneys within days of the service [or, date] of this order [or, that the proposed answer stand as the answer of the defendant herein]; and that defendant stipulate within days of the service [or, date] of this order to refer the issues herein to J. K., Esq., to hear and determine the same; and that defendant receive days' notice of trial for any day after the day of next.

1888. — *Consent to reference, and security for fees:*] and that the said action, and all the issues therein be, and they hereby are, referred to R. F., Esq., as referee, to hear and determine the same, and that defendant accept, and the referee proceed on, days' notice of hearing, after issue joined, and that defendant execute and deliver to the plaintiff, at the time of serving his answer, a bond, with good and sufficient surety, to be approved by the court, in the penalty of dollars, conditioned for the payment by defendants of the referee's fees in said reference in case judgment be rendered in plaintiff's favor.

1889. — *Security for anticipated judgment:*] on defendants giving a bond to plaintiff within [twenty] days from the entry of this order, with two sufficient sureties, to be approved by the court, and to justify as provided by the law in undertakings on appeal, said bond to be in the sum of \$2,000, conditioned for the payment of any judgment which the plaintiff may eventually recover against the defendants or either of them.

Form No. 1890.

Order vacating judgment of divorce, and allowing defendant to defend.

[*Title (court order) and recitals; see Form 493, p. 4.*]

ORDERED, that the judgment heretofore entered in this action be, and the same hereby is in all respects vacated and set aside, and the defendant is allowed to come in and serve his answer, and defend the said action as he may be advised, upon the terms following [and upon payment to plaintiff's attorney of the costs of this action to this time, and].

It is hereby referred to J. W. S., Esq., as sole referee, to take proof of the allegations in the complaint and answer, and report the same to this court, with his opinion thereon, the testimony heretofore taken to stand as testimony in the cause, and the reference to proceed upon two days' notice to the defendant.

The defendant may cross-examine the witnesses heretofore examined by the plaintiff, or any or either of them, before the

referee herein named, and, if necessary, defendant may apply for a commission to examine such as may be absent from this State [*or other conditions as to trial; see Forms 1885-1889*].

Enter: [*signature of judge by initials of name and title.*]

Form No. 1891.

Order setting aside judgment at the instance of a subsequent bona fide purchaser or mortgagee.¹

[*Title (court order) and recitals; see Form 493, p. 4.*]

ORDERED, that the judgment [confessed by Y. Z. in favor of A. B., and entered on the day of , 18] be vacated and set aside as to the said M. N. [*the moving party*], and as to the real estate hereinafter described, and that the execution issued on said judgment, and all proceedings had under it, be set aside so far as they relate to or affect the said real estate, and that the said real estate is hereby made and declared to be freed and discharged of and from the apparent lien of said judgment, and of and from any and every and all proceedings whatsoever, under and by virtue of the same. The premises above referred to are bounded and described as follows: [*description.*]

Enter: [*signature of judge by initials of name and title.*]

¹ Sustained by *Kendall v. Hodgins*, 1 Bosw., 659; s. c., 7 Abb. Pr., 309.

ARTICLE XI.

FURTHER DIRECTIONS.

FORMS.

(1892.) Order on petition for further directions.

(1893.) Notice of motion for reference

to determine mode of carrying into effect a judgment for specific relief, &c.

Form No. 1892.

Order on petition for further directions.¹

[*Title of action.*] At a special term [*&c.*, as in Form 493, p. 4].

This cause coming on regularly to be heard on the petition of the [plaintiff], verified the day of , 18 , for further directions, upon the foot of the judgment entered herein on the day of , 18 , upon reading and filing the said petition [*and designate all other papers relied on; and, if order to show cause was taken directing mode of service, mention it and the proof of due service according to it, and recite also the fact of reference had, if any, report and exceptions taken, if any, and the facts established to the satisfaction of the court; also appearances, &c., if any, as usual, and continue*]:

It is ORDERED AND ADJUDGED [that said exceptions be overruled and said report be confirmed, and] that [*&c.*, as in a judgment]. And either party to said action or to this proceeding, and their successors in interest, have leave to apply further on the foot hereof and of said judgment for further directions.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1893.

Notice of motion for reference to determine mode of carrying into effect a judgment for specific relief (in this case, support).²

[*Move the court; see Form 488 or 491, pp. 1 and 3, for an*

¹ Apply on affidavit or petition, the latter being more usual where persons not parties to the record are concerned. Serve personally on those proceeded against, unless they are represented by attorney still acting for them in the cause after judgment. A voluntary general appearance in response to the petition is equivalent to

service. If appearance is not made, and personal service within the State impracticable, present the petition to the court, adding affidavit that no previous application has been made, and take an order to show cause, directing mode of service. See Forms 1083, 1089; and 20 *Abb. N. C.*, 112.

² On a reference to carry into

order:] that it be referred to some suitable person to [*here state object, for instance thus*] take proofs of all the facts and circumstances relating to or affecting the right of the defendant W. G. to be allowed his support and maintenance, either at the institution of the defendant [*name*], or elsewhere, as he may select, so far as the same has not already been adjudicated, and what is a proper amount to be paid to said W. G., if any, for his reasonable support and maintenance under the judgment-roll herein, and under the will of the testator, since the death of the testator, E. L. M., to the time of the report of the referee, and what will be a reasonable and proper amount to pay to said W. G. for his future support and maintenance under said judgment and under said will during his life, if he shall decide to reside elsewhere than in said institution, and that said referee report to this court, the proofs with his opinion as speedily as may be, or for such other [*dec.*].

effect a judgment, objections to that considered. *Story v. Livingston*, 13 judgment are not properly to be *Pet.*, 359, 365.

ARTICLE XII.

ASSIGNMENT, SET-OFF, DISCHARGE AND SATISFACTION.

FORMS.

- | | |
|---|--|
| (1894.) Assignment of judgment. | (1899.) Order thereon. |
| (1895.) Another Form (shorter), with reservation. | (1900.) Another Form—by perpetual stay. |
| (1896.) Assignment by a corporation. | (1901.) Order denying motion to cancel. |
| (1897.) Order setting off judgments. | (1902.) Another Form. |
| (1898.) Notice of motion (or order to show cause) to cancel a judgment after discharge of debtor. | (1903.) Leave to plead discharge after judgment, &c. |
| | (1904.) Satisfaction of judgment. |
| | (1905.) Another Form. |

Form No. 1894.

Assignment of judgment.¹

THIS INDENTURE, made the day of , one thousand eight hundred and , between J. S. H., party of the first part, and C. & M., party of the second part. WHEREAS the said party of the first part, on the day of , in the year one thousand eight hundred and , recovered a judgment in the [Superior Court of the city of New York] against G. W. B., for the sum of dollars:

NOW, THIS INDENTURE WITNESSETH, That the said party of the first part, in consideration of one dollar to him duly paid [and also in consideration of professional services rendered], hath sold, and by these presents doth assign, transfer and set over unto the said parties of the second part, and their executors, administrators [*or if a corporation or trustees:* their successors] and assigns, the said judgment, and all moneys that may be had or obtained by means thereof, or any proceedings to be had thereupon [and the cause of action whereon the same was recovered].²

And the said party of the first part doth hereby constitute and appoint the said parties of the second part, and their executors, administrators [*or if a corporation or trustees:* their successors] and assigns, his true and lawful attorneys irrevocable, with power of substitution and revocation, for the use, and at the proper costs and charges of the said parties of the second part, to ask, demand and receive, and to sue out executions, and take all lawful ways

¹ Sustained in *Beers v. Hendrickson*, 45 N. Y., 665.

A written assignment duly authenticated may be filed and noted on the docket, &c., so as to charge purchasers with notice. *N. Y. Code Civ.*

Pro., § 1270. Otherwise at common law. *Boston Co. v. Pless*, (*Col.*, 1886) 10 *Pac. Rep.*, 652.

² See *N. Y. Code Civ. Pro.*, §§ 1909-1912.

for the recovery of the money due, or to become due, on the said judgment; and on payment, to acknowledge satisfaction or discharge the same; and attorneys one or more under them, for the purpose aforesaid, to make and substitute, and at pleasure to revoke; hereby ratifying and confirming all that said attorneys or substitute shall lawfully do in the premises. And the said party of the first part doth covenant that there is now due on the said judgment the sum of dollars,¹ and that he will not collect or receive the same, or any part thereof, nor release or discharge the said judgment, but will own and allow all lawful proceedings thereon, the said parties of the second part saving the said party of the first part harmless of and from any costs and charges in the premises.

IN WITNESS WHEREOF, the party of the first part hath hereunto set his hand and seal the day and year first above written.

[*Signature and seal.*]

Sealed and delivered in presence }
of [*signature of witness*]. }

[*Acknowledgment or proof, see Form 495.*]²

Form No. 1895.

Another, shorter Form,³ with reservation.⁴

[*Title of court and action.*]

Judgment recovered and perfected in county clerk's
office, day of , 18 .

Debt, \$.

Costs, \$.

For a valuable consideration [*name of plaintiff or creditor*]
does hereby sell, assign, transfer and set over unto [*naming assignee*] all the right, title and interest of the said [*assignor*], in and under said judgment [and the cause of action therefor], [saving, reserving and providing, however, that this assignment shall transfer no right or claim against the defendant F., who was an indorser upon the note on which this judgment was obtained, nor affect his liability to said—*assignor*].

[*Date.*]

[*Signature.*]

¹ As to implied warranty, see *Furniss v. Ferguson*, 15 *N. Y.*, 437; 34 *id.*, 485; *Glass v. Read*, 2 *Dana (Ky.)*, 168; *Ross v. Terry*, 63 *N. Y.*, 613; *Otis v. Cullum*, 92 *U. S.*, 447.

As to stipulating as to priority, see *Winton's Appeal*, 111 *Pa.*, 387; *s. c.*, 3 *Atl. Rep.*, 789; 5 *id.*, 433.

² One who has assigned, bound to acknowledge. *N. Y. Code Civ. Pro.*, § 1262.

³ From *Booth v. Farmers' &c., Bank*, 50 *N. Y.*, 396.

⁴ *Bostwick v. Scott*, 40 *Hun*, 212.

Form No. 1896.

Assignment by a corporation.

[As in either Form above, adding:]

IN WITNESS WHEREOF, the [naming the corporation] has
hereto caused to be set their seal, and the signature of their
president, this day of , 18 .
[Seal.] [Signature of], President.

Form No. 1897.

Order setting off judgments.¹

[*Title (court order) and recitals; see Forms 493 and 1292.*]

ORDERED, that the judgment recovered by A. B. against Y. Z., in the Court for dollars, be set-off and deducted [with interest thereon to the date of this order] from the judgment recovered by Y. Z. against A. B., in this court for dollars [and the interest due thereon], and that the clerk of this court make the proper correction on the docket of said last-mentioned judgment by reducing said judgment to dollars [to bear interest from this date—and that said A. B. pay said Y. Z. ten dollars costs of this motion], and that said Y. Z. have execution for the said sums, amounting together to dollars.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1898.

Notice of motion (or order to show cause) to cancel a judgment after discharge of debtor.²

[*Move the court, see Forms 488 and 491, pp. 1, 3 (serving party and his attorney), for an order; see next Form.*]

¹ Notice of motion or order to show cause (which will be founded on affidavit) may be adapted from Form 1291.

A motion to set-off judgments should be made in the cause in which the judgment is against the moving party (*Cooke v. Smith*, 7 *Hill*, 186), because that is the cause in which he desires relief; and the rule is the same, though the judgments be in different courts (*id.*), he should apply to the court whose process he seeks to protect himself from by the set-off. If the causes are in the same court, the better practice is to entitle the moving papers in both. *Alcott v. Davison*, 2 *How. Pr.*, 44 (holding this

essential, without sound reason, at least so far as concerns a case where the motion papers, beside being entitled in the cause in which the judgment is against the moving party; also identify distinctly the other causes).

If the causes are in different courts, there is no objection to entitling the motion papers in both, if the body of the notice states in which court the motion will be made. But in either case the title of the cause in which the judgment is against the moving party had better precede the title of the other.

² Am. Exch. Bk. v. Brandreth, 12 Hun. 384.

Form No. 1899.

Order on bankrupt's or insolvent's motion to cancel judgment.

[*Title (court order) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, that the judgment recovered by A. B. against Y. Z., in this court, and entered and docketed in the office of the clerk of _____, on the _____ day of _____, 18____, for _____ dollars, be, and the same is hereby declared to be discharged, and the said clerk is hereby directed to mark the docket thereof as discharged and cancelled by order of court, adding the date of this order.

Form No. 1900.

Another Form—by perpetual stay.¹

That the plaintiff above named and his attorneys be perpetually enjoined from issuing execution on the judgment herein, and if execution has been issued, from enforcing the same, and from collecting or in any way enforcing the judgment herein, or attempting so to do; and that all proceedings in this action, or founded on the cause of action herein, on the part of the plaintiff and his attorneys and agents, be perpetually enjoined and stayed, and for such other [*&c.*].

Form No. 1901.

Order denying motion to cancel, but without prejudice.

ORDERED, that the motion for the cancellation and discharge of record of said judgment as against the defendant I. J. O. be, and the same is hereby denied without costs, and without prejudice to a motion on behalf of said I. J. O. for a perpetual injunction staying all proceedings of the above-named plaintiff or his assignee, or for leave to open said judgment and interpose an answer setting up his discharge in bankruptcy, as he may be advised.

¹ As to this relief, see *Palmer v. Hussey*, 119 U. S., 96; *aff'd* 59 N. Y., 647.

Form No. 1902.

Another Form—requiring issues to try validity.¹

That said motion be and hereby is denied on the plaintiff's serving issues to try the validity of the defendant's discharge within twenty days after the service of a copy of this order. Such issues are to be settled on notice to the defendant's attorney, and when so settled are to be tried by this court and a jury [*may add*: and it is further ordered that the levy made by the sheriff of the county of upon the property of the defendant, be discharged upon the defendant giving a bond in the sum of dollars to the plaintiff conditioned for the payment of the amount of the said judgment, interest and sheriff's fees, to be approved by a judge of this court, or upon his depositing with the clerk of this court the sum of dollars, to abide the result of the issues so formed].

Form No. 1903.

Leave to plead discharge, after judgment, and leave to plaintiff to discontinue.

ORDERED, that said defendant have leave to serve his answer herein within [three] days after the entry of this order, on payment to plaintiff's attorney of costs [accrued since the decision of the general term herein, ordering a new trial of this action], and costs of this motion.

And it is further ordered, that upon the service of said answer and the payment of such costs, the judgment herein entered on the day of , 18 , so far as the same provides for the payment of any deficiency by the said , be vacated and set aside.

And it is further ordered, that the plaintiff have leave to discontinue this action as against said defendant , or to disavow any personal claim against him herein, within twenty days after service of said answer, without costs, if so advised.

Form No. 1904.

Satisfaction of judgment.²

[*Title of court and cause.*]

[*Venue.*]

Satisfaction is acknowledged between A. B., plaintiff, and

¹ Sustained by *Stuart v. Salhinger*, 14 *Abb. Pr.*, 291.

² Sustained by *Beers v. Hendrickson*, 45 *N. Y.*, 665.

Y. Z., defendant, for the sum of \$; judgment entered in the judgment-book of the [Superior Court of the city of New York], the day of , 18 . [Signatures.¹]

[*If acknowledged before clerk, may say:*] Acknowledged before me, the day of , 18 , by O. P., to me known to be [one of the attorneys of record of the plaintiff] in the above action. [Signature of], Clerk.

[*If not before clerk, acknowledge as in Form 495.*]

Form No. 1905.

Another Form—by officer of corporation creditor.²

[*Title of court and action.*]

[*Venue.*]

I, J. G., president of said [corporation creditor], acknowledge satisfaction of a judgment recovered against [naming debtors; adding, if necessary: who were impleaded with], in the [Supreme Court of this State], between the said [naming creditor—plaintiff], and the said [defendants], for dollars, damages and costs [payment thereof to said bank having been made by].

Judgment-record filed and docketed the day of , one thousand eight hundred and , in the county of .
[Date.] [Signature of], President.

[*Acknowledgment as under last Form.*]

¹ May be signed by creditor or by assignee of record, or an executor or administrator; or by signature of attorney of record, if within two years after filing judgment-roll.

² Sustained by *Booth v. Farmers', &c., Bank*, 50 N. Y., 396. It is presumptive evidence of payment, without the express acknowledgment of payment inserted as above.

CHAPTER XV.

APPEAL.

I. NOTICE OF APPEAL; AND LEAVE. FORMS.

- (1906.) Notice of appeal (general form).
- (1907-1909.) Statements suitable to insert in foregoing Form.
- (1910.) Order granting leave to appeal to Court of Appeals in action originating in inferior court, or from a judgment or new trial order involving less than \$500.
- (1911.) Order granting heir, executor, &c., of deceased party leave to appeal, or to move against final judgment for error in fact.

II. SECURITY AND STAY.

- (1912.) Undertaking on appeal from judgment or order to the Court of Appeals, without stay.
- (1913.) Undertaking to stay, pursuant to order, on appeal from money order or judgment (including those payable in instalments, or for alimony, &c.
- (1914.) Undertaking on appeal to General Term or Court of Appeals from money judgment or order, with stay.
- (1915.) Undertaking to stay, on appeal from a judgment or order for possession of personal property.
- (1916.) Undertaking to stay, on appeal from judgment for possession of real property.
- (1917.) Undertaking to stay, on appeal from judgment in foreclosure.
- (1918.) Undertaking, in dower, to prevent stay on defendant's appeal from final judgment.
- (1919.) Certificate of deposit in lieu of undertaking on appeal.

- (1920.) Notice of deposit in lieu of undertaking on appeal.
- (1921.) Waiver of undertaking.
- (1922.) Order for stay on giving security.
- (1922a.) Exception and justification.
- (1923.) Affidavit to move to dismiss for neglect to give new undertaking.
- (1924.) Notice of motion to dismiss for neglect to give new undertaking.
- (1925.) Order allowing new notice of justification or new undertaking on appeal.
- (1926.) Order dismissing appeal or vacating stay.
- (1927.) Affidavit to obtain stay on appeal from an order or judgment.
- (1928.) Notice of motion (or order to show cause) for stay pending appeal.
- (1929.) Order for stay pending appeal.
- (1930.) Order appointing receiver to pay taxes, &c., pending appeal after judgment affecting title.
- (1931.) Affidavit to obtain order to mark judgment "lien suspended on appeal."
- (1932.) Consent of sureties annexed thereto.
- (1933.) Order to show cause why judgment lien should not be suspended on appeal.
- (1934.) Order releasing part of property from judgment lien.

III. SUBSTITUTION OF PARTIES.

The remedies for substitution, when necessary for purposes of appeal, are as follows:

I. Appeal by party taken after his adversary is dead.

- (1.) Appeal as if he were still living. Forms 1906-1909.
- (2.) Undertaking as in Form 1912, p. 995.

- (3.) Affidavit and order compelling the substitution of representative. Forms 1935 and 1936, p. 1010

II. Appeal by representative of party dying before appeal, or by any one not a party who has acquired an interest and is aggrieved.

- (1.) Appeal as if a party. Forms 1906-1911.

- (2.) Move to be substituted, adapting Forms 1115, &c., by adding an allegation of having taken and perfected an appeal.

III. Application of representative of party dying after appeal, taken by such party or by his adversary, to be substituted.

Affidavit and order; see Forms 1937-1940 (below).

IV. Disposal of appeal on application of a party where the adverse party has died after appeal, and his representative fails for three months to procure substitution.

Affidavit and order to show cause; see Forms 1941 and 1942 (below).

- (1935.) Affidavit to compel the substitution of representative of deceased adverse party.
- (1936.) Order compelling the substitution of representatives of adverse party.
- (1937.) Affidavit to move to substitute personal representative of party dying after appeal.
- (1938.) Order substituting personal representative of party dying after appeal.
- (1939.) Stipulation for substitution of heirs and personal representatives pending appeal.
- (1940.) Order substituting parties on appeal by consent.
- (1941.) Affidavit to procure order to show cause why judgment or order should not be reversed, &c.
- (1942.) Order to show cause why judgment or order should not be reversed, &c., where party dies after appeal, and no substitution has been had.

IV. BRINGING ON AND DISMISSING.

- (1943.) Note of issue on appeal.
- (1944.) Notice of argument.
- (1945.) Notice requiring the appellant to file return.
- (1946.) Notice of motion to dismiss appeal.
- (1947.) Order dismissing appeal.

V. THE DECISION AND JUDGMENT.

- (1948.) Order of affirmance.
- (1949-1953.) Statements suitable to insert in foregoing Form.
- (1954.) Order to modify judgment or order, and affirm as modified.
- (1955.) Order of reversal.
- (1956-1958.) Statements suitable to be inserted in foregoing Form.
- (1959.) Order amending General Term order so as to show that reversal was on question of fact.
- (1960.) Order for judgment, on appeal from a judgment and from an order for allowance.
- (1961.) Order for judgment on appeal by both parties.
- (1962.) Judgment on appeal.
- (1963.) Judgment on dismissal of appeal.
- (1964.) Order of General Term reversing order on demurrer.
- (1965.) Affidavit to enter judgment in order of General Term on demurrer.
- (1966.) Judgment after failure to answer pursuant to leave of General Term on reversing order on demurrer.

VI. RESTITUTION.

- (1967.) Affidavit to obtain restitution after reversal at General Term.
- (1968.) Notice of motion for restitution.
- (1969.) Order for restitution (with award of execution).

VII. REARGUMENT.

- (1970.) Order for stay pending motion for reargument.
- (1971.) Order returning remittitur to Court of Appeals, and staying action on undertaking.
- (1972.) Notice of motion for reargument on appeal.

(1978.) Order for reargument.
 (1974.) Order transferring cause to another department.

(1977.) Notice of entry of order on appeal remitting cause for further proceedings, and notice of hearing thereon.

VIII. FILING THE REMITTITUR AND SUBSEQUENT PROCEEDINGS.

(1975.) The remittitur.
 (1976.) Notice of filing remittitur.

(1978.) Order for judgment below on remittitur.

(1979.) Judgment on remittitur.

I. NOTICE OF APPEAL; AND LEAVE.

Form No. 1906.

Notice of appeal (general form).

[*Title of court appealed from, and action.*]

Please take notice, that the plaintiff [*or, the defendant—naming which if all do not unite*] appeals to the Court of Appeals [*or, to the General Term of this court for the Department*] * from the judgment [*or, order*] of the [*or, of this*] Court, herein entered in the office of the clerk of the county of [*or, of the clerk of the*] Court, on the day of , 18 [*may further identify it, if necessary, as thus: affirming—or, reversing—the final—or, interlocutory—judgment—or, the order—of the special term of the*] Court, entered in this action on the day of , 18]. †

[*Date.*] [*Signature and office address of*],
 Attorney for [*the appellant*].

To the Clerk of the county of : [*or, of the*] Court].
 And to
 Attorney for [*each adverse party*].

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1907. *Appeal from part of a judgment or order.* As in last Form to the *, continuing :] so much and such parts of the judgment [*or, order*] of the [*or, of this*] court, herein entered in the office of the clerk of , on the day of , 18 , [*indicating what part, as thus :*] as direct that the order of arrest herein granted be vacated and set aside with, dollars costs; but he does not appeal from the terms on which said order is conditioned.

1908. *Stipulation for judgment absolute on appealing to Court of Appeals from order granting new trial ;* † insert at end of Form No. 1906 after the †:]

† 1 N. Y. Code Civ. Pro., § 191, subd. 96 *id.*, 513; s. c., 6 Civ. Pro. R. 1; *id.*, § 3191, subd. 2; Lane v. Wheeler (Browne), 191, 202; Mott v. Lansing, 101 N. Y., 17; Wilmore v. Flack, 5 *Lans.*, 516.

And the above-named [plaintiff] and appellant hereby stipulates and agrees that if such order be affirmed, judgment absolute shall be rendered against him in favor of the above-named [defendant] and respondent.

1909. *Review of intermediate order or interlocutory judgment; insert at the end of Form No. 1906, after the †:*] And appellant intends to bring up for review upon such appeal the interlocutory judgment entered herein the day of , 18 , and the order entered the day of , 18 [striking out the second defense from the answer herein].

Form No. 1910.

Order granting leave to appeal to Court of Appeals in action originating in inferior court, or from a judgment or a new trial order involving less than \$500.¹

At a General Term [*&c.*; *as in Form 493, p. 4 of this Vol.*].

[*Title of action.*]

On reading and filing the [defendant's] notice of motion for leave to appeal to the Court of Appeals from the judgment [*or, order*] of the present general term of this court [*or, of this court*], entered on the day of , 18 , and since the last general term of this court [upon the decision of this court, at said general term²]; and on reading and filing the affidavit of Y. Z. [defendant], verified the day of , 18 ; and on reading the printed case upon which the appeal to the general term of this court was heard, and upon the pleadings herein; and after hearing [*or, said motion having been submitted by*] T. Z., on behalf of the defendant, and by A. T. on behalf of the plaintiff; and it appearing to the court that a question of law is involved which ought to be reviewed by the Court of Appeals:³

ORDERED, that said motion be, and the same is hereby granted, and that the above-named defendants have leave to appeal from the said judgment [*or, order*] of the general term of this court. [*May add: upon filing the notice and giving the undertaking provided for in such cases within twenty days after the entry of this order.*⁴]

Enter: [*signature of presiding judge by initials of name and title.*]

¹ *Sprague v. Western Union, &c., Telegraph Co.*, 64 *N. Y.*, 658; and *N. Y. Code Civ. Pro.*, § 191.

² Vol. I, p. 131, note 2.

³ *Bastable v. City of Syracuse*, 72 *N. Y.*, 64.

⁴ For the power of the court to insert in such an order a clause to qualify or define the meaning of the decision appealed from, see *Leonard v. Ozark Land Co.*, 115 *U. S.*, 465.

Form No. 1911.

Order granting heir, executor, &c., of deceased party leave to appeal, or to move against final judgment for error in fact.¹

At a special term [*dec., as in Form 493, p. 4*].

[*Title of action.*]

On reading and filing the affidavit of M. N., verified the day of , 18 , whereby it appears that the above-named [defendant] Y. Z. [the deceased], being entitled to appeal from the judgment [*or, from the order*] of this court herein, which was entered on the day of , 18 [*or, being entitled to move to set aside the judgment entered herein on the day of , 18 , for alleged error in fact*], died on the day of , 18 , and before the expiration of the time allowed by law for taking such appeal [*or, making such motion*]; and that M. N., the heir [*or, devisee—or, executor—or, administrator*] of the said Y. Z., desires to appeal [*or, move therefor*]; and on proof of due notice of this motion given to A. B., and after hearing M. T., of counsel for said M. N. and M. T. [*or, and no one appearing for A. B.*] in opposition; Now, on motion of M. T., attorney for M. N.:

ORDERED, that said M. N., as heir [*or, devisee—or, executor—or, administrator*] of the said Y. Z., be and hereby is allowed to take an appeal [*or, to move for said relief*] at any time before the day of , 18 .

Enter: [*signature of judge by initials of name and title.*]

II. SECURITY AND STAY.

Form No. 1912.

Undertaking on appeal from judgment or order to the Court of Appeals, without stay.

[*Title of court below and action.*]

[*If from judgment:*] WHEREAS, on the day of , 18 , the above-named [plaintiff] recovered in the Court a judgment against the above-named [defendant, affirming a judgment], for dollars [*or, for recovery of possession of certain personal property—or otherwise as the case may be*].

[*Or if from order:*] WHEREAS, on the day of ,

¹ N. Y. Code Civ. Pro., § 785.

For proper allegations of affidavit as to death of party, see Chapter XI.

18 , an order of the Court was entered herein [*identify it, if necessary, by subject*].

AND WHEREAS, the said [*naming appellant*], feeling aggrieved thereby, intends to appeal therefrom to * the Court of Appeals [*and if the party adverse to appellant has died, add:*¹ And whereas, said died on or about the day of , 18]: **

NOW, THEREFORE, we, M. N. [*specifying residence and occupation*] and O. P., of [*specifying residence and occupation*], do hereby, pursuant to the statute, jointly and severally undertake † that the appellant will pay all costs and damages which may be awarded against on said appeal, not exceeding five hundred dollars.²

[*Date.*]

[*Signatures.*]

[*Acknowledgment as in Form 495, p. 6, of this Vol.; affidavit of sufficiency, as in Forms 496-498, pp. 6 and 7; approval not necessary; justification, if required, as in Vol. I, p. 482, &c.*]

[*Notice of filing, as in Form 500, p. 8, of this Vol.*]

Form No. 1913.

Undertaking to stay, pursuant to order, on appeal from money order or judgment (including those payable in instalments, or for alimony, &c.).³

[*As in Form 1912 to the **, continuing:*] and the court having made an order that all proceedings on the part of the [plaintiff] be stayed pending the said appeal, on the [defendant] giving an undertaking executed by [the defendant⁴—two] sufficient sureties, conditioned as herein provided:

NOW, THEREFORE, we, M. N. [*specifying residence and occupation*] and O. P. [*specifying residence and occupation*], do hereby, pursuant to the statute and said order, jointly and severally undertake that the appellant will pay all costs and damages which may be awarded against on said appeal, not exceeding five hundred dollars; and also, in like manner,

¹ In this case there must be two or more sureties (*N. Y. Code Civ. Pro.*, §§ 618, 1334), unless one is a fidelity or guaranty company. Vol. I, p. 468.

It is not essential that appellant also sign. § 811; Vol. I, p. 469.

² For a clause charging separate estate of married woman, see Vol. I, p. 70, and note.

³ See Post v. Doremus, 60 *N. Y.*, 371. Compare *N. Y. Code Civ. Pro.*, § 1310. For order, see Form 1922.

⁴ See Vol. I, p. 464, 469.

undertake that if the judgment [*or, order*] appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum recovered, or directed to be paid by the affirmance [*and, if the appeal is to the Court of Appeals from affirmance at General Term, add: and the judgment—**or, order—*affirmed by the judgment—*or, order—*appealed from¹], or the part thereof as to which it shall be affirmed [*or in case of a judgment or order for instalments, †* will pay each instalment of the sum recovered by said judgment—*or, order—*which shall become payable pending the appeal, or the part thereof as to which the judgment—*or, order—*shall be affirmed, not exceeding the sum of dollars §]. [*The following clause is not to be inserted unless required by order of the court, as a condition of stay: and all damages which shall be awarded against the appellant upon the appeal, by the determination of the appellate court, or by the court below, pursuant to the determination of the appellate court.*]

[*Date.*][*Signatures.*][*Authentication, &c., as directed under Form 1912.*][*Notice of filing as in Form 500, p. 8, of this Vol.*]

Form No. 1914.

Undertaking on appeal to General Term or Court of Appeals from money judgment or order, with stay.

[*As in Form 1912, adding at the end:*] and also in like manner undertake that if the judgment [*or, order*] appealed from, or any part thereof, is affirmed, or the appeal is dismissed, said appellant will pay the sum recovered² or directed to be paid by the judgment [*or, order*], or the part thereof as to which it is affirmed [*or in case of instalments, as in last Form from the † to the §*].

[*Date.*][*Signatures.*][*Authentication, &c., as directed under Form 1912.*][*Notice of filing as in Form 500, p. 8, of this Vol.*]

¹ *Morss v. Hasbrouck*, 10 *Abb. N. C.*, 407, 411 (reversed on the ground that the remedy was not by motion to declare insufficient, 15 *Weekly Dig.*, 308); followed in *Briggs v. Brown*, 13 *Abb. N. C.*, 481.

² As to separate recoveries against several defendants, see *Ex parte French*, 100 *U. S.*, 1.

Proceedings under a money judgment against one defendant will not be stayed upon an appeal by a co-defendant, without an undertaking sufficient to cover the amount of the money judgment. *Quinlan v. Russell*, 48 *Super. Ct. (J. & S.)*, 537.

Form No. 1915.

Undertaking to stay, on appeal from a judgment or order for possession of personal property.¹

[*As in Form 1912, inserting at end, before signatures:*] and also in like manner undertake * that the appellant will obey the direction of the appellate court upon the appeal.

Form No. 1916.

Undertaking to stay, on appeal from judgment for possession of real property.²

[*As in Form 1912, adding at end:* and also in like manner undertake * that the appellant will not, while in possession of the property, commit, or suffer to be committed, any waste³ thereon; and that, if the judgment or order is affirmed, or the appeal is dismissed, he will pay the value of the use and occupation of the property, or the part thereof, as to which the judgment or order is affirmed,⁴ from the time of taking the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding the sum of dollars.⁵

[*Date, authentication, &c., as directed under Form 1912.*]

[*Notice of filing as in Form 500, p. 8.*]

Form No. 1917.

Undertaking to stay, on appeal from judgment in foreclosure.⁶

[*As in Form 1912 to the †, continuing:*] * that if the judgment is affirmed, or the appeal is dismissed, the appellant

¹ Whether on appeal from a judgment or order requiring both the payment of money and the delivery of property security is in all cases required. Compare *Elliott v. Buckland*, 37 *How. Pr.*, 71; *Bank of Havana v. Moore*, 8 *Weekly Dig.*, 198.

Where the stay is discretionary, the court may, if the property be perishable or depreciable by time and use, add a provision indemnifying the respondent for the use and depreciation in case the judgment is affirmed. *Read v. Potter*, 11 *Abb. Pr.*, 413.

² On appeal from final judgment for dower, there must also be an order for stay. *N. Y. Code Civ. Pro.*, § 1616.

³ This clause is essential. *State v. Thiele*, 19 *Nebr.*, 220; s. c., 27 *Northwestern Rep.*, 937.

⁴ *Heinlin v. Beans*, 71 *Cal.*, 295.

⁵ To be fixed by a judge of the court appealed from.

⁶ The appellant may prefer to give security in Form 1916. See *Grow v. Garlock*, 29 *Hun*, 598.

will pay any deficiency which may occur upon the sale, in discharging the sum to pay which the sale is directed, with interest and the costs, and all expenses chargeable against the proceeds of the sale, not exceeding dollars [to be fixed by a judge of the court below].

[Date, authentication, &c., as directed under Form 1912.]

Form No. 1918.

Undertaking, in dower, to prevent stay on defendant's appeal from final judgment.

[Title of court below, and action.]

WHEREAS, on the day of , 18 , the above-named plaintiff recovered a judgment against the above-named defendant, awarding to plaintiff possession of premises admeasured and laid off to her as her dower, and whereas defendant, feeling aggrieved thereby, has appealed therefrom to [the Court of Appeals], and has applied for a stay of the execution of said judgment pending such appeal:

Now, THEREFORE, we,¹ A. B. [specifying here one or more sureties, their residence and occupations], hereby, pursuant to the statute, jointly and severally undertake that, if the judgment appealed from is reversed or modified, and restitution is awarded, the plaintiff will pay to the person entitled thereto, the value of the use and occupation of the part so admeasured and laid off to her, or of the portion restitution of which is awarded, during the time she holds possession thereof by virtue of the judgment.

[Date.]

[Signatures.]

[Acknowledgment as in Form 495, p. 6 of this Volume; affidavit of sufficiency as in Forms 496-498, pp. 6 and 7; approval² by the court or judge as in Form 499, p. 7.]

[Notice of filing as in Form 500, p. 8.]

Form No. 1919.

Certificate of deposit in lieu of undertaking on appeal.

[Title of court below, and action.]

This is to certify that T. Z., attorney for the defendant and

¹ It is not essential that plaintiff sign this undertaking, nor that there be more than one surety if the court or judge accepts it without. *N. Y. Code Civ. Pro.*, §§ 811, 1616; Vol. I, p. 469.

² Approval in this case is expressly required. *N. Y. Code Civ. Pro.*, § 1616. But no express provision seems to be made for exception and justification.

appellant in the above entitled action, has this day deposited with me, as clerk of the Court, the sum of dollars. Said sum is deposited in lieu of the undertaking required to be given on appeal to the Court of Appeals from the judgment [*or, order*] entered herein on the day of ; 18 [*or otherwise, according to the nature of the undertaking*], to be held by me to abide the result of said appeal.

[*Date.*]

[*Signature of*],
Clerk of Court.

Form No. 1920.

Notice of deposit in lieu of undertaking on appeal.

[*Title of court below, and action.*]

Please take notice, that in lieu of giving an undertaking, the appellant has this day deposited with the clerk of the county of [*or, the clerk of the Court*], the sum of dollars¹ for the purpose of perfecting his appeal to the [general term of the] Court, from the judgment [*or, order*] in this action entered with said clerk [and for the purpose of staying the execution of said judgment—*or, order*].

[*Date, signature and addresses as in Form 488, p. 1.*]

Form No. 1921.

Waiver of undertaking.²

[*Title of the appellate court and action.*]

The [plaintiff] hereby consents that the [defendant] may appeal to the Court from the judgment [*or, order*] entered in this action on the day of , 18 , and that proceedings under the said judgment [*or, order*] shall be stayed until the decision of the said appeal, without security [*or may say: without other security than the deposit of a certified*

¹ Equal to the amount or aggregate of the amounts, for which otherwise security must be given. *N. Y. Code Civ. Pro.*, § 1306. A less sum or a special deposit may be made on stipulation. *Jessup v. Carnegie*, 45 *Super. Ct. (J. & S.)*, 310. As to the title to such deposits, see note in 18 *Abb. N. C.*, 323.

² Sanctioned by *N. Y. Code Civ. Pro.*, § 1305.

As to implied waiver, see the following cases: *Hill v. Burke*, 62 *N. Y.*, 111; *Halsey v. Flint*, 15 *Abb. Pr.*, 367; *Beckwith v. Kansas City, &c., R. R. Co.*, 28 *Kan.*, 484; *Howard v. Harman*, 5 *Cal.*, 78; *Bryan v. Berry*, 8 *id.*, 130, 134.

check on some responsible bank—by the defendant—in the hands of _____, payable to _____, and to stand in lieu of an undertaking].

[Date.]

[Signature of],
Attorney for [respondent].

Form No. 1922.

Order for stay on giving security.¹

[Name of] Court [or if court order], At a special term [&c.,
as in Form 493, p. 4 of this Vol.].

[Title of action].

An order [or, judgment] having been entered herein on the _____ day of _____, 18 [briefly stating effect, for instance thus:] striking out the defendant's answer as frivolous, and directing judgment for the plaintiff; and the [defendant] having appealed, or being about to appeal, therefrom, to the general term of this court; Now, on reading and filing the affidavit of M. N., verified the _____ day of _____, 18 _____, and after hearing T. Z. for said defendant, and A. T. for plaintiff; and on motion of T. Z. for the defendant:

ORDERED, that all proceedings on the part of the [plaintiff] be stayed pending such appeal,² provided the [defendant] shall duly give an undertaking in due form, executed by [the defendant and] _____ sufficient sureties, who shall justify in the usual manner if excepted to, and conditioned that the appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding five hundred dollars; and also [&c., as in Forms 1914, 1915, 1916 or 1917, from the * to the end].

[Authentication as in Form 491, p. 3 of this Volume.]

Form No. 1922a.

Exception and justification.

[Notice of exception as in Vol. I, p. 495, Form 223. No-

¹ As to the inherent power of the court to order a stay, see *Hudson v. Smith*, 9 Wisc., 122; and *Polini v. Gray*, 41 L. T., N. S., 173.

This order may be made by the court in or from which the appeal is taken, or a judge thereof, upon such terms as to security or otherwise, as justice requires. *N. Y. Code Civ. Pro.*, § 1351.

² A clause granting a necessary extension of time to perform an act required by the order or judgment appealed from may be inserted. *Gray v. Green*, 14 Hun, 18. So the court may impose terms as a condition of granting the stay. *Waring v. Somborn*, 12 id., 81; *Wilson v. Grant*, 59 How. Pr., 350.

*tice of justification as in id., Form 224. But may designate county judge, if desired, instead of the court where the action is pending or a judge thereof.*¹ *Allowance of sureties by court or judge, Form 231, Vol. I, p. 494.*² *Serve copy of the allowance with notice that it was granted.*³

[*Motion for renewal of security, &c., on insolvency, &c., of sureties, see Forms 226-228, Vol. I, p. 496, but entitle and move in the appellate court.*]

Form No. 1923.

Affidavit to move to dismiss for neglect to give new undertaking.

[*Title of appellate court and of action.*]

[*Venue.*]

A. T., being duly sworn, says :

I. That he is the [managing clerk in the office of the] attorney for the [plaintiff and] respondent herein.

II. That , [one of] the sureties in the undertaking given by the appellant on this appeal, after executing said undertaking, became insolvent [or, the circumstances of—&c.—after—&c.—became so precarious that said undertaking was not sufficient to afford due security to the respondent]; and thereupon, and on due proof thereof, this court, on the day of last, duly made an order requiring said appellant to give a new undertaking within twenty days after service of said order; a copy of which order, marked A, together with a copy of the affidavit on which it was granted, marked B, are hereto annexed.

III. That on the day of , 18 , a copy of the said order, with notice of entry of the same, was duly served on the appellant's attorney by this deponent, by [*stating particulars; see Forms 194-197, Vol. I, pp. 428-430, or say: as appears by the affidavit of , hereto annexed, and marked C*].

IV. That although more than twenty days have elapsed since said service, no new undertaking, nor any copy thereof, has been served upon the attorney for the respondent, personally nor in any manner, to the knowledge or belief of deponent, nor has any new undertaking been executed or filed to his knowledge or belief.

[*Jurat.*]

[*Signature.*]

¹ *N. Y. Code Civ. Pro.*, § 1335.

² *Id.*, § 1335.

³ *Id.*, § 812, last clause, and § 1335.

Form No. 1924.

Notice of motion to dismiss for neglect to give new undertaking.¹

[*Title of appellate court, and of action.*]

Please take notice, that upon affidavits, copies of which are annexed [*and designate any other papers relied on*], a motion will be made at a [general] term of this court, to be held at the _____, in _____, on the _____ day of _____, 18____, at the opening of the court, or as soon thereafter as counsel can be heard, that the appeal of the appellant from the [judgment] herein, be dismissed with costs, and with costs of this motion, on the ground that the appellant has neglected to execute, file and serve notice of a new undertaking, as required by the order of this court, and for such other or further order as may be just, with costs of this motion.

[*Date.*]

[*Signature and office address of*],

Attorney for respondent.

[*Address to*], Attorney for appellant.

Form No. 1925.

Order allowing new notice of justification or new undertaking on appeal.²

[*Caption (court order) and recitals, as in Form 493, p. 3, of this Volume.*]

ORDERED, that the [plaintiff] and appellant herein be allowed to give new notice of justification of the sureties named in the undertaking on appeal herein at a time not less than [five] days, nor more than [ten] days after service of a copy of this order on the attorney for the respondent; or the appellant, at his election, may, on the day named for justification as aforesaid, present a new undertaking with sureties in the form prescribed by law, which last-named undertaking shall, if the sureties duly justify [before a justice of this court], stand in the place of the undertaking on appeal now on file in the office of the clerk of this court, and have the same force and

¹ See last clause of *N. Y. Code Civ. Pro.*, § 1808.

This order must be made by the court. *N. Y. Code Civ. Pro.*, § 1803;

² Sustained in *Mason v. Libby*, *N. Y. Supm. Ct., Gen. Term*, 1881, not reported (security on appeal to Court of Appeals).

Wheeler v. Millar, 61 *How. Pr.*, 396 (vacating a judge's order extending the time to justify).

effect as if filed on the same day when the notice of appeal was filed, and as if the sureties therein named had justified within the time prescribed by law.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1926.

Order dismissing appeal or vacating stay.¹

[*Title of appellate court, and of action; recitals according to the case; see Form 493, p. 5.*]

ORDERED, that the appeal taken by _____ from the judgment [*or, order*] entered herein on the _____ day of _____, 18____, be dismissed, with _____ dollars costs² to respondent [*or, that the order—or, judgment—appealed from be executed as if the original undertaking had not been given.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1927.

Affidavit to obtain stay on appeal from an order or judgment.

[*Title of court³ and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he is the [defendant above named].

II. That on the _____ day of _____, 18____, an order [*or, judgment*] was entered in this action, at a [special] term of the _____ Court [*describing it as thus: directing deponent to deliver to the plaintiff certain property alleged to be in deponent's custody or control.*]

¹ Formerly an appeal to general term could not be dismissed for failure to file new security, except in a case where security was essential to perfect the appeal. *Genter v. Fields*, 2 *Abb. Ct. App. Dec.*, 253. And the present statute, § 1308, last clause, seems to bear the same construction.

² As to costs, compare *Dunseith v. Stark*, 3 *Monthly L. Bul.*, 42; *White v. Anthony*, 23 *N. Y.*, 164; *Brown v. Leigh*, 50 *id.*, 427.

³ Entitle in court in or from which the appeal is taken (*McDonald v. Hanlon*, 71 *Cal.*, 535; s. c., 12 *Pac. Rep.*, 515; *N. Y. Code Civ. Pro.*, § 1351), unless the appeal is to the Supreme Court from an inferior court, or from the City Court of New York to the Court of Common Pleas, in which cases the application must be to the Appellate Court or a judge thereof. *N. Y. Code Civ. Pro.*, §§ 1343, 1392.

III. [That the value of the said property is not more than dollars.]

IV. That deponent intends, in good faith, to [or, has perfected an] appeal from said order, and will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal [*stating briefly how and why*].

[*If order to show cause is asked, state as on p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1928.

Notice of motion (or order to show cause) for stay pending appeal.¹

[*Title, in court below; move the court or a judge thereof² for an order:*] staying all proceedings on the part of the respondent under the order [or, judgment] entered herein on the day of , 18 [or describe the nature of the order if necessary to identify it], until the decision of the [general term] upon the appeal taken from the said [order] by the appellant, or for such other relief as may be just.³

[*If order to show cause is taken, may insert:* and let all proceedings on the part of the defendant be stayed until the hearing and decision of the application to be made on this order.]

Form No. 1929.

Order for stay pending appeal.⁴

[*Title (in court below) and recitals according to the case; see Form 493, p. 4.*]

ORDERED, that all proceedings on the [judgment] appealed from [or, all proceedings on the part of the] in this action be stayed pending an appeal to the [Court of Appeals],

¹ If a case has been made on the appeal, move on that, in connection with the affidavit. *Otis v. Spencer*, 8 *How. Pr.*, 171.

² Such an order to show cause, in the Supreme Court, first district, may be made by a judge in any part of the State. *Hull v. Hart*, 27 *Hun*, 21.

³ It seems that the special term may extend the time to redeem fixed by a general term decision, when staying

proceedings on that decision pending an appeal to the Court of Appeals. *Gray v. Green*, 14 *Hun*, 18.

⁴ This order was sustained by the general term in *Granger v. Craig*, 85 *N. Y.*, 619, and an appeal therefrom was dismissed.

For other clauses, see Forms 99 and 100, Volume I, p. 296, and Form 206, p. 446, and note to last Form.

provided the said defendant within [twenty] days from the date hereof execute [*or, give*¹] and file with the clerk of this court an undertaking with [two sureties] justifying in the usual manner if excepted to, and serve a copy of the same, conditioned [*indicate terms, as thus:*] as provided in the Code of Civil Procedure, so far as the judgment now entered in this action adjudges the payment of money by him; and also conditioned that should the judgment appealed from be affirmed, or the appeal dismissed, the said defendant will pay the deficiency, if any, that may occur to the plaintiff on the sale of the mortgaged premises, by reason of the depreciation in their value pending such appeal and before the sale.

Form No. 1930.

Order appointing receiver to pay taxes, &c., pending appeal after judgment affecting title.²

At a special term [*dec., as in Form 493, p. 4 of this Volume*].

[*Title of action.*]

Upon the judgment-roll and notice of appeal herein [*and specify other papers on file if needed to sustain the order*], and on reading and filing the affidavit of A. B., verified the day of _____, 18____, and it appearing that the premises described in the pleadings and judgment herein are subject to a large amount of taxes, water rents and assessments, for some of which said premises have been or are about to be sold; and after hearing A. T., of counsel for the motion, and T. Z., of counsel for the defendant [*or, on reading and filing proof of the notice of this motion, and no one appearing*] in opposition, and on motion of A. T., attorney for the plaintiff:

ORDERED, that R. C., of the city of _____, be and he hereby is appointed receiver of all the premises hereinafter described, as also of all the back outstanding rents due and unpaid from the defendant's tenants therein, during the pendency of and until the final determination of any appeals herein.

[*Directions to receiver, collections, payments, &c.; see p. 142, &c.*]

¹ If the party is not to be required to execute the undertaking. See Volume I, p. 469.

² *Fellows v. Heermans*, 13 *Abb.*

Pr., N. S., 1; s. P., N. Y. Code Civ. Pro., § 713. Compare *Washington Market Co. v. Warthen*, (*Dist. Col.*, 1883) 11 *Wash. Law Rep.*, 498.

ORDERED, that the said plaintiff, his relatives or his family, the said defendant, her relatives or family, or any or either of the families or relatives of the respective parties to this action, or any part thereof, shall not, either directly or indirectly, use, live on or occupy any part or portion of the aforesaid premises under any pretense whatsoever, except the defendant may have to and including _____, 18____, within which to quit and surrender to the said receiver the portion of said premises occupied by her.

[*Bond clause and authentication as in end of Form 655 p. 145.*] [*Description of premises.*]

Form No. 1931.

Affidavit to obtain order to mark judgment, "lien suspended on appeal."

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says: I. That he is the [defendant] in the above action [*or otherwise state relation to the cause*].

II. That judgment was duly entered herein in favor of plaintiff against defendant for the sum of _____ dollars, on _____, 18____, and the judgment-roll was filed and said judgment docketed in the office of the clerk of the county of _____ on the _____ day of _____, 18____ [*or otherwise show lien acquired. See Forms under Execution*].

III. That on the _____ day of _____, 18____, an appeal from said judgment to the [general term of this] court was duly taken and perfected by said _____, and security given sufficient to entitle the appellant to a stay of the execution of the said judgment, without an order for that purpose, by the filing of an undertaking of which a copy is hereto annexed.

IV. That said defendant is owner of [*or, interested in*] certain real property [*or, chattels real—or both*] in said county of _____, on which said judgment is an apparent lien. Said property is described as follows: [*description in full*].

V. That the defendant desires to sell [part of] said property [*designating which part*], but by reason of the lien of said judgment he cannot convey a good title. That he is amply responsible to pay said judgment, and the lien of said judgment is sufficiently secured by resting alone on his other property [*or state other facts making it safe to grant the order*].

[*Jurat.*]

[*Signature.*]

Form No. 1932.

Consent of sureties annexed thereto.

[Title of court and action.]

We do hereby consent to the granting and entry of the proposed [*or, annexed*] order discharging and exempting from the lien of the judgment in the above action the property mentioned and described in the annexed affidavit [*or, in said order*].

*[Signature.]**[Date.]**[Acknowledgment as in Form 495, p. 6 of this Volume.]*

Form No. 1933.

Order to show cause why judgment lien should not be suspended/ on appeal.

[As in Form 491, p. 3, omitting the matter in brackets preceding the ‡, and substituting for the italic matter between the ‡ and ¶:] directing the clerk of the [city and] county of _____ to make an entry on his docket of the judgment described in the annexed affidavit: "Lien [partially] suspended on appeal."

[Serve on attorney for respondent; also on the sureties in the undertaking on appeal.¹]

Form No. 1934.

Order releasing part of property from judgment lien.

At a special term [*dec., as in Form 493, p. 4 of this Vol.*].

[Title of action].

On reading and filing the affidavit of A. B., verified the day of _____, 18____, wherefrom it appears that an appeal from the judgment in this action has been by the [defendant] duly perfected, and that an undertaking sufficient to entitle the appellant to a stay of the execution of the judgment without an order for that purpose has been given by said _____ [*and recite due service on or appearance by the respondent's attorney, and due service on or appearance by the sureties, or if they*

¹ *Munn v. Barnum*, 2 *Abb. Pr.*, 409; *Briggs v. Brown*, 13 *Abb. N. C.*, 481; *N. Y. Code Civ. Pro.*, § 1256.

have consented, add: and on reading and filing the within consent of said sureties to the entry of this order], and on motion of T. Z., attorney for the defendant :

ORDERED, that all the real property and chattels real [*or*, that the property hereinafter described], upon which said judgment is a lien, be and hereby is [*or*, are] henceforward exempted from the lien of said judgment as against judgment-creditors, purchasers, and mortgagees in good faith ; and that the clerk of the [city and] county of _____ is hereby directed to make an entry in his docket of said judgment in each place where it appears in the docket book, substantially as follows : "Lien [partially] suspended on appeal ; see order entered the day of _____, 18 ____" [*here specifying the date of his entry of the order*].

[*If specified parcels only are exempted, add:* the property above mentioned is known and described as follows—*description.*] [*May add:* this order is made upon condition—*stating what.*]¹

Enter : [*signature of judge by initials of name and title.*]

III. SUBSTITUTION OF PARTIES.

[The remedies for substitution, when necessary for purposes of appeal, are as follows :

I. Appeal by party taken after his adversary is dead.

- (1) Take appeal as if he were still living. Forms 1906-1910.
- (2) Undertaking, as in Form 1912, p. 995.
- (3) Affidavit and order compelling the substitution of representative. Forms 1935, 1936, p. 1010.

II. Appeal by representative of party dying before appeal, or by any one not a party who has acquired an interest and is aggrieved.

- (1) Take appeal as if a party. Forms 1906-1910.
- (2) Move to be substituted, adapting Forms 1115, &c., by adding an allegation of having taken and perfected an appeal.

III. Application of representative of party dying after appeal is taken by such party, or by his adversary, to be substituted.

[Affidavit and order, see Forms 1937-1940 (*below*).]

IV. Disposal of appeal on application of a party where the adverse party has died after appeal, and his representative fails for three months to procure substitution.

[Affidavit and order to show cause, see Forms 1941 and 1942 (*below*).]

¹ The court may require further security as a condition. *Bergen v. Stewart*, 28 *How. Pr.*, 6.

Form No. 1935.

Affidavit to compel the substitution of representative of deceased adverse party.¹

[*Title of court² and action.*]

[*Venue.*]

T. Z., being duly sworn, says :

I. That he is the attorney for Y. Z., the [defendant] and appellant herein [*or otherwise show relation to the cause*].

II. That on the day of , 18 , a judgment was rendered and entered [*or, an order was made and entered*] in the above-entitled action, by the court, in favor of the plaintiff and against the defendant, for dollars [*or otherwise describe the judgment or order appealed from*].

III. That after such entry, and on or about the day of , 18 [*or if the judgment or order was entered after the respondent's death in a case allowed by Code Civ. Pro., § 763, allege it according to the facts*], the said A. B. died, leaving his last will and testament, which has been duly admitted to probate by the surrogate of the county, and wherein M. N. was appointed executor, and said M. N. has qualified and entered on the discharge of his duties as executor and now is such executor [*or if the party died intestate, allege the appointment and qualification of M. N. as administrator; see p. 516 of this Volume. Or if the action affects the title to real estate, allege heirship of proposed respondent, or devise to him; see Form 1119, p. 540*].

IV. That the said Y. Z. has appealed from said judgment [*or, order*] to [the general term of] the court, on the day of , 18 [*and state condition of appeal as to stay, &c. If order to show cause is asked, state as on p. 2*].

[*Jurat.*]

[*Signature.*]

Form No. 1936.

Order compelling the substitution of representative of deceased adverse party.

[*Title (court order³) and recitals as in Form 493, p. 4 of this Volume.*]

ORDERED, that said M. N., as the executor [*or other descrip-*

¹ *N. Y. Code Civ. Pro.*, § 1297; 87 *N. Y.*, 503.

² If the appeal is from one court to another, entitle in the appellate court. *N. Y. Code Civ. Pro.*, § 1299. If from special to general term of the same

court, entitle in the court generally, and apply at special term. See Volume I, pp. 122, 129, 130; *N. Y. Gen. Rules*, No. 38, of 1888.

³ See preceding note.

tion] of A. B., be and he is hereby substituted as respondent in place and stead of A. B., deceased, as the respondent in the appeal brought by the above-named Y. Z. from the judgment [or, order] entered herein the day of , 18 .

Enter: [*signature of judge by initials of name and title.*]

Form No. 1937.

Affidavit to move to substitute personal representative of party dying after appeal.¹

[*Title as in Form 307.*]

[*Venue.*]

T. Z., being duly sworn, says :

I. That he has been the attorney for the defendant Y. Z. in this action down to the time of his death [*or otherwise show relation to the cause*].

II. That the said Y. Z. departed this life on the day of , 18 , having duly made his last will and testament, by which he appointed S. Z. sole executor thereof; that the said will has been duly proved before the surrogate of the county of , and letters testamentary thereon have been issued by the said surrogate to the said S. Z., who has qualified and entered upon the execution of such will, and now is such executor [*or allege intestacy and grant of letters of administration (see p. 516), or interest of applicant as devisee or heir according to the facts (see p. 540)*].

III. [*If not sole party, may add:*] That in this action other defendants are joined with the said Y. Z., but that as to the matters in controversy between the plaintiff and the said defendant last named, the said Y. Z. was sole defendant [*or if otherwise, set forth the facts showing that it is necessary to a proper disposition of the matter to bring in the personal representatives*].

¹ This and the following Form can readily be adapted to the case of an application by a surviving party to substitute the proper representative of a deceased party where personal service of notice of the application has been made within the State upon him. *N. Y. Code Civ. Pro.*, § 1299.

For the purpose of substitution on appeal, the judgment with the cause of action survives even if the cause

of action before the judgment could not. *Blake v. Griswold*, 104 *N. Y.*, 613; s. c., 6 *Centr. Rep.*, 771 (granting motion of personal representative of plaintiff respondent for leave to be substituted, where the plaintiff died pending appeal and before argument, and at the same time affirming the judgment); and see *Moses v. Wooster*, 115 *U. S.*, 285.

IV. That judgment [*or*, an order] was entered in this action on _____, 18 [*describing it*], and that on _____, 18 _____, the said Y. Z., by T. Z., his attorney, appealed from the said judgment [*or*, order] to the [general term] of this [*or*, the _____] Court, and was the sole appellant therefrom, and that such appeal is now pending before the said [general term], and the same has not been heard.

V. That the said S. Z. [as such executor] has succeeded to all the rights of the said Y. Z.; [that the cause of action herein continues against him as such executor.]

VI. That the said T. Z. is the attorney for the said S. Z. [as such executor] in the defense of this action, and in the further prosecution of the said appeal.

[*If order to show cause is asked, state as on p. 2.*]

[*Jurat.*]

[*Signature.*]

Form No. 1938.

Order substituting personal representative of party dying after appeal.

[*Title as in Form 1935.*]

On reading and filing the affidavit of [*&c.*], by which it appears, among other things, that judgment was rendered herein on _____, 18 _____, and that the defendant Y. Z. has appealed from such judgment to the [general term] of the _____ Court, and that such appeal is now pending therein, and the same has not been heard; that the said Y. Z. is the sole appellant, and that as to all the matters in issue between the plaintiff and the said defendant, the said Y. Z. was the sole defendant; that the said Y. Z. departed this life on the _____ day of _____, 18 _____, having made his last will and testament, which has been duly proved before the surrogate of the county of _____; that letters testamentary thereon have been issued to S. Z.; who has taken upon himself the execution of such will, and is now such executor; that the said S. Z., as such executor, has succeeded to all the rights of the said Y. Z., and that the cause of action herein continues against her as such executor; and on motion of T. Z., attorney for the said S. Z.:

ORDERED, that this action be and the same hereby is continued against the said S. Z., as executor of the last will and testament of the said Y. Z., deceased.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1939.

Stipulation for substitution of heirs and personal representatives pending appeal.

[Title as in Form 1935.]

It is hereby stipulated that, on filing the affidavit of verified the day of , 18 , and the request of C. B. and D. B. indorsed thereon [and the request of the administrator and administratrix annexed thereto, all of which are hereto annexed], an order be entered in this action continuing the same in the name of the heirs at law of the said A. B., the appellant, who has died pending this appeal, to wit [naming them—and also in the names of—naming the personal representatives], as plaintiffs and appellants.

[Date.]

[Signature of], Attorney for plaintiff.

[Signature of], Attorney for defendant.

Form No. 1940.

Order substituting parties on appeal by consent.

At [&c., designating appellate court, if the appeal be from one court to another—or, at a special term—&c., if the appeal be to the general term of the same court].

[Title of action.]

On reading and filing the stipulation of the attorneys of record in this action, dated the day of , 18 , with the affidavit of M. N., verified the day of , 18 , and the request of C. B. and D. B. [and of the administrator, &c.], annexed thereto:

ORDERED, that this action be and the same is hereby continued in the name of , as heirs at law [and of , as administratrix and administrator] of the said A. B., deceased, as plaintiffs, appellants.

Enter: [signature of judge by initials of name and title.]

Form No. 1941.

Affidavit to procure order to show cause why judgment or order should not be reversed, &c.¹

[Title as in Form 1935.]

[Venue.]

A. T., being duly sworn, says:

¹ N. Y. Code Civ. Pro., § 1298. For another remedy, see § 1299.

I. That he is the attorney for A. B., the plaintiff [and appellant] in the above entitled action [*or otherwise show relation to the cause*].

II. That on the day of , 18 , an appeal to this court was taken by said A. B. from the judgment [*or, order—describing it, with date and place of entry*].

III. That the defendant Y. Z. died on the day of , 18 [*allege, if informed, as to will or intestacy, and letters; see Forms 1935, 1937*].

IV. [*State condition of the cause on appeal.*]

V. That the deponent has made diligent inquiries as to the persons interested in the estate of Y. Z., and the following are all the persons interested in said estate as far as can be ascertained: [*insert names and residences, and, if any are infants, state which, and give names and residences of their guardians or persons with whom they reside.*]

VI. That no order has been made substituting any other person in place of said Y. Z. in said appeal.

VII. That no previous application has been made for this order.

[*Jurat.*]

[*Signature.*]

Form No. 1942.

Order to show cause why judgment or order should not be reversed, &c., where party dies after appeal, and no substitution has been had.¹

[*Title; see Form 1935.*]

On the annexed affidavit of A. T.:

ORDERED, that all persons interested in the estate of Y. Z., deceased, show cause before this court at a [special²] term thereof, to be held [at chambers], at the county court house of the county of [*or, at the Capitol, in the city of Albany*], on the day of , 18 ,³ at o'clock in the noon [*or, as soon thereafter as counsel can be heard*], why the

¹ This order must be made by the court in which the appeal is pending. *N. Y. Code Civ. Pro.*, § 1298.

² It seems that if the appeal is to general term the order should be returnable at special term. *Brokaw v. Brokaw*, 5 *Weekly Dig.*, 267. *S. P.*, Vol. I, pp. 122, 129, 130.

But the general term has jurisdiction. *Van Horne v. France*, 32 *Hun.*, 504, 505, *n.*

³ The return day must be not less than six months after making the order. *N. Y. Code Civ. Pro.*, § 1298.

judgment [*or, order—describing it*] entered on the day of
 , 18 , in the office of the clerk of the county [*or,*
 of the Court] appealed from, should not be reversed [*or,*
 affirmed—*or, why said appeal should not be dismissed*].

It is further ordered that a copy of this order and said
 affidavit of A. T. be served upon the following persons [*desig-*
nating them and prescribing the manner of service], on or
 before the day of , 18 .

Enter: [*signature of judge by initials of name and title.*]

IV. BRINGING ON; AND DISMISSING.

Form No. 1943.

Note of issue on appeal.¹

[Supreme] Court,
 General Term.

A. B., plaintiff and
 [appellant],

against

Y. Z., defendant and
 [respondent].

A. T., plaintiff's attorney.

Appeal from judgment entered af-
 ter trial before Mr. Justice J. K.
 [*or if after trial by referee, say:*²
 on report of R. F., Esq., referee,
 filed the day of , 18 —*or,*
 from an order made by Justice J.
 K. on the day of , 18].

T. Z., defendant's attorney.

Notice of appeal served³ , 18 .

No. of cause on previous calendar⁴ [*or, Not on pre-*
vious calendar].

The cause is preferred, and belongs to the class of .

Appellant's [*or, respondent's*] note.

[*If in the First Department,*⁵ *add:*] Appeal papers printed
 and served in accordance with Rule 41, on the day of ,
 18 .

[*Signature and office address of*],
 Attorney for

¹ In the Court of Appeals, a copy of the notice of argument, specifying the judicial district in which the cause originated, is served on the clerk instead of a note of issue.

² Gould v. Chapin, 5 How. Pr., 358.

³ On an appeal from an inferior court, specify the date of filing the

return instead of date of service of notice of appeal.

⁴ In the New York Superior Court specify also the date on previous calendar.

⁵ N. Y. Special Rules Pr. (First Department, No. 6, and N. Y. Super. Ct., No. 4).

Form No. 1944.

Notice of argument.

[*Title of appellate court, and action.*]

Take notice, that the appeal from the judgment in this action [*or, from the order—&c., describing it*] will be brought to a hearing [and a motion made to dismiss the same] before this court, at a [general] term thereof, to be held at the city hall [*or, capitol*] in the city of _____, on the _____ day of _____, 18____, at the opening of court, or as soon thereafter as counsel can be heard. [*And on an appeal to the Court of Appeals in a cause entitled to preference, add:—*] And the undersigned claims this to be a preferred cause, upon the ground that it is [*specifying the ground so as to show the class; and if the appeal is from an order, state the general character of the order*].¹

[*Date.*]

[*Signature and office address of*],

[*Address*] To _____, Attorney for [*moving party*].

Attorney for [*adverse party*].

[*And in the Court of Appeals: To M. N., clerk of the court.*]²

Form No. 1945.

Notice of requiring the appellant to file return.³

[*Title of appellate court, and action.*]

Please take notice, that the respondent A. B. requires the appellant Y. Z. to cause the return in this cause to be filed with the clerk of the _____ Court within ten days after the service of this notice.

[*Date.*]

[*Signature and office address of*],

[*Address*] To _____, Attorney for respondent.

Attorney for appellant.

Form No. 1946.

Notice of motion to dismiss appeal.

[*Title of the appellate court, and action.*]

Take notice, that [on the affidavits herewith served] the

¹ Rule 20 of N. Y. Court of Appeals; N. Y. Code Civ. Pro., §§ 789–793. adverse party. Court of Appeals Rules, No. 22.

² This notice, filed with the clerk, must be accompanied with an admission or affidavit of its service on the adverse party. See Rule 2 N. Y. Court of Appeals, and Rules 2 and 9, N. Y. Com. Pl.

respondent will move the court, at a [general] term thereof, to be held at the city hall [or, capitol], in the city of _____, on the _____ day of _____, or as soon thereafter as counsel can be heard, to dismiss the appeal from the judgment herein [or, the order—*describing it*; and if the ground of the motion be irregularity, state what], and for such other relief as may be just, with costs of motion.

[Date.] [Signature and office address of],
[Address] To _____, Attorney for respondent.
Attorney for appellant.

Form No. 1947.

Order dismissing appeal.¹

At a general term [*&c.*; see
Form 493, p. 4].

[Title of action.]

On reading and filing notice of motion and affidavit of C. D., and on motion of A. T., for the respondent, after hearing O. P. [or, no one appearing] for the appellant :

¹ Application for this order should be made to "the court or the general term to which the appeal is taken." *N. Y. Code Civ. Pro.*, § 1307.

Where the application is made before the appeal is brought to a hearing, it should be made upon notice; but where the appeal has been reached upon the calendar and been heard, and the court has rendered a decision that the appeal should be dismissed, then the order may be made and entered as of course without previous notice.

Motions on notice to dismiss an appeal are often made because of the non-appealability of the decision below, or because of the non-service of printed copies of the appeal papers pursuant to the rules of court. But the practice under the rules is more properly to move to strike the cause from the calendar, and for judgment in favor of the respondent. *Phelps v. Swan*, 2 *Sweeny*, 696.

By *N. Y. Gen. Rules*, No. 40, of 1888, if the party whose duty it is to furnish the papers upon an appeal in case of an enumerated motion shall

neglect to do so, the opposite party is entitled to move on affidavit and four days' notice that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor; and by Rule No. 41, of 1888, it is further provided that such a motion may be noticed "for the earliest practicable day in term for hearing non-enumerated motions;" and that if the appellant fails to serve the proper papers in case of an appeal from a non-enumerated motion, "the respondent may move on three days' notice, on any motion day in the term, to dismiss the appeal."

A motion to dismiss an appeal must, as a rule, be made to the appellate court and at general term, rather than at a special term thereof. See Vol. I, p. 130, and cases cited.

But a motion to dismiss an appeal from an inferior court on grounds apparent upon the appeal papers, has been sustained at special term of the appellate court, although the general term to which the appeal is taken has the like power to dismiss. *Id.*

ORDERED, that the appeal taken by A. B. from the judgment [*or, order*] entered herein on the day of , 18 , be dismissed, with dollars costs to respondent.

Enter: [*signature of presiding judge by initials of name and official title.*]

V. THE DECISION AND JUDGMENT.

Form No. 1948.

Order of affirmance.¹

At a [general] term of the Court,
[&c. ; as in Form 493, p. 4 of this
Vol.].

[*Title of action.*]

The appeal from the judgment [*or, order*] entered in this action on the day of , 18 , for dollars [*or if for special relief, designate it*], coming on to be heard [and upon reading the case and exceptions on appeal herein, on file with the clerk of this court], and after hearing A. T. of counsel for plaintiff appellant, and T. Z., counsel for the respondent, and due deliberation having been had; Now, on motion of T. Z., attorney for said respondent:

ORDERED, * that said judgment be and the same is in all things affirmed, with costs to the appellant. [*For special clauses, see following Forms.*]

Enter: [*signature of presiding judge by initials of name and title.*]

¹ In general an appellate court, in reviewing such an order or the judgment entered thereon, can only look to the terms of the order or judgment to ascertain the grounds on which it was made. *Snebley v. Connor*, 78 *N. Y.*, 218; *Fisher v. Gould*, 81 *id.*, 228; *Noyes v. Children's Aid Soc'y of N. Y.*, 70 *id.*, 481; *Townsend v. Nebenzahl*, 8 *Abb. N. C.*, 427; s. c., partly reported in 81 *N. Y.*, 644; *Direct U. S. Cable Co. v. Dominion Tel. Co.*, 84 *id.*, 153.

But the grounds may sometimes be gathered from the grounds stated in the original order below, if it is in all things affirmed by the order of the general term. *Equitable Life Ins. Soc'y v. Stevens*, 63 *N. Y.*, 341; *Hewlett v. Wood*, 67 *id.*, 394.

An affirmance expressed to be on the opinion of the court below, or on the grounds stated in the opinion below, brings those grounds before the appellate court. *Matter of Holbrook*, 99 *N. Y.*, 539; s. c., 1 *Centr. Rep.*, 271; *Snyder v. Snyder*, 96 *N. Y.*, 88; s. c., 5 *Civ. Pro. R. (Browne)*, 267; rev'g 4 *id.*, 370.

If a judgment upon appeal may, so far as the record speaks, have proceeded upon either of several grounds, extrinsic evidence is admissible, in a subsequent action, to ascertain what was really decided. *Esterbrook v. Savage*, 21 *Hun*, 145, and cases cited; and see *Bell v. Merrifield*, (*N. Y.*, 1888) 16 *Northeast. Rep.*, 55.

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

1949. *Order for judgment absolute; if the appeal was from an order granting a new trial on a case or exceptions, to the Court of Appeals or to the Court of Common Pleas from the City Court of New York, add at end of Form 1948:]* And it appearing to the court that the appellant has stipulated for the entry of judgment absolute against him upon the affirmance of said order, it is further ordered that judgment absolute be rendered against him in favor of the respondent.

1950. *Affirmance nunc pro tunc after death of party after argument; * add at end of Form 1948:]* And J. L. B., one of the plaintiffs, having died since the argument of said appeal:

It is hereby further ordered, that this order be entered and filed *nunc pro tunc*, as of _____, 18____, the day of such argument.

1951. *Further direction to prevent lapse of order affirmed; * as thus:]* That said order be affirmed [so far as it directs the appellant to appear before a referee and be examined and answer on oath concerning his property], and that the said defendant be required to appear before such referee at such time and place as shall be fixed for that purpose by the county judge who made said order.

1952. *Special award of costs:]* And it is further ordered, that the plaintiffs and the defendant Y. Z. do each recover their costs of this appeal; and, also, that one bill of costs be allowed to each of the following attorneys, viz.: [names;] costs to be taxed by the clerk and paid by the executors out of the estate.

1953. *Recital of continuance in name of representative pending appeal; * insert:]* And the said A. B., having died since the entry of said judgment, and an order having been made on the _____ day of _____, 18____, that said action be continued by C. B., the executor [or, administrator—&c.] of _____, the deceased plaintiff:

Form No. 1954.

Order to modify judgment or order, and affirm as modified.

[*As in Form 1948 to the *, stating modification as thus:]* that the words [“unless the vacancy shall be sooner supplied by an election to be held according to law”] shall be inserted at the end of said judgment [or, order]; and it is further ordered that the said judgment [or, order] be and the same hereby is in all other respects affirmed ⁴ [without costs to either party].

¹ Sustained in *Bergen v. Wyckoff*, 84 N. Y., 659; see *N. Y. Code Civ. Pro.*, § 762.

² *Gaylord v. Jones*, 7 Hun, 480.

³ Compare §§ 1297–1299 with § 765 of the *Code of Civ. Pro.*

⁴ Omission to affirm the part not modified is not fatal. *Washburn & M. Manuf. Co. v. Chicago, &c., Fence Co.*, 119 Ill., 30; s. c., 6 *Northeastern Rep.*, 191.

Form No. 1955.

Order of reversal.

[As in Form 1948 to the *, concluding:] that the said judgment be reversed * [if the judgment or order granting a new trial, now reversed, followed trial by the court or referee, and appeal to Court of Appeals is desired, add, if so: upon questions of fact¹] and a new trial ordered [stating ground for granting new trial], with costs [or, costs to abide the event²—or, reversed; and if the order reversed was the refusal of relief, proceed and award the relief,³ as thus: and the motion granted—or, and the complaint be dismissed—on the merits⁴—with costs to the appellant].

STATEMENTS SUITABLE TO BE INSERTED IN FOREGOING FORM.

1956. *A vacatur of subsequent proceedings.* See Vol. I, p. 367.]

1956a. *Reversal unless respondent consents to reduction; as in Form 1955, to the *, concluding thus:*] unless the plaintiffs consent to reduce the recovery for damages [or, for the debt and interest] to dollars, as of the day of ; and if the judgment be so reduced, then it is ordered that the judgment so reduced be in all things affirmed, with costs already adjudged, and the costs of this appeal.

1957. *Provision for restitution; add to Form 1955:*] And it appearing to the court that, notwithstanding the appeal herein, the respondent executed and collected the amount of the judgment below, costs, and sheriff's fees, to wit, the sum of dollars; therefore, it is further ORDERED and ADJUDGED, that the said respondent make restitution to the said appellant by paying into court to the chamberlain of the city of New York [or in other counties, say: to the county treasurer of the county of], within days after service of this judgment on him or his attorney, the said sum of dollars, with interest from the day of , 18 , the date of said collection by the said respondent, * to abide the order of this court after such new trial is had [or where payment into court is not necessary, say: by paying to the appellant or his attorney within days after—&c., as above, down to the *].⁶

¹ See *Goodwin v. Conklin*, 85 N. Y., 21; *N. Y. Code Civ. Pro.*, § 1338; *Thomas v. Ins. Co.*, 108 Ill., 91, 98. The form in the text allows all questions both of law and fact to be reviewed. *Johnson v. Youngs*, 65 N. Y., 599; *Peterson v. Rawson*, 34 id., 370.

If the order for new trial does not direct the mode of trial, the court below have power in their discretion to allow specific issues to be settled for trial by jury. *Apel v. O'Connor*, 39 Hun, 482 (appeal from county court).

² See note 4 on page 802.

³ This is necessary. *Miller v. Adams*, 7 Lans., 131; aff'd, without

discussing this question, in 52 N. Y., 409.

⁴ See pp. 828, 857.

⁵ This form is sustained by *Britton v. Phillips*, 16 Abb. Pr., 33. Authorized by *N. Y. Code Civ. Pro.*, § 1323.

Defendant cannot insert this provision in the judgment without an order allowing it. *Martin v. Rector*, 11 Abb. N. C., 362; reversed on another point in 28 Hun, 409.

⁶ Whether this can be enforced by proceedings for contempt, compare *O'Gara v. Kearney*, 77 N. Y., 423; *Ex parte Morris*, 9 Wall., 605.

1958. *The same ; in ejectment :*¹ It is further adjudged, that said defendant Y. Z. be by the plaintiffs restored to the possession of said premises, which they took from her as aforesaid, on or about _____, 18____, under a judgment of this [or, the _____] Court, which has been reversed and set aside as aforesaid. Said premises are described as follows, to wit: [*describing them.*]

And it is further ordered and adjudged, that an execution issue and be directed to the sheriff of the [city and] county of _____, to cause the said defendant Y. Z. to have possession of the said premises.

Form No. 1959.

Order amending general term order so as to show that reversal was on question of fact.²

At a general term [*&c., as in Form 493, p. 4 of this Vol.*].

[*Title of action.*]

On reading and filing the affidavit of A. T., and an order to show cause, made herein on the _____ day of _____, 18____, requiring the defendant to show cause why the order hereinafter mentioned should not be amended as hereinafter directed; and after hearing A. T., of counsel for the plaintiff, in support of the motion, and T. Z., of counsel for the defendants, in opposition thereto; and due deliberation having been had; Now, on motion of A. T., attorney for plaintiff:

ORDERED, that the order made herein at a general term of this court, on the _____ day of _____, 18____, reversing that part of the judgment entered herein on the _____ day of _____, 18____, from which an appeal was taken by the plaintiff, and ordering a new trial of said action, be amended *nunc pro tunc* by adding at the end of said order the following clause, to wit: "Said judgment is reversed as aforesaid and a new trial granted, upon questions of fact."

[And it is further ordered, that the return heretofore made by the clerk of this court to the Court of Appeals, upon the appeal from said order taken by the defendant Y. Z., be

¹ As to adding, without prejudice to the rights of third persons, see *Costar v. Peters*, 4 *Abb. Pr.*, N. S., 53; *Wallace v. Berdell*, 101 *N. Y.*, 13.

² The appellate court will suspend proceedings on the appeal if necessary for the purpose of allowing this motion to be made below; and a general term, composed of other justices than those who sat when the defective order was entered, may grant

the amendment. *Buckingham v. Dickinson*, 54 *N. Y.*, 682.

Upon the amendment thus ordered and certified to the clerk of the Court of Appeals, an order may be obtained in the Court of Appeals amending the return accordingly, or by inserting therein the amended order. *Natl. City Bank v. N. Y. Gold Exch. Bank*, 97 *N. Y.*, 645.

amended by inserting therein a certified copy of this order, and that the clerk of this court be directed to forward the same to the clerk of the Court of Appeals as an amendment of said return.]

Enter : [*signature of presiding justice by initials of name and title.*]

Form No. 1960.

Order for judgment, on appeal from a judgment and from an order for allowance.

At a general term [*&c., as in Form 493, p. 4 of this Vol.*].

[*Title of the action.*]

The appeal from the order made at special term the day of , 18 , granting an allowance to the plaintiff of dollars, coming on to be heard, and on hearing T. Z. for the appellants, and A. T. for the respondents, and due deliberation being had; on motion of T. Z., attorney for the appellants :

ORDERED, that said allowance be and the same is hereby reduced to the sum of dollars, on the ground that [*stating it*].

And the appeal from the judgment coming on to be heard at the same time, and on hearing the same counsel :

IT IS ORDERED, ADJUDGED AND DECREED, that the said judgment be and the same is in all things affirmed, with costs, except that the costs of the judgment at special term are reduced to dollars in place of dollars.

Enter : [*signature of presiding justice by initials of name and title.*]

Form No. 1961.

Order for judgment on appeal by both parties.

At a general term [*&c., as in Form 493, p. 4 of this Vol.*].

[*Title of action.*]

This cause having been brought to a hearing upon an appeal taken by the plaintiff from [the last sentence contained in the judgment entered in this action], on the day of , 18 , at [a special term held before Mr. Justice J. K.], which sentence is in the following words : [*reciting it.*]

And A. T. having been heard for the plaintiff, and T. Z. for the defendant, it is ORDERED and ADJUDGED, that the said portion of the said judgment so appealed from by the plaintiff be and the same hereby is in all things reversed.

And the appeal of the defendant from the whole of said judgment having also been brought to a hearing, and the said counsel for the said parties respectively having been heard, it is ORDERED and ADJUDGED, that all that part of the said judgment of the special term, which follows the words ["the plaintiff shall be actually dead"], be and the same hereby is in all things reversed; and this court, proceeding to direct, in lieu thereof, such order and judgment in the premises as ought in that behalf to have been made at the said [special term], it is ORDERED and ADJUDGED [*&c., as in other cases*].

Enter: [*signature of presiding justice by initials of name and title.*]

Form No. 1962.

Judgment on appeal.¹

[*Title of appellate court, and action.*]

The plaintiff having appealed from the judgment entered herein on the day of , 18 , in favor of the [defendant] Y. Z. for the sum of dollars [*or if for special relief, designate it*], to the [general term of the Court], and said appeal having been argued [upon the case and exceptions], and said [general term] having ordered said judgment to be affirmed [*or, reversed—or, modified*], as hereinafter directed [with the costs and disbursements of said appeal to said defendant respondent], and said costs having been duly taxed by the clerk of this court upon due notice and appearance; Now, upon motion of T. Z., attorney for the defendant Y. Z., it is

ORDERED and ADJUDGED [*continue as in the order of affirmation or reversal*].

Judgment signed this day of , 18 .
[*Signature of*], Clerk.

Form No. 1963.

Judgment on dismissal of appeal.

[*As in Form 1948, to the *, and conclude:*] that the said appeal be dismissed, with dollars cost to the respondent.

¹ This judgment should be for costs alone, and should neither include the amount of the judgment below nor of interest on that judgment. *N. Y. Code Civ. Pro.*, § 1317.

Form No. 1964.

Order of general term reversing order on demurrer.

[*Title of court and action.*]

[*As in Form 1948, continuing from the *:*] that said order be and the same hereby is in all things reversed, with costs, with leave to the [plaintiff] to amend the complaint [*or, answer—or, reply—or, to withdraw said demurrer and to answer*] within twenty days after service of this order upon her attorneys, upon payment of the defendant's costs of the demurrer at special term and at general term.

And it is further ordered, that in default of such amendment and of the payment of such costs, judgment be and hereby is directed to be entered [*stating relief, as thus:*] in favor of the defendant, dismissing the said complaint [upon the merits], with costs.

Form No. 1965.

Affidavit to enter judgment in order of general term on demurrer.

[*Title of court and action.*]

[*Venue.*]

T. Z., being duly sworn, says:

I. That he is [managing clerk for the] attorney for the defendant in the above entitled action.

II. That no [amended complaint] in said action has been served upon or received by said defendant's attorneys, nor has the plaintiff paid the costs of this action under the terms of the order of the general term of this court granting leave to plaintiff to amend said complaint, and that the time for service of such amended complaint and payment of costs, as provided in said order, has expired.

III. That no previous application [*&c.; see p. 2.*]

[*Turat.*]

[*Signature.*]

Form No. 1966.

Judgment after failure to answer pursuant to leave of general term on reversing order on demurrer.

[*Title of court and action.*]

The general term of this court having reversed the order

of the special term thereof, overruling the demurrer interposed to the complaint, and having directed judgment in favor of the defendant, dismissing said complaint, with costs, with leave to plaintiff to amend said complaint upon payment of costs within twenty days after service of said order of the general term on her attorneys, now, on said order of the general term, and on reading and filing admission by attorneys for plaintiff of service of said order on them, on the day of , 18 , and an affidavit of T. Z., verified on the day of , 18 , showing that the time fixed by said order for service of an amended complaint and payment of costs has expired; and the defendant's costs having been duly adjusted at \$: now, on motion of T. Z., attorney for the defendant, it is

ORDERED, ADJUDGED and DECREED, 1. That the complaint in this action be and it hereby is dismissed [upon the merits].

2. That said defendant Y. Z. recover of said plaintiff A. B., the sum of dollars.

[*For Forms overruling demurrer, see p. 770.*]

VI. RESTITUTION.

Form No. 1967.

Affidavit to obtain restitution after reversal at general term.¹

[*Title of the action.*]

[*Venue.*]

E. R., being duly sworn, says:

I. That he is one of the attorneys for the Pacific National Bank of Boston, specially appearing in the above entitled action for the purpose of moving and setting aside the judgment and process hereinafter mentioned.

II. That on the day of , 18 , an attachment was issued out of this court at the suit of the plaintiff against the defendant for the sum of dollars.

III. That on the same day a levy was made under the attachment by service of a copy and certificate on the National

¹ From Market National Bank of New York v. Pacific National Bank of Boston, 7 *Northeastern Rep.*, 302; s. c., 102 *N. Y.*, 464, where an order on this affidavit was sustained.

Park Bank of the city of New York, where the defendant had a deposit exceeding the amount of the attachment.

IV. On the day of , 18 , the said attachment was vacated by an order of the special term of this court.

V. That on the day of , 18 , L. M. P., Esq., was duly appointed receiver of the defendant, the Pacific National Bank of Boston, by the comptroller of the currency, pursuant to the statutes of the United States, a duly certified copy of which appointment is annexed hereto.

VI. That on the day of , 18 , the order vacating the said attachment was reversed by the general term of this court in this department.

VII. That on the day of , 18 , a judgment was entered in the action in favor of the plaintiff and against the defendant for dollars, service of the summons in the action having been made out of the State under an order of publication.

VIII. That on the day of , 18 , the sheriff of the county of New York levied, collected and received from the said National Park Bank, as he is informed by the officers of the said bank, the sum of dollars under a writ of execution theretofore issued out of this court in this action to the said sheriff by the plaintiff against the defendant, dated , 18 , for dollars, upon the said judgment of , 18 , and by the endorsement of which the said sheriff was required to levy and collect dollars, with interest from the day of , 18 , besides his fees. The said dollars so paid to the sheriff by the said National Park Bank was paid by the said Park Bank as and for money of the defendant, and the defendant had at that time on deposit with the said National Park Bank that sum, and the said sum so paid was thereupon charged against the said defendant by the said National Park Bank.

IX. Thereafter and on or about the day of , 18 , the order of the special term refusing to vacate the said attachment was reversed by the general term of this court in this department, and the said warrant of attachment and the said judgment entered on the day of , 18 , and the levy under the said attachment and the said judgment were and each of them was vacated and set aside by this court on the defendant's motion.

X. The said order of the general term was thereafter

affirmed by the Court of Appeals, and the order of the Court of Appeals affirming the same was duly made the order of this court on the day of , 18 .

XI. The said receiver has demanded that the plaintiff should make restitution of the sum thus received by it under the attachment, judgment and execution so vacated and set aside, but the plaintiff has nevertheless refused, and still refuses, so to do, as he is informed and believes.

[*Jurat.*]

[*Signature.*]

[*Certified copy of appointment of receiver annexed.*]

Form No. 1968.

Notice of motion for restitution.¹

[*Title of appellate court and action.*]

[*As in Form 488, p. 1 of this Vol., moving the general term or Court of Appeals for an order:*] to compel restitution of the sum of dollars, with interest thereon from the day of , 18 , collected and received by the sheriff of the [city and] county, from , in the said city [*or, county*], under and by means of the erroneous judgment entered in this action on the day of , 18 , and the execution issued

¹ Notice of this application is necessary. *Young v. Brush*, 18 *Abb. Pr.*, 171.

As to addressing notices after judgment, see Vol. I. p. 412.

This and the preceding and following Forms are sustained by *Market Nat. Bk. v. Pacific Nat. Bk.*, 102 *N. Y.*, 464, where, after collection of a judgment in an attachment suit out of the attached property, the attachment, judgment and levy were set aside by the general term, which order was affirmed by the Court of Appeals, and an order entered at special term on the remittitur, making such order that of the Supreme Court. It was held that a motion for restitution was properly made at general term. *s. p.*, *N. Y. Code Civ. Pro.*, § 1323.

But under *N. Y. Code Pro.*, § 330, substantially the same as this section, an order for restitution made

at special term, after the remittitur had been filed, was sustained. *Hall v. Emmons*, 11 *Abb. Pr.*, *N. S.*, 435; *s. p.*, *Dawley v. Brown*, 43 *How. Pr.*, 17.

Defendant may either move or bring an action to enforce restitution. *Kidd v. Curry*, 29 *Hun*, 215.

Compare *Murray v. Berdell*, 98 *N. Y.*, 480, as to cases where actions should be resorted to.

Or the same result may be accomplished by motion in the appellate court to amend the judgment on appeal so as to insert a provision for restitution. *People v. Livingston*, 80 *N. Y.*, 66.

It seems that the Court of Appeals will not entertain the motion after the remittitur has been filed. *Wright v. Nostrand*, 100 *N. Y.*, 616; *s. c.*, 1 *Centr. Rep.*, 235; 3 *Northeastern Rep.*, 78.

thereon [and that said restitution be made by payment of the said sum to L. M. P., Esq., the receiver of the said defendant].

[*Date.*]

[*Signature and office address of*],

Attorney for [*moving party*].

[*Address to plaintiff and to plaintiff's attorneys.*]

Form No. 1969.

Order for restitution (with award of execution).¹

At a general term [*&c., as in
Form 493, p. 4 of this Vol.*].

[*Title of action.*]

The warrant of attachment issued in this action on the day of , 18 , and the judgment entered herein on the day of , 18 , having been vacated and set aside by the order of the general term of this court in this department, dated , 18 , and filed , 18 , and the said order having been affirmed by the Court of Appeals, and the order of the Court of Appeals affirming the same having been made the order of this court on the day of , 18 , and the defendant having moved [pursuant to the provisions of §§ 1292 and 1323 of the Code of Civil Procedure] for restitution of property lost under the said erroneous attachment and judgment, and the said motion having come on to be heard, and the defendant having filed and read in support of said motion the affidavit of E. R., verified , 18 , and a certified copy of the appointment of L. M. P. as receiver of the defendant, and the plaintiff having filed and read in opposition to said motion the affidavit of A. B. C., verified , 18 , and it appearing by the said papers [*state facts established*]; Now, after hearing E. R., Esq., for the motion, and A. W., Esq., in opposition thereto, and due deliberation being had, on motion of E. R., attorney for the defendant:

ORDERED, that the defendant recover of the plaintiff the sum of dollars, with dollars, the interest thereon at the rate of five per cent. per annum, from the day of , 18 , to the date of this order, amounting in the aggregate to dollars, and that the defendants have execution for the said sum and interest [and that satisfaction of the recovery herein provided for shall be made by payment to L. M. P., Esq.,

¹ As to how far this order is discretionary, see *Young v. Brush*, 18 *Abb. Pr.*, 171; *People v. White*, 28 *Hun*, 289; 5 *Monthly L. Bul.*, 21.

receiver of the Pacific National Bank of Boston, or the attorneys of the defendant in this action as the attorneys of the said receiver].

VII. REARGUMENT.

Form No. 1970.

Order for stay pending motion for reargument.

[*Underwritten on affidavit of applicant.*]

On the foregoing affidavit of B. W. H., it is ORDERED that, to enable the [appellant] in the above entitled appeal to prepare and present a motion for reargument, entry of judgment on the decision of said appeal [*or*, the filing of the remittitur, and proceedings to make the judgment of this court the judgment of the court below] be stayed until the decision of such motion for reargument and the further order of the court [and that the attorneys for the respondents have the remittitur ready for the recall thereof by the court, in event such recall shall be ordered].

[*Date.*]

[*Signature*],
Judge Ct. of Appeals.

Form No. 1971.

Order returning remittitur to Court of Appeals, and staying action on undertaking.¹

[*Title (Special term order) and recitals ; see Form 493, p. 4.*]

ORDERED, that the filing of the said remittitur, and the order of this court making the same the order [*or*, judgment] of this court, and each of them be and the same are hereby vacated and set aside ; and the clerk of this court is hereby directed to return the said remittitur to the said Court of Appeals for its further action in the premises.

And it appearing that on or about the day of , 18 , on the appeal of the said Y. Z. to the Court of Appeals, M. N. and O. P. executed to the plaintiff, and filed with the clerk of , an undertaking on appeal in the usual form, conditioned for the payment of the judgment of the Supreme Court, and of any costs that might be awarded against the

¹ This is the Form as entered in *Hadfield, id.*, 109 ; *Cochran v. Ingersoll*, 4 *Weekly Dig.*, 415.
Wilmerdings v. Fowler, 15 *Abb. Pr.*,
N. S., 86. See, also, *Cushman v.*

said Y. Z. on such appeal to the Court of Appeals, should the said judgment be affirmed, and that there is now pending and undetermined in this Court, in the county of , an action brought by the said A. B. against the said M. N. and O. P., as sureties in the said undertaking, for the recovery of the sum of \$ damages and costs, upon the affirmance of the said judgment by the Court of Appeals:

IT IS FURTHER ORDERED [on the consent of the parties hereto given in open court], that all proceedings in said action in said Court be stayed until the hearing and determination by the Court of Appeals, upon the return of the said remittitur thereto, and that in the event that the Court of Appeals refuse to grant a reargument of said appeal, the said action continue as if this order had not been made, but that in the event a reargument of said appeal is had, and the said order [or, judgment] of the general term of the Supreme Court is reversed, the said action shall thereupon and thereby stand discontinued and dismissed.

Enter : [*signature of presiding justice by initials of name and title.*]

Form No. 1972.

Notice of motion for reargument of appeal.¹

[*Title of the appellate court, and action.*]

Please take notice, that the undersigned will move the court at a [general] term thereof, to be held at , on the day of , 18 , for an order allowing the appeal to be taken from the judgment [or, order], entered herein on the day of , 18 , to be reargued on the following grounds [*stating them*], and to stay the entry of the judgment of [affirmance] meantime, or for such other relief as may be just.

[*Signature and office address of*],
[Date.] Attorney for [plaintiff and respondent].
[Address] To
Attorney for [defendant and appellant].

Form No. 1973.

Order for reargument.

At a [general] term [*&c., as in Form 493, p. 4 of this Vol.*].
[*Title of action.*]

On reading and filing notice of motion [and the affidavit of

¹ For an order to show cause readily adaptable, see Vol. I, p. 314.

C. D.—*if any*], and on motion of A. T. for the [appellant], after hearing T. Z. for the respondent :

ORDERED, that the appeal from the judgment [*or, order*] entered herein [*describing it, if necessary*] be reargued, and that the entry of the [judgment of affirmance] heretofore rendered be stayed until the decision of the court upon such reargument.

Enter : [*signature of presiding justice by initials of name and title.*]

Form No. 1974.

Order transferring cause to another department.¹

[*Title of cause.*] At a general term [*&c., as in Form 493, p. 4 of this Vol.*].

The appeal of [the plaintiff] from the judgment in this action coming on to be heard before the general term of this court, Hon. J. K. not sitting, because not qualified to sit in the cause, and the justices present being unable to agree :

After hearing A. T., of counsel for the plaintiff appellant, and T. Z., of counsel [*or, no one appearing*] for the defendant respondent :

ORDERED, that a reargument be had and the appeal decided in the department.

VIII. FILING THE REMITTITUR AND SUBSEQUENT PROCEEDINGS.

Form No. 1975.

The remittitur.²

Court of Appeals, }
State of New York, } ss.:

Pleas in the Court of Appeals held at the Capitol in the city of Albany on the day of , in the year of our Lord one thousand eight hundred and eighty- , before the judges of said court.

¹ Allowed by *N. Y. Code Civ. Pro.*, § 281.

In case of the disqualification of two of the general term justices, the presiding justice may call in two justices from another department to sit, instead of transferring the cause

to another department by order. Matter of Broadway Widening, 63 *Barb.*, 572; *N. Y. Gen. Rules* of 1888, No. 3.

² *N. Y. Court of Appeals Rules*, No. 14. The same rules apply to remittitur from the New York Common Pleas to the City Court.

Witness the Hon. William C. Ruger,
Chief Judge presiding.

E. O. Perrin, Clerk.

Remittitur , 18 .

[*Title of the action.*]

Be it remembered that on the day of , in the year of our Lord one thousand eight hundred and eighty- , A. B., the appellant in this action, came here into the Court of Appeals by A. T., his attorney, and filed in the said court a notice of appeal and return thereto from a judgment of the [Supreme] Court of [the first department and first judicial district of the State of New York]; and Y. Z., the respondent in said action, afterwards appeared in said Court of Appeals by T. Z., his attorney :

Which said notice of appeal and return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals, having heard this cause argued by Mr. A. T., of counsel for the appellant, and Mr. T. Z., of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the

Court appealed from in this action to this court be affirmed, with costs to the respondent against the appellant [*or*, except as to costs, and reversed as to the costs, without costs in this court to either party—*or otherwise as the decision may require*].

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be [*stating result as above*].

And hereupon as well the notice of appeal and return thereto aforesaid, as the judgment of the Court of Appeals aforesaid by them given in the premises, are by the said Court of Appeals remitted into the [*name of court below*], before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said

Court before the justices thereof
[&c.]. [Signature of],

Clerk of the Court of Appeals of the State of
New York.

Court of Appeals, Clerk's Office, {
Albany, Nov. , 18 . }

{ Seal
Court of
Appeals. }

I hereby certify that the preceding
record contains a correct trans-
cript of the proceedings in said
action in the Court of Appeals,
with the papers originally filed
therein attached thereto.

[Signature of],
Deputy Clerk.

Form No. 1976.

Notice of filing remittitur.¹

[Title of court and action.]

Please take notice, that the remittitur in the above action
has been filed in the office of the clerk of the county of
[or, of this court], and that on the day of , 18 , the
undersigned will move this court at a special term, at the city
hall in , on the day of , at o'clock in the
noon, or as soon thereafter as counsel can be heard, for an
order that judgment be entered thereon.

[Date.] [Signature and office address of],
[Address] To , Attorney for [successful party].
Attorney for [adverse party].

Form No. 1977.

Notice of entry of order on appeal remitting cause for further
proceedings, and notice of hearing thereon.²

[Unless this is indorsed on the copy order served, entitle it in the
court and cause.]

Please take notice, that within is a copy of an order duly .

¹ As to filing the remittitur, and
its effect, see the following cases:
Dresser v. Brooks, 4 How. Pr., 207;
id., 184, note; Judson v. Gray, 17
How. Pr., 289; Seacord v. Morgan, 4
Abb. Pr., N. S., 249; Newton v. Har-

ris, 8 Barb., 306; Cushman v. Hatfield,
52 N. Y., 653; s. c., 15 Abb. Pr., N.
S., 109, and note; Marshall v. Macy,
5 Week. Dig., 90; Andrews v. Durant, 6
How. Pr., 191.

² N. Y. Code Civ. Pro., § 1345.

made herein, and [this day] entered in the office of the clerk of this court [or, of the county of].

And also take notice, that the hearing on the merits of the [defendant's motion for a perpetual stay of all proceedings on the judgment herein, directed in the within order], will be heard at a special term of this court, to be held [at chambers], at the court house in the city of , on the day of , 18 , at o'clock in the noon, at the opening of the court at that day, or as soon thereafter as counsel can be heard, and application will then and there be made that said motion be granted. [Signature and office address of],

[Date.] Attorney for
[Address] To ,
Attorney for .

Form No. 1978.

Order for judgment below on remittitur.

At a special term [&c., as in
[Title of cause.] Form 493, p. 4].

This cause having been brought on upon the remittitur herein sent down from the Court of Appeals, and now filed in this court, by which remittitur it appears that an appeal was taken by the defendants from the judgment of this court to the said Court of Appeals, and that such appeal has been [dismissed] by such court [with costs, for want of prosecution], and that the record and proceedings had been directed by said Court of Appeals to be remitted to this court, and this court directed to enforce the said judgment of the Court of Appeals according to law; Now, therefore, on motion of A. T., of counsel for the plaintiffs:

IT IS ORDERED AND ADJUDGED, that the judgment of the said Court of Appeals be, and the same is hereby made the judgment of this court; and that the plaintiffs have execution against the defendant for the costs when adjusted by the clerk and inserted in this judgment, as well as for the amount adjudged to be recovered in and by the judgment of this court in this cause, entered the day of , 18 , and that this order or judgment be annexed to the judgment-roll.¹

¹ Sustained by Union India Rubber Co. v. Babcock, 4 Duer, 620; s. c., 1 Abb. Pr., 262. See, further, Macgregor v. Buell, 17 Abb. Pr., 31; Brown v. Leigh, 50 N. Y., 427; s. c., 13 Abb.

Pr., N. S., 305; Seacord v. Morgan, 17 How. Pr., 394; Chatauqua Co. Bank v. White, 23 N. Y., 347. Under N. Y. Code Civ. Pro., §§ 194, 1317, application for this order should be made at

Form No. 1979.

Judgment on remittitur.

[Title of court below and of the cause.]

Judgment [date].

A judgment in this action in favor of the [plaintiff] against the [defendant] having been rendered in this court on the day of , one thousand eight hundred and , upon verdict of a jury [or, upon the report of a referee], for damages to the sum of dollars found by said jury [or, reported by said referee], and dollars interest thereon from the date of said verdict [or, report] to the entry of said judgment, making together the sum of dollars, and also for dollars costs adjusted in said judgment; and the defendant having appealed from said judgment to the general term of this court [for the department], and the said judgment having been [affirmed in all things] by this court at said general term, and judgment of [affirmance] having been rendered thereon the day of , one thousand eight hundred and , that the [plaintiff] recover against the [defendant] dollars costs of said appeal; and the defendant having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur, filed herein the day of , 18 , by which it appears that the said Court of Appeals has [affirmed the said judgment in all things with costs], and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this court to be enforced according to law; and this court having [on due notice] by an order entered herein the day of , 18 , ordered that said judgment be made the judgment of this court [*where the costs are taxable by the court and not by the clerk*,¹ substitute: with costs, the same having been adjusted by the court at the sum of dollars as per bill of costs filed with the clerk of this court on this day]; Now, on motion of A. T. [plaintiff's] attorney, it is adjudged that [*proceeding as in the order for judgment; see preceding Form*].

[Signature of], Clerk.

a special term of the Supreme Court in the county where the judgment appealed from was entered, and although it is said to be the better practice to give notice of the application for the order (see *Chautauque Co. Bank v. White*, 23 *N. Y.*, 347), yet the order is matter of cause, and notice is

not now deemed essential, for the order cannot go beyond the remittitur.

¹ See *Cochran's Executor v. Ingersoll*, 11 *Hun*, 342, where it was held that on such a remittitur the court below has power to adjust the costs in cases where the clerk of the court cannot do it.

CHAPTER XVI.

EXECUTING THE JUDGMENT.

ARTICLE I.—EXECUTION AGAINST PROPERTY.

II.—EXECUTION AGAINST THE PERSON,

III.—ENFORCING JUDGMENT FOR SPECIFIC RELIEF BY JUDICIAL SALE OR OTHERWISE.

IV.—ENFORCING JUDGMENT FOR COSTS AGAINST A THIRD PERSON INTERESTED.

ARTICLE I.

EXECUTION AGAINST PROPERTY.

I. LEAVE TO ISSUE EXECUTION.

FORMS.

(1980.) Affidavit to obtain leave to issue execution for possession of realty after death of party against whom judgment was had.

(1981.) Notice of motion thereon.

(1982.) Order thereon.

(1983.) Affidavit to move for leave to issue execution after lapse of five years.

(1984.) Notice of motion thereon.

(1985.) Another Form, by order to show cause directing mode of service.

(1986.) Order thereon.

(1987.) Affidavit to move for execution against property of a judgment-debtor having died after judgment.

(1988.) Notice of motion thereon.

(1989.) Another Form, by order to show cause directing mode of service.

(1990.) Order thereon.

(1991.) Petition to surrogate's court for execution against property of a judgment-debtor having died since judgment.

(1992.) Decree thereon.

(1993.) Affidavit to obtain execution on judgment against executor or administrator as such.

(1994.) Notice of application to surrogate thereon.

(1995.) Another Form, by order to show cause, with directions as to service.

(1996.) Undertaking by legatee or next of kin before issuing execution on judgment against executor or administrator.

(1997.) Order of surrogate that executor (or administrator) render an intermediate account (under N. Y. Code Civ. Pro., § 2723, subds. 1 and 2).

(1998.) Order of surrogate allowing execution against executor or administrator as such.

II. THE EXECUTION AND INDORSEMENTS.

(1999.) Execution against property, on judgment recovered in a court of record, &c.

(2000.) — — — from a county court, or the N. Y. Common Pleas, upon a judgment rendered

- in a court of a justice of the peace, &c.
- (2001.) — — — where attachment had been levied and debtor was personally served within the State, or (being a resident and absconding or concealed) was served by publication.
- (2002.) — — — where attachment had been levied and debtor is a non-resident, or a foreign corporation, and has not been served personally within the State, and has not appeared.
- (2003.) — against joint property, where an attachment has been levied, and the debtors have appeared, or been personally served within the State.
- (2004.) — against joint property of all, and separate property of some of the judgment-debtors, where part only have been served.
- (2005.) — against property issued to a sheriff who has levied an attachment in the action, but whose term of office has expired.
- (2006.) — for the possession of a chattel with or without damages for the taking or detention thereof.
- (2007.) The same—in favor of defendant unless plaintiff pays value of special property in chattel, &c.
- (2008.) Execution for delivery of possession of real property with damages.
- (2009.) — for deficiency in foreclosure.

- (2010.) — against property of an unincorporated association.
- (2011.) — against real or personal property in the hands of an executor, &c.
- (2012.) Indorsement on execution (against property).
- (2013–2023.) Statements suitable to insert or substitute in foregoing Form.

III. LEVY AND INDEMNITY, &c.

- (2024.) Bond to indemnify the sheriff on his levying execution.
- (2024a.) Notice to sheriff of third person's claim to property levied on; notice thereof to execution creditor, &c.
- (2025.) Undertaking to indemnify sheriff for not relinquishing levy.
- (2026.) Notice by officer, &c., indemnified, that he is sued, given to entitle him to recover over on the indemnity.
- (2027.) Order staying sheriff from removing property or releasing levy.
- (2028.) Affidavit of sheriff to obtain order extending time to return conflicting executions, &c.
- (2029.) Order thereon.
- (2029a.) Notice of motion thereon.

IV. PURCHASE AND REDEMPTION.

- (2030.) Affidavit by purchaser at execution sale for order to enjoin waste.
- (2031.) — of amount due remaining unpaid, on judgment.
- (2031a.) — of agent to sum remaining unpaid on mortgage.

I. LEAVE TO ISSUE EXECUTION.

Form No. 1980.

Affidavit to obtain leave to issue execution for possession of realty after death of party against whom judgment was had.¹

[*Title of court and action.*]

[*Venue.*]

Y. Z., being duly sworn, says:

¹ *N. Y. Code Civ. Pro.*, § 1376 (clause 2). See notes, pp. 1038, 1039.

I. That he is the [plaintiff] in the above-entitled action.

II. That final judgment herein was entered in his favor and against the above-named [defendant] on the day of , 18 , for the recovery of the possession of the following real property, to wit: [*description.*]

III. That thereafter and on or about the day of , the said [defendant] died intestate, leaving A. B. and C. D. his only heirs at law [*or, leaving a last will and testament whereby he devised the said real property to A. B. and C. D., who are the present and sole occupants of the land so recovered* [*or otherwise according to the case.*]

[*Signature.*]

[*Jurat.*]

Form No. 1981.

Notice of motion for leave to issue execution for possession of realty after death of party against whom judgment was had.¹

[*Title of court and action.*]

Please take notice, that [upon the affidavit, a copy of which is herewith served upon you] application will be made to this court, at a special term thereof, to be held [at chambers] at the city hall [*or, county court house*], in the [city] of , on the day of , 18 , at the opening of the court, or at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, for an order granting leave to issue and execute an execution or writ of possession for the delivery of the possession of the real property described in the judgment rendered the day of , 18 , in the above-entitled action, in the Court of , in favor of the said [name] against the said [name], and for such other or further relief as may be just. The said property is thus described in said judgment [*description.*].

[*Date.*] [Signature and office address of],
[Address] To , Attorney for [moving party].
[Occupants of the lands, and to the heirs and devisees, and to the grantees of the deceased].

¹ Twenty days' notice must be given, and served in the same manner as a summons in an action in the Supreme Court. *N. Y. Code Civ. Pro.*, § 1376. Hence notice should not be given by an order to show cause which, by the rules of practice, must be returnable in less than eight days. Application should be made to the court. See note 1, p. 1039.

Form No. 1982.

Order granting leave to issue execution for the possession of realty on a judgment recovered against a party since deceased.¹

At a special term [*&c.*, as in
Form 493, p. 4].

[*Title of action.*]

Upon reading and filing the affidavit of A. B., verified on the day of , 18 , and proof of due notice of this motion to all the persons entitled to such notice, and after hearing A. T., Esq., attorney for [plaintiff], in support of the motion, and Z. T., Esq., attorney for the heirs at law [*or*, devisees—*or other parties*] of the deceased [*or*, no one appearing], in opposition thereto, and due deliberation being had; Now, on motion of A. T., Esq., attorney for the plaintiff, it is :

ORDERED, that leave be and hereby is granted to the [plaintiff] herein [*naming him*], to issue and execute an execution upon the judgment rendered herein for the recovery of the possession of the real property described in the said judgment, and that such execution may be issued in the same form and be executed in the same manner as if the said judgment-debtor was still living.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1983.

Affidavit to move for leave to issue execution after lapse of five years.²

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says :

¹ See Form 2008, p. 1071, for an execution for possession of real property.

Under *N. Y. Code Civ. Pro.*, § 1376 (as amended in 1887), apply for this order to the court in which judgment was rendered, "upon giving twenty days' notice to the occupants of the lands so recovered, and to the grantees or devisees of said deceased, or if he died intestate, to the heirs at law of said deceased; said notices to be served in the same manner as a sum-

mons is directed to be served in an action in the Supreme Court." Although this section (§ 1376) does not expressly require the application to be made to the court instead of a judge, yet by § 1377 of the Code it is evident that it should be made to the court.

² *N. Y. Code Civ. Pro.*, §§ 1377, 1378. The five years are computed from the time of docketing. *Kupfer v. Frank*, 30 *Hun*, 74. And by *Code Civ. Pro.*, § 1382, a stay is not counted as a part of the time limited for issu-

I. That he is the [plaintiff] above named.¹

II. That a final judgment was rendered in the above-entitled action, in favor of the [plaintiff] and against the [defendant], in the Court of , for the sum of dollars and cents [or specify other relief granted], and the same was duly docketed therein on the day of , 18 [in case of a judgment of a court of record, add: in the clerk's office of said court—or if the Supreme Court: in the county clerk's office of county—in case of a judgment in a N. Y. City District Court,² or in a justice's court,³ add, instead: and a transcript thereof was duly filed and the judgment docketed in the clerk's office of county on the day of , 18 ⁴].

ing an execution or for making an application for leave to issue an execution from a court of record.

In *Mereness v. Brenon*, 7 *Weekly Dig.*, 24, it was held that leave to issue execution (for the first time) after five years may be granted upon motion of the personal representatives of a deceased judgment-creditor.

If execution has been issued and returned wholly or partly unsatisfied or unexecuted within the five years, no leave of court is necessary to issue it again. *Wade v. De Leyer*, 40 *Super. Ct. (J. & S.)*, 541. And even if issued (for the first time) after the said five years without leave, the execution is not void, but voidable only in the discretion of the court. See *Wooster v. Wuterich*, 2 *Abb. N. C.*, 206.

¹ The Code does not expressly require the affidavit to be made by a party to the judgment-record. An assignee of the judgment may make the affidavit. See *Duell v. Alvord*, 41 *Hun*, 196, 198.

² Application for leave to issue execution on such a judgment must be made to the Court of Common Pleas. *N. Y. Code Civ. Pro.*, §§ 3220 and 3022 (last clause); *N. Y. City Consol. Act of 1882*, § 1397.

³ Apply to the county court of the county in which such a judgment was rendered for leave to issue execution thereon. *N. Y. Code Civ. Pro.*, § 3022 (last clause). See also *id.*, §§ 3133, 3225 and 3226, for the same provision for justices' courts of certain cities.

⁴ It has been held that a transcript of a judgment of a district court or

of a justice's court must be filed within six years from the time the judgment was rendered, because no action can be brought on such a judgment after six years, and to allow the judgment to be thus revived and enforced as a judgment of the Court of Common Pleas, or of a county court, would be to defeat the policy of the Statute of Limitations contained in *Code Civ. Pro.*, § 382, subd. 7. See *Lewis v. Acker*, 7 *Weekly Dig.*, 169 (denying application made in Court of Common Pleas for leave to issue execution on district court judgment where transcript had not been filed in county clerk's office until after six years had elapsed). *Kincaid v. Richardson*, 9 *Abb. N. C.*, 315, 320, contains a *dictum* to same effect. See also the recent case of *Davidson v. Horn*, 47 *Hun*, 51, so holding in effect, and reversing an order appointing a receiver in supplementary proceedings based upon the return of an unsatisfied execution issued in a case where the transcript of a justice's judgment had not been filed until after the lapse of six years. See, however, *Rose v. Henry*, 37 *Hun*, 397, holding to the contrary, and reversing an order which had denied a motion for leave to issue an execution upon such a judgment where the transcript had been filed after the lapse of six years, and distinguishing the Statute of Limitations (*Code Civ. Pro.*, § 382, subd. 7) as applying to the remedy by action solely, and not to the remedy by execution issued out of a county court.

III. That no execution has ever been issued on said judgment [*and in case of a money-judgment, add: and the same remains wholly unsatisfied, and no part thereof has ever been paid*¹ *or collected—or if partly collected, substitute after the word “judgment:” and the same remains partly unsatisfied in that there has been collected thereon only the sum of* dollars and cents, which was paid on the day of , 18 , but leaving the sum of dollars and cents still due and unpaid upon said judgment—*or otherwise state the facts concisely*].

[*Or in case of an assignment of the judgment, substitute:* ²*]*
 III. That the said judgment was assigned by [plaintiff] on the day of , 18 , to [*naming assignee*]. That as the deponent has been informed by the said assignor and verily believes, prior to said assignment no execution was ever issued upon the said judgment [*if money-judgment, add: and at the time of said assignment the judgment remained wholly unsatisfied and unpaid, and that no execution has been issued since the assignment, and that the judgment still remains wholly unsatisfied and unpaid*].

[*If an order to show cause is asked, state reason, as thus:*]
 IV. An order to show cause is necessary for the reason that it is essential that such order should provide for the manner of giving notice³ of the application for leave to issue execution to the said [judgment-debtor], who resides out of this State at , in the State of [*or, who resides in this State at , but personal service cannot with reasonable diligence be made upon him—setting forth in detail the efforts made to serve him; see Forms in Vol. I, Ch. IV*].

But if the transcript of such a judgment is filed within the six years, then the judgment is deemed to be one of a court of record, and may be enforced by execution at any time within twenty years after such docketing; and in a proper case leave to issue execution thereon should be granted as a matter of right. Kincaid v. Richardson, 9 Abb. N. C., 315, appeal dismissed in 25 Hun, 237; Lewis v. Acker, 7 Weekly Dig., 169 (*dictum*); Otten v. Boebeling, 4 Month. L. Bul., 63 (granting motion made in the Common Pleas for leave to issue execution where the transcript of a district court judgment had been filed within six years after judgment was rendered, but no execution had been issued for upwards of ten years).

¹ See Wadley v. Davis, 30 Hun, 570, and Duell v. Alvord, 41 id., 196, holding that an affidavit to the effect “that said judgment is wholly unsatisfied and unpaid” is sufficient in the absence of any evidence to the contrary. That a court in such a case is bound to be “satisfied” within the meaning of the Code, see Kincaid v. Richardson, 9 Abb. N. C., 315, 321.

² This clause when used it would be well to have supplemented by the affidavit of the assignor, to the effect that before the assignment no execution had been issued and nothing paid on the judgment, &c.

³ N. Y. Code Civ. Pro., § 1378 (first clause).

V. No previous application has been made for an order to show cause herein for this purpose. [Signature.]
[*Jurat.*]

Form No. 1984.

Notice of motion for leave to issue execution after the lapse of five years.¹

[*Move the court, see Forms 488, &c., and state order asked, as thus:*] granting leave to issue an execution on the final judgment rendered in this action in the Court of _____ and entered on the _____ day of _____, 18____, or for such other [&c.].

Form No. 1985.

Another Form, by order to show cause, directing mode of service.²

At a special term [&c., as in
[*Title of action.*] Form 493, p. 4 of this Vol.].

On the annexed affidavit of A. B., verified the _____ day of _____, 18____, and on motion of A. T., Esq., attorney for [judgment-creditor or assignee]: *

ORDERED, that the [*parties to be served*] herein show cause at a special term of this court to be held [at chambers] at the county court house [or, city hall] in the [city] of _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why an execution should not issue on the final judgment entered in this action on the _____ day of _____, 18____ [and the transcript of which was duly filed in the county clerk's office on the _____ day of _____, 18____], and why the said [*judgment-creditor*] should not have such other or further relief as may be just.

¹ As to manner of service, see *N. Y. Code Civ. Pro.*, § 1378.

² See Volume I, p. 160, paragraph 106, and note 4 thereto, to the effect that application for such an *ex parte* order to show cause (used as a short notice of motion) must be made to the court before whom the motion is to be made, or a judge thereof; and as an order granting leave to issue execution is to be made by the court (*N. Y. Code Civ. Pro.*, § 1377), this order to show cause must be made returnable before the court out of which

the execution is to be issued. In courts of record this is the court in which the judgment was originally rendered; but in the case of judgments of inferior courts, such as those rendered in justices' courts and in N. Y. city district courts, these applications must be made to the county court of the county in which the judgment was rendered, and to the Court of Common Pleas for the city and county of New York respectively. *Id.*, §§ 3022 (last clause) and 3220; *N. Y. City Consol. Act of 1882*, § 1397.

[When adverse party is a non-resident, and his exact residence doubtful, may add:¹] And it is further ORDERED, that notice of this application for leave to issue such execution be given to the said [adverse party] by serving on him personally, on or before the day of , a copy of this order and the annexed affidavit, at , in the State of , or at such other place in the said State as the said [adverse party] may be found.

[Or where judgment-debtor cannot be served personally with reasonable diligence:] And it is further ORDERED, that a copy of this order and of the said affidavit be served upon [adverse party], by a publication of this order once a week for weeks successively in the , a newspaper published in the county of , and by depositing in the post office at , on or before the day of , 18 , a copy of this order and said affidavit, contained in a securely-closed postpaid wrapper directed to the said [adverse party; or state other manner of service as may be directed by the court].

[For another form of direction, see Form 1989.]

Enter: [signature of judge by initials of name and title.]

Form No. 1986.

Order granting leave to issue execution after the lapse of five years.²

At a special term [dec., as in
[Title of action.] Form 493, p. 4 of this Vol.].

The motion for leave to issue execution on the final judgment entered in this action and duly docketed on the day of , 18 [and the transcript of which was duly filed and the judgment docketed in the office of the clerk of , on the day of , 18], having been duly heard; and upon reading and filing the affidavit of , verified on the day of , 18 [whereby it is proved to the satisfaction of the court that the said judgment remains wholly—or, partly—unsatisfied];³ and upon reading and filing the

¹ Under *N. Y. Code Civ. Pro.*, § 1378, such an order to show cause used as a short notice of motion "must be served personally upon the adverse party, if he is a resident of the State, and personal service can, with reasonable diligence, be made upon him therein: otherwise, notice

must be given in such manner as the court directs."

² *Id.*, §§ 1377, 1378. As to what court to apply for this order, and as to the rules governing the application, see notes to the affidavit, &c., p. 1042.

³ It may be well to insert this re-

notice of motion [*or, order to show cause*] dated the day of , 18 , and upon reading and filing [*specifying papers in opposition*], and after hearing A. T., Esq., attorney for [*judgment-creditor or assignee*], in support of the motion, and Z. T., Esq., attorney [*or, and on reading and filing proof of due notice of motion and no one appearing*] for [*the judgment-debtor*] in opposition, and after due deliberation being had thereon; Now, on motion of A. T., Esq., attorney for [*judgment-creditor or assignee*], it is:

ORDERED, that said motion be and hereby is granted, and that leave be and hereby is given to the said [*judgment-creditor or assignee*] to issue an execution upon the said judgment.

Enter: [*signature of judge by initials of name and title.*]

Form No. 1987.

Affidavit to move for execution against property of a judgment-debtor having died after judgment.¹

[*Title of court and action.*]

[*Venue.*]

A. B., being duly sworn, says:

I. That he is the [plaintiff] in the above-entitled action.

II. That the [plaintiff] on * the day of , 18 , in the Court of the of [*or, before J. P., Esq., a justice of the peace of the town of —or, in the district court for the judicial district of the city of New York*], in the county of , recovered a final judgment against the [defendant], the said Y. Z., for [*or, directing the payment by the said Y. Z. to the said A. B., of*] the sum of dollars and

cital in case of a money-judgment, even though unnecessary. See *id.*, § 1378 (last clause).

¹ Unnecessary for purpose of enforcing execution issued before the debtor's death. *Wood v. Morehouse*, 1 *Lans.*, 405; *Allan v. Hoffman*, 11 *Va. L. J.*, 663.

Required where death is before issue of execution, by *N. Y. Code Civ. Pro.*, §§ 1379, 1380, 1381. See also note 3, p. 1046.

The Code does not expressly require the affidavit to be made by a party to the judgment-record, and it may be made by an assignee of the

judgment. See *Duell v. Alvord*, 41 *Hun*, 196. Instead of obtaining an order of court and a decree of the surrogate granting leave to issue an execution, a judgment-creditor may in some cases find it a preferable course to apply (after six months have elapsed after the issue of letters) to the surrogate by petition for an order directing the executor or administrator to pay the judgment (or a just proportion thereof) out of assets in his hands. *N. Y. Code Civ. Pro.*, § 2717, and see *McNulty v. Hurd*, 72 *N. Y.*, 518.

cents damages and , dollars and cents costs. [*And add facts showing the judgment to be a lien¹ on property described, as for instance:*] That the judgment-roll upon said judgment was duly filed² and the judgment duly docketed in the office of the clerk of the [city and] county of [or, of the Court of], on the day of , 18 [*and in case of a judgment of any court other than the supreme (and including also cases where execution is to be issued to another county), add:* and a transcript of said judgment was duly filed, and the judgment was duly docketed, in the county clerk's office,³ on the day of , 18].

III. That said Y. Z., died on the day of , 18 , intestate, leaving C. D. and E. F. as his only heirs⁴ at law [*or, leaving a last will and testament which has been duly admitted to probate by the surrogate of the county of , whereby the real property hereinafter described was devised to C. D. and E. F.*], and letters of administration [*or, letters testamentary under said will*] were duly granted upon the estate of the said deceased judgment-debtor by the surrogate of county to [*naming administrator—or, to , the executor named in said will*], on the day of , 18 , and the said administrator [*or, executor*] has duly qualified as such [*and more than three years have elapsed since the said letters were duly granted*].⁵

[*Or in the cases specified in last part of N. Y. Code Civ. Pro., § 1380 (as amended in 1885), substitute the following:*] III. That said Y. Z. died intestate at on the day of , 18 , and that although three years have elapsed since said death, letters of administration upon his estate have not been granted by the Surrogate's Court of the county of

¹ *N. Y. Code Civ. Pro.*, § 1389 (first clause). If the judgment is not a lien on any property against which it may be enforced, it seems that no execution could be issued thereon even with leave of court. *Kenney v. Geoghegan*, 1 *N. Y. State Rep.*, 135; s. c., 9 *Civ. Pro. R. (Browne)*, 378.

² By *N. Y. Code Civ. Pro.*, § 1250, a judgment does not become a lien on real property and chattels real until the judgment-roll is filed and the judgment docketed. In case of a justice's judgment, however, omit statement as to filing of judgment-roll. See *id.*, § 1367.

³ See *id.*, § 1251.

⁴ Where there are tenants of the

property it is well to specify their interests therein.

⁵ Where the lien of the judgment was created as prescribed in § 1251 of the Code, the affidavit must show that three years have elapsed since letters testamentary or letters of administration have been duly granted upon the estate of the decedent. *Code Civ. Pro.*, § 1380, and see *Duell v. Alvord*, 41 *Hun*, 196, and cases cited in note thereto. *Kerr v. Kreuder*, 28 *id.*, 452, is not followed on that point. See *N. Y. Code Civ. Pro.*, § 1382, to the effect that a stay, &c., is not a part of the time limited for making an application for leave to issue an execution.

, in which the decedent resided at the time of his death [or, That said Y. Z. died at on the day of , 18 , and resided out of this State at the time of his death at—*specifying place*—and that although three years have elapsed since said death, neither letters testamentary nor letters of administration have been granted by the Surrogate's Court of the county of , in which the property on which the said judgment is a lien is situated]; and the said decedent did not leave any personal property within this State upon which to administer [*state evidence or means of information*].

IV. That at [or, after] the time the said judgment was duly docketed in said county [and at the time of his death] the said Y. Z. was the owner of real property situated therein, upon which the said judgment was and still is a lien [to wit—*add a particular description,¹ if practicable*].

V. That [no execution on said judgment has ever been issued, and] the said judgment remains wholly unsatisfied and unpaid² [or, remains partly unsatisfied, in that the sum of dollars and cents is still due and unpaid thereon]. †

VI. That on the day of , 18 , a decree, a certified copy of which is hereto annexed, was duly made by the Surrogate's Court of county granting the [plaintiff] leave to issue an execution upon said judgment [or *if application therefor is pending or not yet made,³ state the fact*].

[*If order to show cause is asked, state reason, as thus:*]

VII. An order to show cause is necessary, for the reason that it is essential that such order should provide for the manner of giving notice of this application for leave to issue execution to the persons whose interest in the said property will be affected by a sale by virtue of the execution, because [some of] the said persons, viz. [*naming them*], are not residents of this State, but reside in , in the State of [or *otherwise state reasons for special directions as to service*].

¹ In *Wadley v. Davis*, 30 *Hun*, 570, 573, it was held that where "the affidavit used furnished a description of certain real estate of the debtor * * * it is no defense to the application to show that the debtor had other lands upon which the judgment was a lien."

² That this is sufficient under *Code Civ. Pro.*, § 1381, see *Wadley v. Davis* (above), and note 2, p. 1041, of this Volume.

³ There is no requirement that the application for leave of the surrogate must precede the application to the court. Either application may precede the other. See *Kerr v. Kreuder*, 28 *Hun*, 452. Ordinarily it is better to get leave of the court whose judgment is to be enforced, before applying to the surrogate.

VIII. No previous application has been made for an order to show cause herein for this purpose. [Signature.]
[Jurat.]

Form No. 1988.

Notice of motion for execution against property of a judgment-debtor having died after judgment.¹

[*Move the court, see Forms 488, &c., and state order desired, thus:*] granting leave to the [plaintiff] to issue an execution upon the final judgment herein and against the hereinafter-described property of the above-named [defendant] now deceased, [or, against the property of above-named Y. Z., deceased, which is described in the annexed affidavit, and] upon which property the said judgment is now a lien, with like effect as if the said judgment-debtor was still living, or for such other or further relief as may be just. [The property above-mentioned is described as follows—*description*.]

[*Address to and serve on all persons whose interests may be affected by a sale; as well as on the debtor's executor or administrator.*]

Form No. 1989.

Another Form, by order to show cause directing mode of service.*

[*As in Form 1985 to the *, continuing:*]

ORDERED, that C. D., the executor [or, administrator] of Y. Z., deceased, and [naming all whose interests may be affected by sale], show cause at a special term of this court to be held [at chambers] at the county court house in the [city and] county of _____ on the _____ day of _____, 18____, at _____ o'clock in the _____ noon of that day, or as soon thereafter as counsel can be heard, why an execution should not issue upon the final judgment herein against the hereinafter-described property of Y. Z., deceased, [or, against the property of above-named Y. Z., deceased, which is described in the annexed affidavit, and] upon which the said judgment is a lien, with like effect as if the said judgment-debtor was still living. Service of this order and the said affidavit of A. B. upon C. D., the executor [or, administrator] of Y. Z., deceased, and upon [naming the persons to be served], either personally or by depositing in the post office at _____, on or before the _____ day

¹ N. Y. Code Civ. Pro., §§ 1379-1381. See also notes to previous Form. a court order where it contains directions as to manner of service.

² By *id.*, § 1381, this order must be

of , 18 , a copy of this order and said affidavit contained in a securely-closed postpaid wrapper directed to each of the said persons [*or in such other manner as the court prescribes*¹], shall be sufficient. [*For another form of direction see Form 1985.*] [*If not referred to as described in the affidavit, add: The property above-mentioned is described as follows:—description.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1990.

Order of court allowing execution against property of judgment-debtor having died since judgment.²

At a special term³ [*dec., as in Form 493, p. 4 of this Vol.*].
[*Title of action.*]

Upon reading and filing the affidavit of A. B., verified on the day of , 18 [and the order of the Surrogate's Court thereto annexed], whereby it appears that [*here recite concisely the facts, as thus*] the final judgment recovered by A. B. in the Court on the day of , 18 , for [*or, directing the payment by the said Y. Z. to the said A. B. of*] the sum of dollars, is unsatisfied and is a lien upon the real property below described; and that the sum of dollars remains now due thereon with interest from the day of , and that more than three years have elapsed since letters testamentary [*or, of administration*] were duly granted upon the estate of the said Y. Z., who died on the day of , 18 , and it also appearing that due notice of this motion [*by order to show cause duly made by this court*] has been given to the executor [*or, administrator*] of the said Y. Z., and upon [*naming them*], being all the persons whose interest in the said property may be affected by a sale thereof by virtue of an execution herein [*if surrogate's leave has been already had, may add: and that the surrogate of county has granted leave for the issue of such execution as is hereafter mentioned*], and after hearing A. T., Esq., attorney for A. B., in support of said motion, and Z. T., Esq., attorney for [*or, no one appearing*], in opposition thereto, and due deliberation being had thereon; Now, on motion of A. T., Esq., attorney for A. B.:

¹ *N. Y. Code Civ. Pro.*, § 1381 (subd. 1).

² *Id.*, §§ 1379-1381. See also notes to the affidavit on which this order is made, pp. 1044-6. For petition to surrogate and decree granting leave to issue execution, see Forms 1991, 1992, pp. 1049, 1050.

³ This must be an order of the court from which the execution is to be issued, and made upon notice served in the manner (and upon the persons) specified in *id.*, § 1381 (subd. 1).

ORDERED, that leave be and hereby is granted to the said A. B. to issue an execution upon said judgment to be enforced against the said property on which it is a lien, with like effect as if the said judgment-debtor were still living. Said property is described as follows: [*description.*]

Enter: [*signature of judge by initials of name and title.*]

Form No. 1991.

Petition to surrogate's court for execution against property of a judgment-debtor having died since judgment.¹

In the surrogate's court of the county of .

In the Matter of the Petition of
A. B., for leave to issue execution against the property of
Y. Z., deceased.

To the surrogate of the county of .

The petition of A. B. respectfully shows :

I. That your petitioner [*continuing as in Form 1987, p. 1047, from the * to the †, in middle of p. 1046; concluding as follows*].

VI. That on the day of , 18 , an order, a certified copy of which is hereto annexed, was duly made by the said Court² of , granting your petitioner leave to issue execution therefrom on said judgment. [*Or if application therefor is pending, or not yet made, state the fact.*]

WHEREFORE, your petitioner prays that a decree be made by this court allowing said judgment to be enforced by execution against the said property, on which it is a lien, with like effect as if the said Y. Z. were still living, and that [the said administrator—with the will annexed—or, executor of said Y. Z., and] C. D. and E. F. [*naming all others whose interests*

¹ N. Y. Code Civ. Pro., §§ 1379-1381, and see notes to Form 1987, p. 1044 (*above*). No notice is necessary of the presentation of the petition to the surrogate. *Kerr v. Kreuder*, 28 Hun, 452.

² This order is made by the court

from which the execution is to be issued. Code Civ. Pro., § 1380 (second clause). Either application (to the court or surrogate) may precede the other. See note 3, p. 1046 of this Volume.

*may be affected by sale*¹] may be cited² to show cause why such decree should not be granted, and for such other or further relief as may be just.

[*Date.*]

[*Signature.*]

[*Verification as in Form 494, p. 5 of this Volume.*]

[*Citation as usual in surrogate's court.*]

Form No. 1992.

Decree of surrogate's court allowing execution against property of judgment-debtor having died since judgment.³

At a surrogate's court, held in and for
the [city and] county of , on
the day of , 18 .

Present: Hon. , surrogate.

In the Matter of the Petition of
A. B., for Leave to Issue Ex-
ecution against the Property
of Y. Z., Deceased.

The written petition of A. B., of , duly verified the day of , 18 , having been presented to the surrogate of the county of for a decree granting permission to issue an execution against the property of Y. Z., deceased [and mention any other papers relied on], and due proof having been made thereby that [here recite concisely the facts upon which the application is based as they appear in the petition], * and a citation having been duly issued thereupon directing the said executor [or, administrator] and [naming the other persons cited], the parties entitled to such notice, to show cause before this court on the day of , 18 , why the prayer of the said petition should not be granted, and the said citation having been returned on that day and filed, together with proof of due service thereof on each of the per-

¹ *Code Civ. Pro.*, § 1381 (subd. 2).

² Parties in interest making a voluntary appearance at the time the petition is presented will be bound by the decree, even though not cited. *Kerr v. Kreuder*, 28 *Hun*, 452.

³ *N. Y. Code Civ. Pro.*, §§ 1379-

1381. Three years must have elapsed before execution can issue where the lien of the judgment was created as prescribed in *id.*, § 1251. See *Duell v. Alvord*, 41 *Hun*, 196, and case cited in note thereto.

sons therein named, and the said executor [*or, administrator*] having appeared on the return day of the said citation by A. T., his attorney [and also produced and filed his intermediate account pursuant to an order¹ of this court returnable on that day], and [*naming the parties, if any, appearing*] having also appeared on said day by [*naming attorneys*] their attorneys respectively, and the allegations and proofs of the respective parties having been duly heard [*may recite facts as to amount due, &c., established, if desired*], and due deliberation having been had thereon; Now, on motion of M. N., Esq., attorney for the said petitioner A. B., it is

ADJUDGED AND DECREED, that the said A. B. be and he is hereby permitted to issue an execution upon the said judgment against the property hereinafter described, upon which the said judgment is a lien, with like effect as if the said judgment-debtor was still living, for the sum of dollars and cents, together with interest from the day of , 18 [*naming date of entry of judgment*]. The property herein mentioned is described as follows: [*description.*]

[*Signature of*], Surrogate.

Form No. 1993.

Affidavit to obtain execution on judgment against executor or administrator as such.²

In the surrogate's court of the county of .

In the Matter of the Application
of A. B., for Leave to Issue
Execution on Judgment Re-
covered by him in the
Court of , in the Action
of A. B. against Y. Z., as Ex-
ecutor, &c.

[*Venue.*]

M. N., being duly sworn, says:

I. That he is the plaintiff's attorney⁴ in said action.

¹ *N. Y. Code Civ. Pro.*, § 2723; and see Form 1997, p. 1055; and note 1, p. 1044 of this Volume.

² *N. Y. Code Civ. Pro.*, § 1211.

³ *N. Y. Code Civ. Pro.*, §§ 1825, 1826.

⁴ See Matter of Howell, 2 *Redf.*, 269.

II. That judgment therein was duly recovered and docketed in the office of the clerk of the [said court, and a transcript of said judgment was duly filed and the judgment was duly docketed in the office of the clerk of the] county of _____, on the _____ day of _____, 18____, for the sum of _____ dollars, damages and costs, in favor of the said plaintiff and against the said defendant as executor [*or, administrator*] in his representative capacity.

III. That said action was brought to recover upon the following demand, viz.: [*here set forth the nature of the cause of action succinctly, so as to guide the surrogate in determining what claims are entitled to priority over it, and what proportion it is entitled to of the assets, if they are insufficient.*¹]

IV. That there is due and unpaid on said judgment the sum of _____ dollars, and interest from the _____ day of _____, 18____, and the said defendant has failed to pay the same after due demand made by deponent on said Y. Z., at _____, on the _____ day of _____, 18____; although [*as deponent is informed—giving sources of information—and verily believes*] there are [*sufficient*] assets of the decedent in the possession of the defendant or under his control which are applicable to such judgment.²

V. That letters testamentary [*or, of administration—with the will annexed*] were issued to the said defendant out of the surrogate's court of the county of _____, on the _____ day of _____, 18____; and that he duly qualified and now is such executor [*or, administrator*].

VI. That this deponent is advised and believes that an order permitting an execution to be issued against the said defendant in his representative capacity upon the said judgment is necessary to collect the amount due thereon.

VII. [*Where an order to show cause is desired, add:*] An order to show cause is necessary for the reason that it is essential that such order should provide for the manner of giving notice of this application for leave to issue execution to the said Y. Z. (or such persons as the surrogate directs), because the said Y. Z. cannot, with due diligence, be personally served with said notice, for the reason that [*setting forth specifically facts showing this, such as, for instance, disclosing efforts made to serve the defendant personally*].

[*Jurat.*]

[*Signature.*]

¹ *N. Y. Code Civ. Pro.*, § 1826.

² The affidavit (or petition) should allege that there are assets in the hands of the executor, &c., which are applicable to the judgment; otherwise, upon a sworn statement of the

executor in opposition, that there are no assets, the application for leave to issue execution will be denied or dismissed without further investigation as to the existence of assets. So held in *Hauselt v. Gano*, 1 *Dem.*, 36.

Form No. 1994.

Notice of application to surrogate for leave to issue execution upon judgment against an executor or administrator as such.¹

[*Title as in last Form.*]

Please take notice, that on the day of , 18 , at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, the undersigned will apply to the surrogate of county, at his office in the [city] of , for an order permitting an execution to be issued upon the judgment recovered by A. B. against Y. Z., in his representative capacity as executor [*or, administrator*] of M. N., in the court of , and docketed in the office of the clerk of said court [*or, of the county of*] on the day of , 18 , or for such other or further relief as may be just. [*Signature and office address of*],
[*Date.*] Attorney for [*judgment-creditor*].

To Y. Z., Executor [*or, administrator*]
of C. D., Deceased.

[*Serve personally on the executor (or administrator) at least six days before the application, or if impracticable take surrogate's direction by order to show cause. N. Y. Code Civ. Pro., § 1826.*]

Form No. 1995.

Another Form—by order to show cause, with directions as to service.²

At a surrogate's court [*&c., as in Form 1992*].

Present: Hon. , surrogate.

In the Matter of the Application
of A. B., for Leave to Issue
Execution on Judgment Re-
covered by him in the
Court of , in the Action
of A. B. against Y. Z., as
Executor, &c.

Upon reading and filing the affidavit [*or, petition*] of ,

¹ This application must be made to the surrogate from whose court the letters were issued to the executor or administrator. *N. Y. Code Civ. Pro., §§ 1825, 1826.*

² *N. Y. Code Civ. Pro., § 1826.*

verified on the day of , 18 , whereby it appears that a judgment for dollars was recovered by the said A. B. against Y. Z., as executor [*or, administrator*], in his representative capacity, in the court of , and that the said judgment was duly docketed in the office of the clerk of the said court [*or, of the county of*] on the day of , 18 , and that no part thereof has been paid, although duly demanded; * Now, therefore, on motion of A. T., Esq., attorney for A. B., it is

ORDERED, that the said Y. Z., executor [*or, administrator*] as aforesaid, and [*such other persons as the surrogate designates under N. Y. Code Civ. Pro., § 1826*], personally be and appear before the surrogate of the county of , at his office in the [county court house in the] city of , on the day of , 18 , at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, and there to show cause why the application for leave to issue execution upon the said judgment should not be granted.

Service of this order and the said affidavit [*or, petition*] upon which it is granted, upon [*naming the persons to be served*] either personally, or by depositing it in the post office at , on or before the day¹ of , 18 , a copy of this order and said affidavit [*or, petition*], contained in a securely closed postpaid wrapper, directed to each of the said persons [*or in such other manner as the surrogate shall designate*²] shall be sufficient.

[*Signature of*], Surrogate.

Form No. 1996.

Undertaking by legatee or next of kin before issuing execution on judgment against executor or administrator.³

[*Title of court and proceedings as in Form 1993.*]

WHEREAS, in an action in the court of the

See *id.*, § 2723, as to power of surrogate to make an order requiring the executor (or administrator) to render an intermediate account so as to ascertain sufficiency of assets upon this application for leave to issue such an execution. Such an order generally requires the account to be rendered upon the return day of the above order to show cause. See Form 1997 (*below*).

¹ At least six days' notice must be given by personal service upon the executor (or administrator), unless it appears that service cannot be so made with due diligence. *Id.*, § 1826.

² *Id.*, § 1826.

³ *N. Y. Code Civ. Pro.*, § 1827.

See Vol. I, pp. 461-499, as to requisites of undertakings generally.

judgment was rendered in favor of A. B., as legatee [*or*, next of kin] of C. H., deceased, and against Y. Z., as executor [*or*, administrator], for the sum of dollars, which judgment was entered and docketed in the office of the clerk of the county of , on the day of , 18 ;

AND WHEREAS, the said A. B. has made application to the surrogate of the county of , from whose court letters testamentary [*or*, of administration—with the will annexed] upon the estate of said deceased were issued to the said Y. Z., for leave to issue an execution upon the said judgment;

Now, therefore, pursuant to the requirement of the said surrogate upon such application, and according to the statute in such case made and provided, we,¹ C. D., of No. ,

street, in the of , county of , and State of New York, by occupation a , and E. F., of No. ,

street, in said , county and State, by occupation a , do hereby jointly and severally² undertake and become bound in the sum of dollars to the said Y. Z.; that if, after the collection of any sum of money by virtue of the execution which the said surrogate shall, upon said application, permit to be issued upon the said judgment, the remaining assets³ are not sufficient to pay all sums for which the said Y. Z. is chargeable for expenses, claims entitled to priority as against the said A. B., and the other legacies [*or*, distributive shares] of the same class as the said A. B.'s, then the said A. B. will refund to the said Y. Z. the sum so collected, or such ratable part thereof, with the other legatees [*or*, representatives] in the same class as the said A. B. as shall be necessary to make up the deficiency.

[*Date.*]

[*Signatures.*]

[*Acknowledgment, affidavit of sufficiency, and approval as in Forms Nos. 495-499, pp. 6-8 of this Volume.*]

[*File in surrogate's court, and serve copy with notice of filing, as in Form No. 500, p. 8 of this Volume.*]

Form No. 1997.

Order of surrogate that executor (or administrator) render an intermediate account (under N. Y. Code Civ. Pro., § 2723, subs. 1 and 2).

[*As in Form 1995 or 1992 to the * (according to the case), continuing thus:*]

¹ It is not essential that the creditor join.

² *N. Y. Code Civ. Pro.*, § 812.

³ The fair construction of the statute seems to be that if the assets re-

maining after collection of this creditor's claim are sufficient when properly administered, then the obligation is null.

ORDERED, that the said executor [*or, administrator*] Y. Z. appear before this court on the day of , 18
[*naming the return day of the order to show cause (or petition)*],
at o'clock in the noon of that day, and render and
file an intermediate account, together with the vouchers in
support of the same.

[*Signature of*], Surrogate.

Form No. 1998.

Order of surrogate allowing execution against executor or administrator as such.¹

[*Title of court and proceeding as in Form 1992.*]

Application having been made to me by A. B., for an order permitting an execution to issue upon the judgment in the above mentioned action, and due proof having been made to me that [*here recite succinctly the facts deemed established*], and on reading and filing proof of the personal service upon the said executor [*or, administrator*], of at least six days' notice, of the application for this order [*or if service was pursuant to order to show cause, say: proof of due service upon said* of due notice of this application, pursuant to the directions of this court in said order to show cause];

[*If the judgment is for a legacy or distributive share, add:*] And on reading and filing the undertaking of the said applicant, heretofore required by me to be given before granting this order, according to the provisions of § 1827 of the Code of Civil Procedure;

And it appearing to my satisfaction [from the intermediate account of the executor (*or, administrator*) rendered herein], that the assets of the said estate are [*or, are not—or, will—or, will not—be*] sufficient,² after the payment of all sums chargeable against them for expenses and for claims entitled to priority of payment as against the said judgment-creditor, to pay in full all the demands of the same class against the said estate

¹ N. Y. Code Civ. Pro., §§ 1825, 1826.

Such an execution does not bind the real estate of the decedent, unless the judgment by its terms is a lien thereon. *Id.*, § 1823.

² To ascertain the sufficiency of the assets, &c., upon an application for this order, the surrogate has power, in his discretion, to make an order requiring the executor (*or, adminis-*

trator) to render an intermediate account. *Id.*, § 2723.

By *id.*, § 2552, this "order, permitting a judgment-creditor to issue execution against an executor or administrator, is, except upon an appeal therefrom, conclusive evidence that there are sufficient assets in his hands to satisfy the sum * * * for which the order permits the execution to issue."

[and if not sufficient, add : and that the sum below mentioned is not more than the plaintiff's just proportion of the assets of the estate]; I do hereby order that an execution upon the said judgment, in due form of law, be and hereby is permitted to issue in favor of the said creditor and against the said executor [or, administrator] to collect the sum of dollars [and interest from the day of , 18].

[Signature of], Surrogate.

II. THE EXECUTION AND INDORSEMENTS.

Form No. 1999.

Execution against property,¹ on judgment recovered in a court of record, &c.

The People of the State of New York, to the Sheriff² of the [city and] county of , greeting :

¹ For an execution solely against personal property upon an order directing the payment of costs (motion or interlocutory) or other sum of money (under *N. Y. Code Civ. Pro.*, §§ 3233 and 779), see Vol. I, p. 329 (Form No. 158); and also, *id.*, p. 280, paragraph 89, as to when leave is necessary to issue such an execution.

Leave of court is necessary before selling, under an execution, property in the hands of a receiver, even though the levy is made before the receiver is appointed. *Walling v. Miller*, 108 *N. Y.*, 173. See Forms 728-733 in this Volume, for motions asking leave to interfere with assets in the hands of a receiver, which may be easily adapted for this purpose.

² Under *id.*, § 1362, "an execution must be directed to the sheriff, unless he is a party or interested."

As to what has been held a sufficient direction to a sheriff, see *White v. Coulter*, 59 *N. Y.*, 629, at p. 631.

By *N. Y. Code Civ. Pro.*, § 706, where a levy of attachment has been made, but final judgment has not been recovered by plaintiff until after the expiration of the sheriff's term of office, the execution against property must still be directed to and executed by that sheriff, unless another person is designated by law to complete the

unfinished business of such office, or in that case to the person so designated. See Form No. 2005, p. 1069; and see *Code Civ. Pro.*, §§ 707, 708.

As to what sheriff and upon what judgment execution must issue to entitle a judgment-creditor to maintain supplementary proceedings, see *id.*, § 2458.

As to what sheriff an execution should be directed to in order to sustain a creditor's action, see *id.*, § 1872.

Note on executions in favor of and against particular parties.—Under *N. Y. City Consolidation Act of 1882*, § 1106, no execution can lawfully issue upon a judgment recovered upon certain claims against New York city "until after ten days' notice in writing of the recovery of such judgment shall have been given to the comptroller" of said city.

That no execution can issue upon a judgment against the people of the State, see *N. Y. Code Civ. Pro.*, § 1985 (last clause).

As to an execution against the individual property of certain public officers upon a judgment against them in their official capacity, see *id.*, § 1931.

Under *id.*, § 1375, "except otherwise specially prescribed by law, the

Note continued.

party recovering a final judgment, or his assignee, may have execution thereupon, of course, at any time within five years after the entry of the judgment;" and by *id.*, § 1376 (as amended in 1887), "where the party recovering a final judgment has died, execution may be issued at any time within five years after the entry of the judgment by his personal representatives, or by the assignee of the judgment, if it has been assigned, and the execution must be indorsed with the name and residence of the person issuing the same." The five years are computed from the time of docketing. *Kupfer v. Frank*, 30 *Hun*, 74. But after the said five years execution cannot be issued without leave of court, unless an execution was issued within that time, "and has been returned wholly or partly unsatisfied or unexecuted" (*N. Y. Code Civ. Pro.*, § 1377), *i. e.*, if the execution has been issued and thus returned within the five years, no leave of court is necessary to issue it again. *Wade v. De Leyer*, 40 *N. Y. Super. Ct.*, 541. And even if issued (for the first time) after the said five years without leave, the execution is not void, but voidable only in the discretion of the court. See *Wooster v. Wuterich*, 2 *Abb. N. C.*, 206.

As to the necessity and manner of obtaining the leave of court and of the surrogate, before issuing execution against the property of a judgment-debtor who has died since the entry of judgment, see *N. Y. Code Civ. Pro.*, §§ 1379-1381.

As to the manner of issuing and levying execution against real property or a chattel real when ten years after the filing of the judgment-roll have expired, see *id.*, § 1252.

By *id.*, § 1382, "the time during which the person entitled to enforce a judgment is stayed from enforcing it by the provision of a statute, or by an injunction or other order, or in consequence of an appeal, is not a part of the time limited * * * for issuing an execution thereupon, or for making an application for leave to issue such an execution."

By *id.*, § 1490, an execution against the property of a judgment-debtor cannot be issued without leave of the

court while an execution against his person, issued in the same action, remains unreturned. See, also, *id.*, §§ 1491-1495 for other provisions as to the issue of an execution against the property of a judgment-debtor in a case where an execution against his person has been issued.

Under *id.*, § 1829, "an execution may be issued in the name of an executor or administrator, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of the same estate in any case where it might have been issued in favor of the original plaintiff, and without a substitution."

Under *id.*, §§ 1815, 1816, in case of a judgment against an executor or administrator in an action brought against him both in his representative capacity and also personally, "so much of the judgment as awards a sum of money against him personally may be separately docketed, and a separate execution may be issued thereupon as if the judgment contained no award against him in his representative capacity." Such execution against him personally may be issued without leave; but otherwise of the execution against him in his representative character. *Id.*, § 1825.

By *id.*, § 1817, in an action against two or more executors or administrators representing the same decedent, where only part of them are served, or appear, judgment in favor of the plaintiff may be entered, and in a proper case execution may be issued against all the defendants as if all had appeared.

By *id.*, § 1374, "where a judgment awards different sums of money to or against different parties, a separate execution may be issued to collect each sum so awarded, subject to the power of the court to control the enforcement of the executions upon motion, where the collection of one execution will wholly or partly satisfy another."

By *id.*, § 3249, "where costs are awarded against an infant plaintiff, they may be collected by execution or otherwise from his guardian *ad litem* in like manner as if the latter was the plaintiff."

WHEREAS, judgment¹ was rendered on the day of ,
 one thousand eight hundred and , in the [here name the
court], * in an action between [naming all the plaintiffs],
 plaintiffs, and [naming all the defendants who are debtors],
 defendants, in favor of the said [naming judgment creditor],
 against the said [naming debtor²], † for the sum of dollars
 and cents,³ ‡ as appears to us by the judgment-roll, filed
 in the office of the clerk of the [city and] county⁴ of
 [or, of the court of]; § and whereas the said
 judgment was duly docketed in the office of the clerk of your
 county,⁵ ¶ on the day⁶ of , in the year one
 thousand eight hundred and [at o'clock, min.
 M.—and if the execution is issued out of a court other

¹ By *N. Y. Code Civ. Pro.*, § 1366 (first clause), “an execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which the judgment was rendered.”

In *Reid v. Stegman*, 15 *Abb. N. C.*, 422, where a judgment was rendered against the Board of Commissioners of Charities, &c., consisting of three persons named, it was held (affirming judgment in favor of sheriff in action for non-return of execution) that an execution thereon against the three persons named *individually* was unauthorized and void, and that the sheriff was justified in his refusal to execute it, even though regular upon its face.

² By *N. Y. Code Civ. Pro.*, § 1368 (last clause), if all the parties against whom a judgment for a sum of money, or directing payment of a sum of money, is rendered, are not judgment-debtors, the execution thereon must show who is the judgment-debtor.

³ By *id.*, § 1368 (first clause), “an execution issued upon a judgment for a sum of money, or directing the payment of a sum of money, must specify in the body thereof the sum recovered or directed to be paid, and the sum actually due when it is issued.”

⁴ By *id.*, § 1366 (second clause), an execution upon a judgment rendered in the Supreme Court must state the county in which the judgment-roll is filed.

⁵ See note on what county execution may issue to (*below*).

⁶ Under *N. Y. Code Civ. Pro.*, § 1369 (first clause), “an execution against property must, if the judgment-roll is not filed in the clerk's office of the county to which it is issued, specify the time when the judgment was docketed in that county.”

As a matter of convenience, the sheriff or clerk of another county may be constituted an agent to fill a blank in an execution so as to accurately designate the time when the judgment was docketed in that county. See *Chase v. Ostrom*, (*Wisc.*, Jan., 1881) 7 *Northwestern Rep.*, 299, where it was held that a county clerk to whom the transcript of a judgment rendered and docketed in another county has been sent by the party or attorney obtaining such judgment, together with an execution thereon duly signed and filled out, except the dates of filing such transcript and docketing such judgment by him, and with directions to file the transcript, docket the judgment, and then fill the blanks in the execution and deliver the same to the sheriff, may act as the clerk or agent of the party or attorney giving such directions in so doing; and if he does so act the execution will be deemed issued as of the date when it is delivered to the sheriff.

Note on the county to which execution may issue.—Under *id.*, § 1365, “an execution against property can be issued only to a county in the clerk's office of which the judgment is docketed;” and as by § 3347 (subd. 10) this requirement applies to any court of

Note continued.

record, it was held in *Disosway v. Hayward*, 1 *Dem.*, 175, that the decree of a surrogate directing the payment of money must first be docketed in the county clerk's office before an execution thereon can be issued by the surrogate or the clerk of his court to the sheriff of the surrogate's own county; and that an execution against property, issued without such docketing, is irregular, and must be set aside on motion. In *Roof v. Meyer*, 8 *Civ. Pro. R. (Broune)*, 60, there is a *dictum* of the city court of New York that an execution would be sufficient to sustain a levy upon *personal* property whether a transcript was filed in the county clerk's office or not; and it has been held that prior to 1880 the statutes relating to the Marine Court of the city of New York (the present City Court of New York) did not require any transcript of any judgment rendered in *that court* to be filed in the county clerk's office before a valid execution could issue. See the recent case of *Dunham v. Reilly*, 47 *Hun*, 241, so holding (citing statutes, and *Palmer v. Clark*, 4 *Abb. N. C.*, 25), but clearly intimating and assuming that the repeal of certain statutes and the adoption of the second part of the Code (containing § 3347, subdiv. 10) in 1880, changed the law in that respect as to that court.

And it would seem that in view of the positive language of §§ 1365 and 3347 (subd. 10) of the Code, the only safe practice is to file a transcript and docket the judgment in the county clerk's office of the county to the sheriff of which an execution against property is to be issued upon any judgment of the City Court of New York, or of the Court of Common Pleas, or of the Superior Court of the city of New York or the City Court of Brooklyn, or other court of record, unless the judgment is already docketed there, as may be the case in a supreme or county court action. By a special provision, however, in the act for the organization of the city court of Yonkers (a court of record), an execution from that court may issue directly to the sheriff of Westchester county without the filing of a transcript or docketing the judgment in the office of the county clerk. See

Prime v. Anderson, 29 *Hun*, 644, so holding and affirming an order denying motion to vacate supplementary proceedings based upon the return of such an execution unsatisfied.

But an execution against the *person* may be issued to any county irrespective of the county where the judgment is docketed. *N. Y. Code Civ. Pro.*, § 1365; and see, also, Form No. 2032, p. 1089 of this Vol.

By this section also (§ 1365) "executions upon the same judgment may be issued at the same time to two or more different counties" after the judgment has been docketed in such counties. So, too, by *N. Y. Code Civ. Pro.*, §§ 1364, 1365, 278 and 347, an execution against property upon a judgment of a superior city court or a county court may issue to the sheriff of any county in the State, after the judgment has been docketed in the clerk's office of that county; and by *id.*, §§ 338 and 339, an execution upon a judgment of the city court of New York must be directed to and executed by the sheriff, and where the judgment is "for a sum exceeding twenty-five dollars, may be issued out of the court, tested in the name of the chief justice thereof, to the sheriff of any county wherein the judgment has been duly docketed."

So, also, an execution upon a surrogate's decree, directing the payment of a sum of money, may issue to any county in the State after the decree has been docketed in the county clerk's office of that county. See *Disosway v. Hayward*, 1 *Dem.*, 175 (*above*), citing *N. Y. Code Civ. Pro.*, §§ 1365, 1369, 2553 and 2554, which latter section see cited below as to other requisites of an execution upon such a decree.

But these provisions of § 1365 (*above*) as to executions issuing to counties other than the one in which the judgment was rendered, apply only to an execution upon a judgment of a court of record (*id.*, § 3347, subd. 10); and an execution upon a justice's judgment or a judgment of a district court of the city of New York cannot be issued in any county other than the one in which the judgment was rendered, until a transcript has been filed and the judgment dock-

than that in which the judgment was rendered, add: upon a transcript on that day duly filed with said last mentioned clerk¹; and whereas the sum of dollars and cents, with interest,² from the day³ of , 18 , is now

eted in the clerk's office of the county in which the judgment was rendered, and also a transcript of such docket has been obtained from such county clerk and filed in the county clerk's office of such other county; and then the execution (having the requisites specified in § 1367 of the Code) must be issued by the clerk of such other county out of the county court of his county to the sheriff thereof. *N. Y. Code Civ. Pro.*, §§ 3017-3022, 3043, and *N. Y. City Consolidation Act* of 1882, §§ 1392, 1397 and 1403. And the Court of Common Pleas for the city and county of New York is to be deemed a county court within the meaning of these provisions as to justices' courts. See *Gray v. Lieben*, 8 *Civ. Pro. R. (Browne)*, 48, holding in effect that where an execution is to be issued to New York county upon a justice's judgment rendered in another county, the county clerk of New York county (after the filing in his office of a transcript of the docket of such judgment in such other county clerk's office) must issue the execution out of the Court of Common Pleas for said county; and that an order for the examination of a judgment-debtor must be set aside when (as in that case) founded upon the return of an execution (unsatisfied) that has been improperly issued in such a case out of the Supreme Court, and tested in the name of the presiding justice thereof in New York county.

In *Vedder v. Lansing*, 44 *Hun*, 590, it was held (citing *Code Civ. Pro.*, § 347, among others) that the county clerk of the county in which a justice's judgment has been rendered might issue the execution out of the county court of his county to the sheriff of another county in the clerk's office of which the judgment had also been docketed, and that too even though the execution was properly issuable by the clerk of such other county under *Code Civ. Pro.*, §§ 3022 and 3043. But there was a dissenting opinion, and it is to be observed that in this case the execution

was issued (after a period of five years) pursuant to leave of court, which (under *id.*, § 3022) had to be obtained from the county court of the county in which the judgment had been rendered.

¹ By *N. Y. Code Civ. Pro.*, § 1367, "where an execution is issued out of a court other than that in which the judgment was rendered, upon filing a transcript of the judgment rendered in the latter court," the execution "must also specify the clerk with whom the transcript is filed, and the time of filing, and it must be made returnable to that clerk;" and "if the judgment was rendered in a justice's court, it must specify the justice's name; and it must omit the specification respecting the filing of the judgment-roll. These provisions (of § 1367) apply to executions upon such judgments as those of justices' courts (and also of the justices' courts of Albany and Troy, and the municipal court of the city of Rochester), where the execution is issued out of a county court by the county clerk upon the filing of a transcript of such a judgment and the docketing thereof in his office under *id.*, §§ 3017-3022, 3043, 3225 and 3226; and also to executions issued out of the Court of Common Pleas for the city and county of New York by the county clerk to the sheriff of that county upon judgments of the district courts of said city, upon the filing of a transcript and docketing such a judgment in his office; and also to executions issued out of a county court by a county clerk in a county other than New York upon such a district court judgment upon the filing in his office of a transcript furnished by the county clerk of New York county upon the docketing of such a judgment in his office. See *id.*, § 3220 (and the sections of the Code therein referred to), and also *N. Y. City Consolidation Act* of 1882, §§ 1392, 1397 and 1403.

² See *N. Y. Code Civ. Pro.*, § 1211, and next note (*below*).

³ By *id.*, § 1368 (second clause),

actually due thereon:¹ || Therefore, we command you, that you satisfy the said judgment ** out of the personal property of the said judgment-debtor² [*or, said judgment-debtors, or either of them*³] in your county; and if sufficient personal property cannot be found, then out of the real property in your county belonging to said judgment-debtor [*or if there are several: said judgment-debtors, or either of them*], at ††

the execution may specify a day from which interest upon the sum due is to be computed, in which case the sheriff must collect interest accordingly until the sum is paid. See *Todd v. Botchford*, 86 *N. Y.*, 517 (aff'g 24 *Hun*, 495), holding that where an execution omits to give directions as to the collection of interest (under *Code Civ. Pro.*, § 1368), it is satisfied when the amount of the judgment is collected, and that no second execution can be issued to collect the interest, and that it is error to deny a motion to set aside such a second execution.

¹ By *id.*, § 1368 (first clause), "an execution issued upon a judgment for a sum of money, or directing the payment of a sum of money, must specify in the body thereof the sum recovered or directed to be paid, and the sum actually due when it is issued."

² By *N. Y. Code Civ. Pro.*, § 1369 (second clause), an execution against property "must (except in a case where special provision is otherwise made by law) substantially require the sheriff to satisfy the judgment out of the personal property of the judgment-debtor, and if sufficient personal property cannot be found, out of the real property belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter." But such "special provision is otherwise made by law" by *id.*, § 1277, in the case of an execution upon a judgment by confession where a part only of the debt is due; and by § 1370 where an attachment has been levied; and by § 1371 in case of "an execution against real or personal property in the hands of an executor, administrator, heir, devisee, legatee, tenant of real property, or trustee;" and by § 1383 in case of an execution against the property of one or more surviving

judgment-debtors; and by § 1433 in case of an execution upon a judgment recovered for a "mortgage debt, or any part thereof;" and by § 1825 in case of an execution issued "upon a judgment for a sum of money against an executor or administrator in his representative capacity;" and by § 1883 in case of an execution upon a "judgment recovered against the sheriff and any of his sureties in an action" upon his official bond; and by § 1921 in case of an execution upon a judgment rendered in an action against an unincorporated association; and by § 1931 in case of an execution against certain public officers; and by §§ 1934 and 1935 in case of an execution upon a judgment rendered against two or more defendants jointly indebted upon contract where the summons had been served upon one or more, but not upon all of the defendants; in all of which cases the particular sections of the Code thus referred to should be examined to determine what particular indorsements should be made upon, or directions given to the sheriff in, the execution proper for each case, although all these executions against property are in other respects substantially the same in form. See Nos. 2013 to 2023, pp. 1075-1077, of this Volume, for examples of such special indorsements. As to the necessary directions to be contained in an execution for the delivery of the possession of a chattel, or real property, or in an execution against the person, see *N. Y. Code Civ. Pro.*, §§ 1372, 1373, 1731, and Forms Nos. 2006, 2008, and notes thereto, pp. 1070, 1071, and Form 2032, p. 1089, of this Volume.

³ It is not essential to name all. See note 3 to Form 2012, and *Ruckman v. Decker*, 28 *N. J. Eq.*, 5.

the time when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be, †† and return this execution, within sixty days after its receipt by you,¹ to the clerk of the [city and] county of [or, of the court of —specifying the clerk with whom the judgment-roll was filed, unless the execution was issued out of a court other than that in which the judgment was rendered, in which case specify the clerk with whom the transcript was filed, as above indicated].

¹ Under *N. Y. Code Civ. Pro.*, §§ 1366, 1367, every execution must require the sheriff to return it within sixty days after the receipt thereof to the clerk with whom the judgment-roll is filed, except when issued out of a court other than that in which the judgment was rendered (as in the case of the inferior courts specified in note 1, p. 1061, *above*), in which case it must be made returnable to the clerk with whom the transcript is filed, and who (under *N. Y. Code Civ. Pro.*, §§ 3017, 3043, 3220, &c.), issues the execution in question. Hence, in *Schwartz et al. v. Lewis* (*N. Y. Daily Register*, Oct. 6, 1886), where an execution against property was issued out of the Supreme Court in New York county to the sheriff of King's county, it was held that (under *Code Civ. Pro.*, § 1366) the execution must be returned to the clerk of New York county, where the judgment-roll was filed; and that a return to the clerk of King's county was not a return to the proper clerk within the meaning of the Code, so as to support an execution against the person based upon such return. So held, setting aside a body execution based upon such a return, and also holding that the court had no power to permit the proper return to be made *nunc pro tunc* in such a case. See, also, *N. Y. Code Civ. Pro.*, § 1266 (last clause). And see *id.*, § 102. &c., as to duties of sheriff in making returns, &c. In *Douglas v. Haberstro*, 88 *N. Y.*, 611, it was held that where a body execution did not direct the time of its return, such an omission did not render the process void, but it was a mere irregularity which might be amended or disregarded, and could not be taken advantage of

by the sheriff. And see *dictum* to same effect as to any execution, in *Wright v. Nostrand*, 94 *N. Y.*, 31, at p. 48. See, also, *Witbeck v. Van Rensselaer*, 64 *id.*, 27, cited in note 3, p. 1071, as to return in case of an execution for delivery of possession of real property.

By *N. Y. Code Civ. Pro.*, § 2554, an execution against property to enforce a surrogate's decree directing the payment of money, "must be issued by the surrogate or the clerk of the surrogate's court under the seal of the court, and must be made returnable to the court," thus forming another exception to the general requirement of § 1366 (cited in note 1, on this page, *above*), that an execution must be made returnable to the clerk with whom the judgment-roll is filed.

Hence it was held in *Bingham v. Burlingame*, 33 *Hun*, 211, that an execution issued by an attorney upon a decree of the surrogate, and tested in the name of one of the justices of the Supreme Court, was void, because not issued by the surrogate or his clerk under the seal of his court, as required by § 2554 of the Code. But this section (§ 2554) also provides that "in all other respects the provisions" of the Code "relating to an execution against the property of a judgment-debtor, issued upon a judgment of the Supreme Court and the proceedings to collect it, apply to an execution issued from the surrogate's court and the collection thereof, the decree being for that purpose regarded as a judgment; except that" supplementary proceedings, "if founded upon such a decree, must be taken as if the decree was a judgment of the county court, or, in the city of New York, of the Court of Common Pleas."

Witness,¹ Hon. [here name any justice² of the Supreme Court, if the execution is issued from that court, adding:] justice of our said court [or if from another court, name any judge thereof, adding: judge of our said court], at the day of , 18 .

[Seal of court,³ when execution is issued by a county clerk.]

[Signature⁴ and office address of],

Attorney for [creditor].

[Or where execution must be issued by a county clerk—signature of],

County Clerk of county.

¹ By *N. Y. Code Civ. Pro.*, § 1364, "an execution is the process of the court from which it is issued," and therefore (under *id.*, §§ 22, 23 and 24) it "must be in the name of the people of the State;" and when "issued out of a court of record," must be tested in the name of a judge of the court on any day, and must, before the delivery thereof to the sheriff to be executed, be subscribed or indorsed with the name of the attorney for the party or person at whose instance it was issued, or with the signature of the county clerk when issued by him under *id.*, §§ 3017, 3043 and 3220, &c.; but when thus subscribed or indorsed, the execution is "not void or voidable by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the *teste* thereof, or in the name of the clerk, unless it was issued by special order of the court." See *Douglas v. Haberstro*, 88 *N. Y.*, 611, holding that the entire omission of a *teste* does not render the process void, but is a mere irregularity which may be amended or disregarded, and cannot be taken advantage of by a sheriff, either in his official character or as bail. See, also, *Wright v. Nostrand*, 94 *id.*, 31; at pages 47 and 48, for a *dictum* to the same effect, together with authorities on amendable defects in executions.

² This is not the judge's signature. The attorney inserts the name.

³ No seal was necessary under the old Code. See *N. Y. Code Pro.*, §§ 286 and 289 (first clause). And doubtless no change in the law was intended in the new Code. See Throop's Note to *N. Y. Code Civ. Pro.*,

§ 1364. But under §§ 1366 and 24 of the New Code of Civil Procedure a seal would seem to be proper, and especially so when the execution is issued by a county clerk; yet, when the execution is issued by the attorney, the practice now (as formerly under the old Code) is to omit the seal, and (under § 24) such omission does not render the execution void, or even voidable, unless it is "issued by special order of the court." Whether an order granting leave to issue an execution is such a "special order" within the meaning of that section does not seem to have been passed upon by the courts. It would be safe practice to add a seal in such a case. Compare the following cases, which construe substantially the same provision of law in the Judiciary Act of 1847 (*L. 1847, c. 280, § 57*), and hold that a commission to take testimony out of the State must be sealed, because it is a process that does not issue of course, but upon a special order of the court upon motion. *Whitney v. Wyncoop*, 4 *Abb. Pr.*, 370; *Tracy v. Suydam*, 30 *Barb.*, 110, 115 (where the court said: "The Judiciary Act of 1847 only dispensed with the seal in respect to process which issues of course, without any application to the court"); *Ford v. Williams*, 24 *N. Y.*, 359; and see *Mason & Hamlin Organ Co. v. Pugsley*, 19 *Hun.*, 282, holding a seal necessary to such a commission under the New Code, because (*per curiam*) "the Code of Civil Procedure (§ 24) has effected no change of the law in this particular."

⁴ See note 1 on this page. The execution should be signed and is-

[*Always file a transcript of the judgment of any court of record (or decree of surrogate's court for payment of money) in the clerk's office of the county to the sheriff of which the execution against property is to be issued, if not already there docketed, so that the judgment (or decree) shall be docketed therein before execution, because, under N. Y. Code Civ. Pro., § 1365, "an execution against property can be issued only to a county in the clerk's office in which the judgment is docketed."*]

Form No. 2000.

Execution against property 'from a county court, or the New York Common Pleas, upon a judgment rendered in a court of a justice of the peace,' or in a district court 'of the city of New York, or in a justice's court of a city.'

[*File a transcript and docket the judgment (of the justice's court, or district court, or justice's court of a city) in the clerk's*

sued by the attorney of record for the judgment-creditor, but may be issued by an authorized attorney other than the one by whom the judgment was recovered. See Vol. I, pp. 409, 410; and *Cook v. Dickerson*, 1 *Duer*, 679; and *Ovoronhe v. Terry*, 17 *Weekly Dig.*, 503 (mem., s. c., under the name of *O'Rourke v. Terry*, in 30 *Hun*, 221), in which latter case there is a dictum that the party himself may issue the execution "or any person being an officer of the court, and acting for him and at his request;" and the case holds that the entire omission of any signature (such as required by § 24 of the Code) does not render an execution void, but at most only voidable, and that it may be amended. So held reversing an order denying a motion to amend two executions having no signatures. That an indorsement of the signature is equivalent to a subscription of the execution,—see *Hellner v. Walsh*, 47 *Super. Ct. (J. & S.)*, 269. When the execution is issued by an attorney other than the one of record, no formal order of substitution is necessary. See *Thorp v. Fowler*, 5 *Cow.*, 446, cited in *Robinson v. Brennan*, 90 *N. Y.*, 208, which latter case holds that an assignment of a judgment after issue of execution operates as a revocation of the attorney's authority thereafter without the entry of any formal order.

See special note on pp. 1059-1061, and note 1, p. 1061, as to when an execution must be issued by the county clerk. As to whether an execution issued by an attorney, when it ought to have been issued by a county clerk, is void or merely voidable, and subject to amendment, compare *Hill v. Haynes*, 54 *N. Y.*, 153 (arising under old Code); and *Ovoronhe v. Terry*, 17 *Weekly Dig.*, 503; and *Throop's Note to N. Y. Code Civ. Pro.*, § 3017.

¹ See Form No. 1999, p. 1057, and notes thereto. See *N. Y. Code Civ. Pro.*, §§ 3022, 3220, and notes 3 and 4 (*below*), as to what court to apply to when leave to issue this execution is necessary.

An execution for the delivery of the possession of a chattel upon a judgment rendered in one of these inferior courts (where the chattel exceeds twenty-five dollars in value) may be issued from such a court of record in substantially the same manner; and the necessary changes (here indicated) may be readily made in Form No. 2006, p. 1069, of this Volume. See *N. Y. Code Civ. Pro.*, §§ 3019, 3220, 3225, 3226, and *N. Y. City Cons. Act of 1882*, §§ 1394, 1397 and 1403.

² *N. Y. Code Civ. Pro.*, §§ 3017, 3043.

³ *Id.*, § 3220, and *N. Y. City Cons. Act of 1882*, §§ 1392, 1397 and 1403.

⁴ Such as the justices' courts of Al-

office of the county in which the judgment was rendered;¹ then obtain from such clerk a transcript of such docket and likewise file it in the clerk's office of any other county in which the execution is to be issued.²]

*[Execution as in Form 1999, p. 1057, except that at the * insert:³] held by [naming him⁴], justice of the said court.*

[And omit⁵ the clause as to judgment-roll between the † and the §.]

[The county clerk's signature at the end is the only one necessary. N. Y. Code Civ. Pro., §§ 3017, 3043, 3220, 3225 and 3226. See also N. Y. City Consolidation Act of 1882, §§ 1392, 1397 and 1403.]

[Such an execution can be issued only by the county clerk of the county (in which the levy is to be made) out of his own county court⁶ (or, in the city of New York, out of the Court of Common Pleas⁷ for said city) to the sheriff⁸ of

bany and Troy. *N. Y. Code Civ. Pro.*, § 3225. Or, a judgment rendered in the municipal court of the city of Rochester. *Id.*, § 3226.

¹ *Id.*, §§ 3017, 3220, 3225, 3226, and *N. Y. City Consolidation Act of 1882*, §§ 1392, 1394 and 1403. But where a judgment has been rendered against any marshal or his sureties in any of the said district courts, the transcript thereof must be filed in the office of the clerk of the Court of Common Pleas for the city and county of New York, and the judgment must then be enforced like other judgments of that court, by issuing the execution to the sheriff of that county, and the execution must be made returnable to the clerk of that court. See *id.*, §§ 1398 and 1703.

² *N. Y. Code Civ. Pro.*, § 3022, and see the sections of the Code and of the Consolidation Act cited in the last note (*above*).

Upon such filing, jurisdiction is presumed in favor of such a judgment for purposes of issuing execution thereon, but not for the purpose of bringing an action on such a judgment. See *Agar v. Tibbets*, 45 *Hun*, 52, where it was so held in reversing a judgment in favor of a plaintiff where the transcript did not disclose jurisdiction of the person of the defendant.

³ But if the judgment is for a sum

less than twenty-five dollars, exclusive of costs, the direction to satisfy the judgment out of the real property of judgment-debtor, must be omitted. *N. Y. Code Civ. Pro.*, §§ 3017, 3043.

⁴ *Id.*, § 1367.

⁵ *Id.*

⁶ *N. Y. Code Civ. Pro.*, §§ 3017, 3022, 3043, and citations referred to in last note (*above*). In *Vedder v. Lansing*, 44 *Hun*, 590, it was held, however, that the clerk of the county where the judgment was rendered might also issue execution to another county in which the judgment has been also docketed; but it is to be noted that this was a case where leave had to be obtained to issue the execution, from the county court of the county where the judgment was rendered, under § 3022 of the Code.

⁷ This court is deemed to be a county court within the meaning of the provisions of the Code cited as to justices' courts, so that where an execution is to be levied in New York county upon a justice's judgment rendered in another county, the county clerk of New York county, upon the filing in his office of a transcript of the docket of such a judgment in such other county clerk's office, must issue the execution as out of the Court of Common Pleas for the city and county of New York.

⁸ In case of a district court judg-

his own county, who must make his return upon the execution to such clerk.¹]

Form No. 2001.

Execution against property where attachment has been² levied and debtor was personally served within the State, or appeared,³ or (being a resident and absconding or concealed⁴) was served by publication.⁵

[As in Form 1999, p. 1057, substituting instead of the words between the ** and the ††] out of the personal property of the said judgment-debtor heretofore attached by you in this action, and if that is insufficient, out of the other personal property⁶ of the said judgment-debtor; if both are insufficient, out of the real property of the said judgment-debtor so attached, and if that is insufficient, out of the real property belonging to said judgment-debtor at the time when the judgment was docketed in the clerk's office of your county, or at any time thereafter.⁷

[Indorsement accordingly. See Form 2012, p. 1075.]

Form No. 2002.

Execution against property, where attachment had been levied and debtor is a non-resident, or a foreign corporation, and has not been served personally within the State, and has not appeared.⁸

[As in Form 1999, p. 1057, substituting for the words

ment, the judgment-creditor has the option to have the execution issued by the clerk of the district court to a marshal, even after the judgment has been docketed in the county clerk's office. *N. Y. Code Civ. Pro.*, § 3220, and *N. Y. City Consolidation Act of 1882*, § 1392. But in case of a justice's judgment, the justice has no power to issue an execution after the judgment has been docketed in the county clerk's office. *N. Y. Code Civ. Pro.*, § 3024; and see *Martin v. The Mayor, &c.*, of N. Y., 11 *Abb. Pr.*, 295, 299, so holding under a corresponding provision of the old Code.

¹ *N. Y. Code Civ. Pro.*, § 1367.

² See Form 2005, p. 1069, in case the sheriff who made the attachment has gone out of office.

³ See *N. Y. Code Civ. Pro.*, § 1370, subd. 2.

⁴ That this Form and not Form 2002 must be used, see *Place v. Riley*, 98 *N. Y.*, 1; aff'g 32 *Hun*, 17.

⁵ It was held in *Bogart v. Swezey*, 26 *Hun*, 463, that substituted service of a summons (*i. e.*, by posting, &c., under *Code Civ. Pro.*, § 435) is not such service as is required by *id.*, § 638, to be made within thirty days after the attachment. But there is good authority for a contrary view. See 21 *Abb. N. C.*, 178, note.

⁶ The statute (*Code Civ. Pro.*, § 1370, subd. 2) must be strictly followed. See *Place v. Riley*, 98 *N. Y.*, 1, so holding, and setting aside a sale and execution as void because of the omission of such a clause.

⁷ As to manner of satisfying such an execution, see *N. Y. Code Civ. Pro.*, § 708.

⁸ See *id.*, § 1370, subd. 1.

*between the ** and the ††*] out of the personal property of the said judgment-debtor heretofore attached by you in this action, and if that is insufficient, out of the real property of the judgment-debtor so attached.¹

[*Indorsement accordingly. See Form 2012, p. 1075.*]

Form No. 2003.

Execution against joint property, where an attachment has been levied, and the debtors have appeared, or been personally served within the State.²

[*As in Form 1999 to the **, and continuing thus:*] out of the joint personal property of the said judgment-debtors heretofore attached by you in this action, and if this is insufficient, out of the other joint personal property of said judgment-debtors, or if both are insufficient, out of the joint real property so attached, or if this is insufficient, out of the joint real property belonging to said judgment-debtors at the time when the judgment was docketed in the clerk's office of your county, or at any time thereafter, and if all are insufficient, then out of the individual personal property of the said judgment-debtors, and either of them, and if this is insufficient, then out of the individual real property belonging to either of the said judgment-debtors at [*concluding as in Form 1999 from the ††*].

[*Indorsement accordingly. See Form 2012.*]

Form No. 2004.

Execution against joint property of all, and separate property of some of the judgment-debtors, where part only have been served.

[*As in Form 1999, p. 1057, substituting instead of the*

For the proper form of execution in case of an absconding or concealed resident debtor served by publication, see Form 2001, and *Place v. Riley*, 98 N. Y., 1 (aff'g 32 Hun, 17), cited in note 5, p. 1067.

¹ That such an execution can be levied only upon the attached property, see *N. Y. Code Civ. Pro.*, § 707. As to manner of satisfying such an execution, see *id.*, § 708.

In *Woolworth v. Taylor*, 62 How. Pr., 90, the rule is laid down that where real property has been at-

tached, the execution should require the sheriff to satisfy the judgment out of the real property belonging to the debtor on the day when the attachment was levied thereon. So held in granting a motion to amend an execution which had only directed the sheriff to satisfy the judgment out of real property belonging to the judgment-debtor on the day when judgment was docketed.

² *N. Y. Code Civ. Pro.*, § 1370, subd. 2.

*words between the ** and the †† the following:]* out of the joint personal property of all of the said judgment-debtors and the separate personal property of the said [*naming which defendants*] within your county; or if sufficient personal property cannot be found, then out of the real property in your county belonging jointly to all such judgment-debtors, or separately to the said [*naming which defendants*].

[*Indorsement accordingly. See Form 2013.*]

Form No. 2005.

Execution against property issued to a sheriff who has levied an attachment in the action, but whose term of office has expired.¹

The People of the State of New York to J. K., late sheriff of the county of , greeting :

Whereas, in pursuance of a warrant of attachment dated the day of , 18 , issued out of the [*here name the court*], against the property of [*naming judgment-debtors*], in an action pending in said court between [*naming all the plaintiffs*], plaintiffs, and [*naming all the defendants*], defendants, and delivered to the said J. K., then sheriff of said county, the following property, the property of the said defendants, was on the day of , 18 , duly levied by [and taken into the custody of] the said J. K., viz. [*set forth the several items of property*], which property amounted in value to the sum of dollars :

And whereas, judgment was rendered in said action on the day of , 18 , in favor of the said [*naming judgment-creditor*], against the said [*naming debtor*], for the sum of [*&c., continuing as in Form 1999 from the †, except substituting instead of the words between the ** and †† the clauses contained in Form 2002, or Form 2001, according to the case*].

Form No. 2006.

Execution for the possession of a chattel with or without damages for the taking or detention thereof.²

[*As in Form 1999, p. 1057, to the †, continuing thus:*] that the [plaintiff] recover of the said [defendant] the

¹ See *N. Y. Code Civ. Pro.*, §§ 706, 707 and 708, qualifying effect of § 183.

² *Id.*, §§ 1373 and 1731, subd. 2.

possession of the property hereinafter mentioned, or if possession of the same [*if several articles, add: or any part thereof*] be not delivered, then for the value thereof [*if several articles, add: respectively*] as hereinafter set forth, together with dollars damages and dollars costs, with interest from said day of , 18 , as appears to us by the judgment-roll filed in the office of the clerk of the [city and] county of [or, of the Court of]; and whereas, [a transcript of the said judgment was duly filed and] the said judgment was duly docketed in the office of the clerk of your county.¹ on the day of , 18 , at o'clock. minutes. M.; and whereas, the whole of said property still remains undelivered to the said [plaintiff] [*if not the whole, add: except the specified in said judgment*]; and whereas, the sum of dollars damages aforesaid, and dollars costs, with interest, is now actually due thereon: * Therefore we command you that you take the following-described property from the [defendant], or in whose hands soever the same may be² within your county, and deliver the same to the [plaintiff] A. B.; or if the same or any part thereof cannot be found within your county, to wit [*description or list with values*³], that you satisfy the said judgment as to the value of any such property that cannot be found in your county, together with the damages and costs as aforesaid and your fees⁴ [*&c., continuing as in Form 1999, p. 1057, from the ** to the end*].

Form No. 2007.

The same—in favor of defendant unless plaintiff pays value of special property in chattel, &c.⁵

[*Recite judgment; see Forms 1999 and 2006, to the asterisk, substituting proper parties, &c., and continuing thus:*]

Therefore we command you to deliver the possession of said

¹ *N. Y. Code Civ. Pro.*, § 1365 (last two clauses). See also *id.*, §§ 1373 (last clause), and 1731 (last clause), to the effect that when this execution contains a direction to collect a sum of money, it must have the same requisites as an execution against property. For such requisites see Form 1999, p. 1057, and notes thereto.

² In *Hoffman v. Conner*, 76 *N. Y.*, 121, it is held that it is the duty of the sheriff to take and deliver the property in whosoever possession it may be found.

³ The execution must particularly describe the property of which possession is required to be delivered. *N. Y. Code Civ. Pro.*, § 1373; *Talcott v. Belding*, 36 *Super. Ct. (J. & S.)*, 84, 91.

⁴ Fees are not usually mentioned in the body of an execution, but the statute as to execution on replevin, above cited, directs that they be included.

⁵ *N. Y. Code Civ. Pro.*, §§ 1727, 1731, subd. 1.

property to the said defendant, unless the said plaintiff before such delivery pays to you the sum of dollars,¹ with interest from the day of , 18 , besides your fees;² and in case the chattel cannot be found within your county, then to satisfy that sum, with interest and fees as aforesaid, out of [*&c.*, *continuing as in Form 1999, p. 1057, from the ** to the end*].

Form No. 2008.

Execution for delivery of possession of real property with damages.³

[*Insert in Form 1999, p. 1057, at the †, the following:*] that the [plaintiff] recover of the said [defendant] the possession of the following-described real property, viz. [*describing particularly*⁴ *the real property, and further reciting the substance of the judgment*], and also—

[*And substitute for the words between the ‖ and the ** the following:*] Therefore we command you that you deliver the possession of the said real property within your county⁵ to [*naming judgment-creditor*], the said [plaintiff], and that you satisfy the said judgment for damages⁶ and costs, with interest, as aforesaid—

¹ Damages, if they have been sustained in addition to the value of the defendant's special property, &c., may be included. Compare *N. Y. Code Civ. Pro.*, §§ 1726, 1730, 1731.

² See note 4 to Form 2006 (*above*).

³ *N. Y. Code Civ. Pro.*, §§ 1364, 1373. By *id.*, § 1376 (as amended in 1887), "where a party, or one or more of several parties, against whom a judgment for the recovery of possession of real property has been obtained, has died, an order granting leave to issue and execute such execution or writ of possession may be granted upon giving twenty days' notice to the occupants of the lands so recovered, and to the grantees or devisees of said deceased; or, if he died intestate, to the heirs at law of said deceased; said notices to be served in the same manner as a summons is directed to be served in an action in the Supreme Court."

An execution for possession of real property is not analogous to one against personal property where a levy is necessary (within sixty days) to subject the personalty to the operation of the writ, for the judgment binds the land, and the command to return the writ within sixty days is directory merely. So held in sustaining such an execution in ejectment executed after the return day thereof. *Witbeck v. Van Rensselaer*, 64 *N. Y.*, 27; *aff'd* 2 *Hun*, 55.

⁴ See note 3, Form 2006, p. 1070.

⁵ *N. Y. Code Civ. Pro.*, § 1365 (third clause).

⁶ If desirable, a separate execution may issue for the collection of the money awarded by the judgment, and from that the direction to deliver possession would be omitted. *Id.*, § 1373.

Form No. 2009.

Execution for deficiency in foreclosure.

The People of the State of New York to the sheriff of the
[city and] county of , greeting:

Whereas, judgment of foreclosure and sale was duly made and entered on the day of , 18 , in an action in the Court of , between [*naming all the plaintiffs*], plaintiffs, and [*naming all the defendants*], defendants, in favor of said plaintiffs and against said defendants, as appears to us by the judgment-roll filed in the office of the clerk of the [city and] county of [or, of the Court of];

And whereas, the premises described in said judgment were, on the day of , 18 , sold pursuant to said judgment;

And whereas, the referee named in said judgment filed his report of sale under said judgment on the day of , 18 , with the clerk of said court, whereby he reports, pursuant to said judgment, that there is a deficiency of dollars, with interest from the day of , 18 , thereunder, which the said defendants [*naming them*] are liable to pay to the said plaintiffs; and whereas, said report has been duly confirmed, and judgment for said deficiency and interest has been duly entered, docketed and filed in your county on the day of , 18 , in favor of said plaintiff, and against said defendant, for said sum of dollars, with interest from , 18 ; and whereas, said sum of dollars and interest is now actually due thereon: therefore [*&c., continuing to the end as in Form 1999, p. 1057, from the*]].

Form No. 2010.

Execution against property of an unincorporated association.¹

[*As in Form 1999, p. 1057, substituting for the words between the * and the † the following:*] in an action between [*naming all the plaintiffs*], plaintiffs, and [*naming the president (or treasurer) of the association*], as president [or, treasurer] of the [*name of the association*], defendant, in favor of the said [*naming plaintiffs*] against the said [*name of president (or treasurer)*], as president [or, treasurer] of the [*name of the association*].

¹ Sustained by *Bank v. Van Derwerker*, 74 N. Y., 234. See *N. Y. Code Civ. Pro.*, §§ 1919, 1921.

[Also substituting for the words in same Form, between the ** and ††, the following:] out of any personal property¹ in your county, belonging to the [name of the association], or owned jointly or in common by all the members thereof at

Form No. 2011.

Execution against real or personal property in the hands of an executor, administrator, heir, devisee, &c.²

[As in Form No. 1999, to the word "defendants," continuing:] as the executor of the will [or, the administrator of the goods, chattels and credits which were—*or*, the heir³—*or*, the devisee—*or other representative, &c.*] of M. N., late of _____, in the county of _____, deceased, in favor of said [judgment-creditor] and against said [naming judgment-debtor] as such executor [or, administrator—*or other representative, &c.*] as aforesaid, for the sum of _____ dollars, as appears to us by the judgment-roll filed in the office of the clerk of _____ county [or, of said court]. And whereas, [a

¹ *N. Y. Code Civ. Pro.*, § 1921. If desired to reach real property upon a money-judgment, the creditor should sue the members. See *Throop's note* to § 1921.

² *N. Y. Code Civ. Pro.*, § 1371.

Under *id.*, § 1817, in an action against two or more executors or administrators representing the same decedent, where only part of them are served or appear, judgment in favor of the plaintiff may be entered, and in a proper case execution may be issued against all the defendants as if all had appeared.

An order of the surrogate granting leave to issue such an execution against an executor or administrator in his representative capacity is always necessary under the new (but was not under the old) Code. See *id.*, §§ 1825, 1826, 1827, 2552, and see Form 1998 and notes thereto, p. 1056. See, also, *Syms v. Mayor, &c.* of N. Y., 105 *N. Y.*, 153, 159, so holding as to an execution for costs, and that it is irregular for a judgment against an executor to contain a provision that judgment-creditor have execution for costs, &c.

So, too, the authority of the surrogate to grant the necessary leave to issue such execution extends to the case of a judgment against an executor or administrator for the necessary and reasonable expenses of the administration, as well as to that of a judgment recovered for a debt of the decedent. See *Matter of Estate of Thompson*, 41 *Barb.*, 237; s. c., 1 *Redf.*, 490, arising under corresponding provisions of former statutes, and so holding as to an execution upon a judgment for legal services rendered to the administrator.

See *Matter of Clark*, 2 *Abb. N. C.*, 208, for an instance where it was necessary to obtain leave also of the court to issue execution where the assets were in the hands of a receiver appointed in a suit brought by one of the executors against the others.

As to separate executions upon a judgment awarding different sums to or against different parties, see *N. Y. Code Civ. Pro.*, § 1374.

³ An execution against an infant heir or devisee cannot be issued until one year after final judgment. *Id.*, § 1858.

transcript of said judgment was duly filed and] said judgment was duly docketed in the office of the clerk of your county on the day of , in the year 18 , and the sum of dollars is now actually due thereon, with interest from the day of , 18 ;

[*And where issued against an executor or administrator in his representative capacity, insert:*¹ And whereas, an order has been duly made by the surrogate of the county of , from whose court were issued the letters testamentary under the said will—*or*, of administration upon the said decedent's estate—to the said executor—*or*, administrator,—permitting this execution to be issued upon the said judgment, and specifying the sum of dollars and cents to be collected thereon;]

Therefore, we command you that you satisfy the said judgment [*or where the estate has been found insufficient to satisfy it, substitute:*² that you collect the sum of dollars and cents] out of the personal³ property of said M. N., in the hands⁴ or under the control of [*or in action against heirs, devisees, trustees, &c., of realty, substitute (according to case*⁵): out of the estate, interest and right in the real property of said M. N.—*better describe it here, as in the judgment*,—which descended to—*or*, was devised to—*or*, is in the possession of] said [*judgment-debtor*], in your county; and [*concluding as in Form 1999, from the ††*].

¹ See note 2, p. 1073.

² See *N. Y. Code Civ. Pro.*, §§ 1825, 1826. See, also, *id.*, §§ 2552 and 2723 (subd. 1).

³ An execution against executors or administrators in their representative character can issue against and bind only personal assets in their possession or under their control, and does not affect the real property of the decedent, unless in a case where the judgment was expressly made by its terms a lien upon specific real property therein described, &c. *Id.*, § 1823; and see *Lichtenberg v. Herdtfelder*, 103 *N. Y.*, 302, 306.

⁴ This requisition of *N. Y. Code Civ. Pro.*, § 1371, is imperative, as the execution cannot be satisfied out of the individual property of such judgment-debtor. See *Olmsted v. Vredenburg*, 10 *How. Pr.*, 215 (so holding as to same provision of the old Code; but upon another point—as to necessity of leave to issue execution—the

case is superseded by *Code Civ. Pro.*, § 1825); and see *Felt v. Dorr*, 29 *Hun*, 14 (arising under *Code Civ. Pro.*, § 1371, and holding that an execution simply describing the defendant in his representative capacity, is not a sufficient compliance with the statute, and that an order in supplementary proceedings, based upon such an execution, was properly set aside in a case where the execution was issued against an assignee for the benefit of creditors, for he is a "trustee" of an express trust, and comes within § 1371).

⁵ See *N. Y. Code Civ. Pro.*, §§ 1371 and 1843; and see, also, *Armstrong v. McKelvey*, 104 *N. Y.*, 179, 184, holding that devisees are none the less liable (under *Code Civ. Pro.*, § 1843) to the extent of whatever interest in realty has been effectually devised to them, because their interest is only a beneficial one, and not the legal title.

Form No. 2012.

Indorsement on execution ¹ (against property ²).

[Title of court and action.]

† Execution against [property].

Sheriff of the [city and] county of .

Levy \$ for \$, with interest from the day of
 18 , ¶ besides your fees and poundage * [out of the property
 of Y. Z.³], and return this execution within sixty days after its
 receipt by you to the clerk of the county of .

[Signature and office address of],
 Attorney for [creditor].

Rec'd,⁴ , 18 , at o'clock,
 min., m.

[Name of], Sheriff.

By [signature of], his deputy.

STATEMENTS TO INSERT OR SUBSTITUTE IN FOREGOING FORM.

2013. *Indorsement against joint debtors, part only of whom have been served.*⁵
 Insert in Form 2012, at the *:] not upon the sole property of S. T. [or, U. V.
 —naming each defendant not served—or either of them], who was [or, were]
 not served, but on personal property owned by him [or, them] jointly with
 the defendants W. X. [and Y. Z.—naming each who was served—or with any
 of them]; and if sufficient personal property cannot be found, then on the
 real and personal property of said W. X. [and Y. Z.—naming each who was
 served—or any of them].

2014. *Against joint property, where attachment has been levied.* Insert in
 Form 2012 (above), at the *:] upon attached joint personal property, and if

¹ Though always useful for convenience, an indorsement is not indispensable (*Code Civ. Pro.*, § 1368), except where expressly required by the Code, as where one of several joint debtors has died, &c.

² For other cases, see Forms 2013 and 2023, pp. 1075, 1077.

³ This direction to levy on the property of one of two debtors may be used to restrict the direction in the body of the execution, if not inconsistent with the judgment. *Crossitt v. Wiles*, 13 *Civ. Pro. Rep.* (Browne), 327 (holding that such a direction, even in the body of the execution, did not vitiate).

⁴ *N. Y. Code Civ. Pro.*, § 1363. By *id.*, § 100, it is the duty of the sheriff to furnish, when required, a memorandum of the time of receiving any process. See, also, Vol. I, p. 393, par. 3, as to effect of such an indorsement upon any process.

N. Y. Code Civ. Pro., § 101, provides that "a sheriff or other officer serving a mandate must, upon the request of the person served, deliver to him a copy thereof without compensation."

⁵ *N. Y. Code Civ. Pro.*, §§ 1934, 1935.

that is insufficient, then on the attached joint real property, then on individual personal property, and then on individual real property, as directed within.

2015. *Against the property of surviving judgment-debtors.*¹ Insert in Form 2012, p. 1075, at the *:] but take notice, that [naming deceased judgment-debtor], one of the judgment-debtors within named, died on or about the day of , 18 , and that you are required not to collect this execution out of any property which belonged to him;

2016. *Against an unincorporated association.* Insert in Form 2012, p. 1075, at the *:] upon any personal property in your county belonging to the [name of the association], or owned jointly or in common by all the members thereof—

2017. *Upon a judgment by confession where part only is due.*² Instead of the words, "Levy for \$,", substitute in Form 2012:] Levy for and collect only \$, the sum now due [and on the first of successive executions, add: together with the further sum of dollars costs of the said judgment].

2018. *Upon a judgment recovered for a mortgage debt when issued to the county where the mortgaged property is situated.*³ Insert in Form 2012, p. 1075, at the *:] but you are directed not to levy this execution upon the following mortgaged real property, or any part thereof, to wit, [briefly describe the mortgaged property,] which property is more fully described in a certain mortgage, dated , 18 , and given by [naming mortgagor] to [naming mortgagee], and recorded in the county clerk's [or, register's] office, for county, in book of mortgages No. , p. ;

2019. *Against a sheriff*⁴ (or other public officer⁵) and sureties upon his official bond.⁶ Insert in Form 2012, p. 1075, at the *:] out of the property of the said [naming sheriff, or other public officer] sheriff [or other public officer], and

¹ This indorsement is required. See *N. Y. Code Civ. Pro.*, § 1383, for requisites thereof.

² Indorsement required. See *N. Y. Code Civ. Pro.*, § 1277, for requisites thereof.

³ This indorsement is required. See *N. Y. Code Civ. Pro.*, § 1433, for the requisites thereof. As to the effect of an omission of this indorsement, see *Delaplaine v. Hitchcock*, 6 *Hill*, 14, arising under the corresponding provisions of the Revised Statutes (for which *Code Civ. Pro.*, §§ 1432, 1433, are substitutes), and holding that a purchaser of such mortgaged property, at a sheriff's sale under an execution without such indorsement, gets no title, as the execution as to such property is void, though valid in other respects, and the court said: "This [indorsement] was designed as a guide to the sheriff and a protection to third persons who might become purchasers. * * * The omission of the attorney to make the proper indorsement upon the exe-

cution may render him liable to a purchaser who has lost his money, but it cannot create a power to sell the land."

⁴ Where the sheriff is a party, an execution against him must be issued to a particular coroner, or generally to the coroners of the county, or to a person designated in an order of the court. See *Code Civ. Pro.*, §§ 173 and 1362.

⁵ By *id.*, § 1889 (and the sections therein referred to), this indorsement must be made also upon such an execution when issued against a surrogate (or an officer acting as surrogate), or a county treasurer, or other public officer. And by *id.*, § 1890, "a receiver, an assignee of an insolvent debtor, or a trustee or other officer appointed by a court or a judge, is a public officer within the meaning" of the rule.

⁶ Such indorsements are required. See *N. Y. Code Civ. Pro.*, § 1883, for requisites thereof.

if sufficient property of the said sheriff [or other public officer] cannot be found, then collect the deficiency out of the property of the said surety [or, sureties].

2020. *On execution issued by personal representative or assignee of deceased judgment-creditor.*¹ *As in Form 2012, p. 1075; but after the signature and office address of the attorney, add also the name and residence of the personal representative (or assignee) of the deceased judgment-creditor.*

2021. *On execution against executor or administrator, heir or devisee, &c.*² *Insert in Form 2012; at the *:]* out of the personal property of M. N., late of , in the county of , deceased, in the hands or under the control³ of [naming judgment-debtors], in your county.

[Or where execution is against heirs, devisees, trustees, &c., of real property, say:] out of the estate, interest and right in the within described real property of said M. N. which descended to [or, was devised to—or, is in the possession of] said [judgment-debtor], in your county.

2022. *In replevin: for possession;* ⁴ *substitute for all between the †, at the beginning of Form 2012 and the ¶:]*

Execution for Possession of Chattel.

Sheriff of [city and] county of .

Deliver possession of the property within described, and collect the value as within stated, with interest, if any, which cannot be found in your county; together with \$ damages, with interest from the day of , 18

2023. *For the possession of real property. Substitute in Form 2012, for all between the † and §:]*

Execution for Possession of Real Property.

Sheriff of the [city and] county of .

Deliver possession of the within described real property, in your county, as directed, and also levy—

III. LEVY, INDEMNITY, PROCESS, &c.

Form No. 2024.

Bond to indemnify the sheriff on his levying execution.⁵

[For penal clause, see Vol. I, pp. 69 and 70.]

WHEREAS, the above-named [name of principal] did obtain judgment in the court of , against Y. Z., for the

¹ Required by *N. Y. Code Civ. Pro.*, § 1376, which seems intended to secure the personal address of the party in addition to the business address of the attorney.

² *Id.*, § 1825.

³ *Lichtenberg v. Herdtfelder*, 103 *N. Y.* 302, 306.

⁴ See notes to Form 2006. This Form may be easily modified to adapt it to the case of an execution in favor of a defendant having a

special property in the chattel. See Form 2007.

⁵ This is the usual form. The obligation is absolute, and the sheriff need not show that the obligor had notice of an action against him, nor that he has paid the judgment recovered against him for levying. *Connor v. Reeves*, 35 *Hun*, 507. Compare *Preston v. Yates*, 24 *id.*, 534, for a clause requiring notice.

sum of dollars, whereupon execution has been issued, directed and delivered to the said [*name of sheriff*], as such sheriff, commanding him, that of the goods and chattels of the said judgment-debtor, Y. Z., he should cause to be made the sum aforesaid ;

And whereas, certain personal property, that appears to belong to the said judgment-debtor, against whom said execution has been issued as aforesaid, is claimed by some other party or parties ;

Now, THEREFORE, the condition of the above obligation is such that if the above bounden obligors shall well and truly save, keep and bear harmless, and indemnify the said [*name of sheriff*], and all and every person and persons aiding and assisting him in the premises, of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, attachments, fines, special proceedings, and executions that shall or may at any time arise, come, accrue or happen to be brought against him, them or any of them, for or by reason of the levying, attaching and making sale under or by virtue of such execution of all or any personal property which he or they shall or may judge¹ to belong to the said judgment-debtor, or for or by reason of entering any shop, store, building, or other premises, for the taking of any such personal property, or for or by reason of the defense of any action or proceeding which may be so brought against him, them or any of them, then this obligation to be void, else to remain in full force and virtue.

Signed, sealed and delivered [*Signatures and seals.*]
in the presence of
[*Signatures of witnesses*].

[*Acknowledgment as in Form 495, p. 6 ; and Affidavit of sufficiency as in Forms 496-498, pp. 6, 7 ; Approval, if required, as in Form 499, p. 7 of this Volume.*]

Form No. 2024a.

Notice to sheriff of third person's claim to property levied on ; notice thereof by sheriff to execution creditor ; subpoenas to witnesses before sheriff's jury, and subpoena ticket ; oath to jurors and witnesses ; and inquisition.

[*Adapt Forms 815-822, substituting " execution " for " attachment."*]

¹ O'Donohue v. Simmons, 86 Hun, 331 ; Clark v. Woodruff, 83 N. Y., 518.

Form No. 2025.

Undertaking to indemnify sheriff for not relinquishing levy.¹

[*Title of court and cause.*]

WHEREAS, the above-named [*execution creditor*] obtained a judgment in the _____ court of _____ against the above-named [*debtor*] for certain damages and costs, whereon execution has been duly issued, directed and delivered to [*naming sheriff*], commanding him to satisfy said judgment out of the personal property of the said [*naming debtor*];

AND WHEREAS, certain personal property [*may briefly identify it*] which [by an inquisition duly made] appears to belong to the said [*debtor*—and has been levied on as such] is claimed by or in behalf of one M. N. [*naming the third person*] as his property;

NOW, THEREFORE, we, [*naming at least two sureties, with residences and occupations,*] hereby jointly and severally² undertake, pursuant to the statute, that we will indemnify said [*naming sheriff*] to the amount of _____ dollars [*not less than twice the value of the property, as determined by the jury, and \$250 in addition thereto*] against all damages, costs and expenses in an action to be brought against him by the claimant, his assignee or other representative, by reason of the levy upon, detention or sale of any of the property by virtue of the execution.³

[*Date.*]

[*Signature.*]

[*Acknowledgment, and Affidavit of sufficiency as in Forms 496, &c., p. 6 of this Vol.*]

[*Justification according to N. Y. Code Civ. Pro., § 1419, as am'd by L. 1888, c. 98.*]

Form No. 2026.

Notice by officer, &c., indemnified, that he is sued, given to entitle him to recover over on the indemnity.⁴

[*Title of court and action.*]

Please take notice, that an action against the undersigned

¹ *N. Y. Code Civ. Pro.*, § 1419.

² *Id.*, § 811; and see Vol. I, pp. 461–499, for requisites of undertakings in general.

³ This is in the language of the statute. The form of indemnity heretofore commonly used is a bond conditioned as in the preceding Form.

⁴ By *N. Y. Code Civ. Pro.*, § 1427 (as amended in 1887), this notice must be given before the trial, or at least ten days before judgment by default is taken therein; and by *id.*, § 3347 (subd. 10), this provision applies only to a case where such an execution is issued out of the Supreme Court, a

[*or if the notice is to be signed by attorney, against M. N., sheriff of [dec., or other official addition], to recover [here indicate the object of the action, for instance, thus:] damages, in the sum of dollars, by reason of a levy alleged to have been made by me [or, by said M. N.] upon one hundred bales of cotton, by virtue of the execution [or, warrant of attachment] issued to me [or, to said M. N.] on your behalf [or, on behalf of said A. B.], mentioned in a certain undertaking or obligation of indemnity given by you and C. D. to me [or, to M. N.], dated the day of , 18 , has been commenced in the court for the county of , by [here name plaintiff, and if there are defendants other than those giving the notice, name all, so as to give a complete designation of the action]; and that O. P., of , is the attorney for the plaintiffs in said action, and the undersigned [or, Q. R., of] is the attorney for the defendants therein; and [here it will be well to indicate the condition of the cause, for instance: that the summons and complaint were served on the day of , 18]; and the undersigned claims to be indemnified by you.*]

[Date.]

[Signature and office address.]

To [here name all the persons upon whom notice may be served¹].

Form No. 2027.

Order staying sheriff from removing property or releasing levy.²

[Title of court and action.]

On reading and filing the annexed affidavit of L. A., dated , 18 , and on motion of T. Z., attorney for defendant:

ORDERED, that S. H., sheriff of the county of , and his deputies, agents and servants, be stayed, restrained and

superior city court, the city court of New York, or a county court, or where a warrant of attachment against property is granted in an action brought in one of those courts.

At common law such notice is given in order to invite the obligor in to defend, and if he does not, to make the judgment conclusive against him in favor of the obligee, when the latter sues on the obligation, or for money paid. Compare note 5, p. 1077. So, too, where the instrument of

indemnity contains an express provision for notice and permission to defend, a failure to give notice and permit the defense would defeat a recovery by the officer against the indemnitor. See *Preston v. Yates*, 24 Hun, 534.

¹ See *Code Civ. Pro.*, § 1427 (as amended in 1887), for the particular persons who may be served.

² From *Second N. Bank of Oswego v. Dunn*, 97 N. Y., 149; rev'g 29 Hun, 529.

enjoined from the further removal of malt from the malt house of Y. Z., or W. X. as assignee of said Y. Z., at in , or which may be in the possession of W. X. as such assignee, and also from the further delivery of the same to the plaintiff, his [*or, its*] officers, agents, servants or assigns. And it is also further ordered, that the said sheriff be restrained and enjoined from doing any act which shall release his said levy and lien on said malt, made under and by virtue of the execution issued and delivered to him in favor of the plaintiff herein, on , 18 , on the judgment in the above entitled action, for twenty days from this date, or until the sooner order of this court in the premises.

[*Date.*]

[*Signature.*]

Form No. 2028.

Affidavit of sheriff to obtain order extending time to return conflicting executions, and enjoining creditors therein meanwhile, pending motion to determine the various claims.¹

[*Title of court and cause.*]

Judgment August 9, 1887; docketed Albany county, same day, for \$3,936.20 and interest. Execution received August 9, 1887, nine hours and five minutes, A. M.

[*Name of*]

Plaintiff's attorney.

[*Here followed the titles of 32 other causes, with similar indications as to the judgments therein.*]

J. W. H., being duly sworn, says :

1. I am, and for the year 18 have been, the sheriff of county.

2. As such, I have received executions against the property of the defendant or defendants in above actions in the usual form, issued out of the courts, purporting to be docketed in county clerk's office, for the amounts for which executions were received by me, as such sheriff, at the times, and were issued by the attorneys above stated.

3. Upon information and belief, that all of said judgments, except No. , were recovered in actions, the judgment-rolls whereof were filed in county clerk's office, or in the county court, and a transcript thereof filed in said clerk's office.

¹ I am indebted to Nathaniel C. Moak, Esq., for this precedent.

4. Upon information and belief that the defendant, the F. Manufacturing Company, was and is a domestic corporation of this State, having its principal place of business in said city of

5. That under and pursuant to said executions, I, as such sheriff, very soon after the receipt thereof, levied upon all the personal property of said, the F. Manufacturing Company, within said county, which I could or have been able to find, have sold the same, and realized on such sales \$

6. That all the personal property of said F. Manufacturing Company I could find was so sold, except some which was replevied of and from me by the vendors thereof to said company, as I am informed and believe, on the ground that such property had been recently purchased thereby when hopelessly insolvent, with an intent not to pay therefor, but to subject the same to levy and sale for the benefit of some of its favored creditors or alleged creditors. That such property has been all delivered by the coroner to the plaintiffs in such suits, I giving notice to the attorneys for the plaintiffs in above suits, and allowing them to defend said suits on indemnifying me, but they declined or neglected so to do.

7. That I have been unable to find or to levy upon any personal or real property of the defendants, T. H. F. and G. D. F., or either of them.

8. That the personal property of the F. Manufacturing Company, levied upon, consisted of a large number of articles, among others, of small parcels of leather, cut for particular sized shoes, which were of very little value separately, and were only of value when sold and used in connection with the other parts of such shoes. That said articles of personal property made a list of seventy printed pages, each page containing some thirty-five articles or parcels.

9. That the sales of personal property took place on divers days, commencing , 18 , and was last adjourned to , 18 , at the request of Mr. B., attorney for the plaintiffs in several of above actions.

10. That I have advertised all the real estate of said F. Manufacturing Company which I have been able to find or learn of for sale, on the day of , 18 .

11. Upon information and belief that such real estate is largely incumbered, and from the best information I can obtain, it is doubtful whether it will sell for much beyond the incumbrances.

12. That on the day of , 18 , I was served with papers, copies whereof are hereto attached, marked A and B.

13. I have no knowledge or information other than from said papers, whether Mr. B. has or had any authority from S. F. to give me such directions, and I am informed and believe it is doubtful whether he had any such authority unless expressly conferred by her upon him, and I have no knowledge or information that he had such authority.¹

14. I am informed and believe that should I comply with such directions they would afford me no justification for doing so.

15. On the of , 18 , I was served with a summons, a copy whereof is hereto annexed, marked C 3.

16. I am informed and believe that the plaintiffs in said summons, who are the plaintiffs in the executions above numbered and , claim and insist that the judgments and executions in the actions above, numbered and and some of the others above named, were fraudulently obtained for the purpose of giving the plaintiffs in said last named judgments and executions a preference over other creditors of said F. Manufacturing Company, by means of and through collusion with, and conspiracy between, said plaintiffs and the trustees and officers of said F. Manufacturing Company, and that said judgments and executions, and the alleged debts or demands upon which they are claimed to have been recovered, were fictitious, fraudulent and unfounded in fact, and as against the other execution-creditors against said F. Manufacturing Company, were fraudulent, null and void.

17. I am informed and believe that said suit in Exhibit "C," attached, was brought upon the theory and alleged facts last stated.

18. I am informed and believe that others of the execution creditors above named make the same claims.

19. I am informed and believe that it would be unwise, unsafe and improper for me to apply any of the moneys collected by me, as aforesaid, or hereafter collected, if any, out of real estate upon said executions, numbered and , or any of them, or upon any of the executions above stated, except pursuant to an order of this court made after notice to and a hearing of all parties in interest, so as to preclude them thereby, or that pursuant to an order so made, I be allowed to pay said moneys into court, either of which, as allowed, I am ready, willing and anxious to do.²

¹ *Averill v. Williams*, 4 *Denio*, 295; *Mandeville v. Reynolds*, 68 *N. Y.*, 528, 529; *Sheridan v. Farnham*, 21 *Weekly Dig.*, 470; *Lewis v. Woodruff*, 15 *How. Pr.*, 539; *Heyman v. Berin-*

ger, 1 *Abb. N. C.*, 315; cases cited, 26 *Eng. Rep. (Moak)*, 50; *Zapp v. Miller*, 20 *Weekly Dig.*, 321; *Gearon v. Bank*, 50 *Super. Ct. (J. & S.)*, 264.

² *Phillips v. Wheeler*, 67 *N. Y.*,

20. That Mr. B., attorney for the plaintiffs in said executions, claims to me that such executions are valid; and the moneys realized by me as such sheriff as aforesaid, and to be so realized, should be applied thereon.

21. I cannot now determine the legal expenses and percentages to which I may be entitled, as they will depend upon how much, if any, may be realized for real estate, the expenses of advertising same and the percentages upon which executions they may be ordered to be paid, as they are for different amounts.

22. This motion will be noticed for a regular special term at as early a day as it can be to enable me to sell the real estate and serve an additional affidavit as to the amount of money which may be finally realized by me.

23. I desire an order extending the time for me to return all of the above mentioned executions, until fifteen days after the decision of such motion and entry of order thereon, and notice thereof,¹ so that I may not be liable to suits or proceedings by the plaintiffs in said executions, for failure to return said executions within sixty days from the times of my receipts thereof.

24. I desire an order prohibiting and forbidding the plaintiffs in the above mentioned executions and each of them, until fifteen days after the decision of such motion, entry of order thereon and notice thereof, from suing, impleading, prosecuting or instituting any proceeding against me by reason or in consequence of said executions, or either of them, so that I may have reasonable time after notice or knowledge of such order to comply therewith.

25. No previous application has been made for this order.

[*Jurat.*]

[*Signature.*]

Form No. 2029.

Order extending time to sheriff to return conflicting executions, and enjoining creditors therein meanwhile, pending motion to determine the various claims.

At a special term [*&c.*; see
[*Title of action.*] *Form 493, p. 4.*]

On reading and filing the annexed affidavit and the execu-

104; 6 *Supm. Ct. (T. & C.)*, 306; *McDonald v. Allen*, 37 *Wisc.*, 108, 112; *Stebbins v. Walker*, 14 *N. J. Law*, 90; *Parker v. Barker*, 42 *N. H.*, 78, 90, 91, 92; *Nelson v. Kerr*, 59 *N. Y.*, 224; *Smith on Sheriffs*, 405, *et seq.*; *Acker v. Ledyard*, 8 *N. Y.*, 62; *N. Y. Code Civ. Pro.*, § 745.
¹ *Parker v. Barker*, 42 *N. H.*, 78, 89, 90.

tions therein referred to, on motion of N. C. M., of counsel for J. W. H., as sheriff of county, it is

ORDERED,¹ 1. That the time for said sheriff to return all of the executions above mentioned in the preceding affidavit, be enlarged and extended until fifteen days after the decision of the motion to be made pursuant to the notice following this order, entry of an order thereon, and notice thereof.

2. That the plaintiffs in the execution above mentioned in the preceding affidavit, and each of them, be prohibited and forbidden until fifteen days after the decision of such motion, entry of order thereon and notice thereof, from suing, impleading, prosecuting or instituting any proceedings against said J. W. H., as sheriff, or otherwise, by reason or in consequence of said executions or either of them.

Granted at above term.

[Signature, &c.]

Form No. 2029a.

Notice of motion underwritten.

Take notice, that upon an affidavit, with a copy whereof you are herewith served, the executions therein mentioned, the judgment-rolls upon which the same were issued, and upon such papers and affidavits as shall be hereafter served, this court will be moved, on behalf of J. W. H., as sheriff of county, at a special term thereof, to be held at the [city hall], in the city of , on the last of , 18 , at the opening of the court, or as soon thereafter as counsel can be heard, for a rule or order ordering and directing as to which, if any, of the plaintiffs in the executions before mentioned, the said sheriff, after deducting his legal expenses, fees, percentages and commissions, shall pay the moneys collected by him upon or by virtue of said executions, or any of them, and as to the order in which said sheriff shall so make payments upon said executions, or any of them; or that said sheriff be allowed to pay the moneys so collected into court, and on his so doing discharging him from further liability therefor or by reason thereof. And that said sheriff may be allowed, out of said moneys, his costs of this motion, and may have such further and other rule, order or relief as to the court shall seem meet and agreeable to equity.

¹ 42 N. H., 89, 90; 10 How. Pr., Civ. Pro., § 775; 3 How. Pr., 400; 2 415; 4 Wait's Pr., 600; N. Y. Code Sandf., 703.

scribed by statute, for the sum of dollars, that sum being the highest bid therefor. That your petitioner paid to the said sheriff the purchase-money aforesaid, together with his fees, amounting in the whole to the sum of dollars [or, after deducting the amount of his execution, paid the residue of the consideration of said purchase to the said sheriff], who thereupon returned said execution satisfied, as by reference to the annexed certified copy of an original duplicate certificate of the said sheriff, and which your petitioner caused within the time limited by law to be filed in the office of the clerk of said county, reference being thereto had, will more fully appear.

V. That the aforesaid Y. Z., who was previously to and at the time of said sale, and who thenceforth has been in the occupation, use and enjoyment of the said premises so sold to your petitioner, has since the said sale, and without having redeemed said premises, or paid to your petitioner the principal or interest of the purchase-moneys aforesaid, or any part thereof, to wit, on or about the day of [allege waste or other damage; see Form 628, p. 86].

[Application may be ex-parte; and if so, allege as on page 2 of this Vol.]

[Jurat.]

[Signature.]

[Order thereon. Adapt from Forms 533, and 534, and 629.]

Form No. 2031.

Affidavit of amount due, remaining unpaid, on judgment.¹

[Title of court and cause, unless the affidavit be indorsed on the assignment or transcript.]

[Venue.]

A. B., being duly sworn, says :

I. That he is [the agent—or, attorney—of C. D.] the owner and holder * of the judgment mentioned in the foregoing copy of docket of judgment [if under an assignment, allege the fact, and that a true copy of the assignment is annexed].

II. That the sum remaining unpaid this day on said judgment is , with interest to the day of , 18 , amounting together to dollars.²

[Jurat.]

[Signature.]

¹ N. Y. Code Civ. Pro., § 1464.

² See note 1 to next Form (below).

ARTICLE II.

EXECUTION AGAINST THE PERSON.

FORMS.

(2032.) Execution against the person.

(2033.) Indorsement upon an execution against the person.

(2034.) Order vacating body execution on condition of stipulation not to sue, or, in default thereof, execution to

stand amended *nunc pro tunc*.

(2035.) Affidavit to obtain discharge from execution against the person.

(2036.) Order discharging from execution a debtor who has been discharged from his debts.

Form No. 2032.

Execution against the person.¹

[Commence as in Form 1999, but instead of the words, your county, before the ¶, may substitute, the county of .]²

[And from the ¶, continue as follows:] And whereas, an execution against the property of the said [naming the judgment-debtor] has been duly issued to the county of [naming county of his residence,³ if he be a resident of the

¹ *N. Y. Code Civ. Pro.*, §§ 1372, 1487-1489; and as to time within which such exemption should be issued, see § 572. By *id.*, § 1490, leave of court is necessary to issue this execution "while an execution against his property issued in the same action remains unreturned."

Where one defendant only is liable to be taken on execution against the person, such execution need not run in form against all the defendants, and by indorsement be restricted in its execution to such defendant, but it may run against him alone. *Whitman v. James*, 14 *Weekly Dig.*, 214; *aff'd* (without opinion) in 89 *N. Y.*, 635.

² An execution against the person may be issued to any county, irrespective of that where judgment is docketed. *Code Civ. Pro.*, § 1365. It is not necessary to recite that the judgment has been docketed in the county of the debtor's residence, as such docketing (when necessary) may be presumed, and is not required by *id.*, § 1372. *O'Shea v. Kohn*, 38 *Hun.*, 149.

³ Required by *N. Y. Code Civ. Pro.*, §§ 1372 and 1489, "unless the judgment-debtor is actually confined without having been admitted to the liberties of the jail, by virtue of an execution against his person, issued in another action, or of an order of arrest or a surrender by his bail, in the same action," in which case omit statement as to execution against property and substitute the clause indicated in the Form. A body execution is void if issued against a resident debtor not in confinement when no execution against his property has been issued to the county of his residence and returned unsatisfied. See *Bergman v. Noble*, 19 *Abb. N. C.*, 62; *s. c.*, 45 *Hun.*, 133.

In *People v. Reilly*, 58 *How. Pr.*, 218, it was held that a body execution reciting that an execution against property was issued to the proper county and returned unsatisfied without indicating what county, was insufficient, and the defect was so substantial that its validity was properly de-

provided and upon condition that the defendant stipulates not to sue for the arrest or for any imprisonment on or by virtue of said execution; and, in default of said stipulation being made and delivered to the plaintiff's attorney within five days after service of a copy of this order, it is ordered, that said execution be and the same hereby is amended *nunc pro tunc* as of the date when the same was issued, by inserting at the end of the line thereof the words "the county of _____," so that when so amended, the said execution will recite that an "execution against the property of the judgment-debtor has been duly issued to the sheriff of the county of _____, the county where the said judgment-debtor resides, and returned unsatisfied;" and as so amended that the said execution stand.

Enter: [*signature of judge by initials of name and title.*]

Form No. 2035.

Affidavit to obtain discharge from execution against the person.*

[*Title of court and cause.*]

[*Venue.*]

Y. Z., being duly sworn, says:

I. That he resides [and at the time of the application hereinafter mentioned resided] at _____, in the county of _____, in this State.

II. That on or about the _____ day of _____, 1S _____, one A. B., of _____, in the county of _____, recovered judgment against deponent, as appears by the execution hereinafter referred to, for [*here state the cause of action briefly*].

III. That thereafter, and on the petition of _____, proceedings in bankruptcy were commenced, and an adjudication that deponent was a bankrupt, was thereon had in the

condition of setting aside the execution, and to grant, in the alternative, leave to amend the execution *nunc pro tunc*. But where the execution is void, the court has no such power. See *Mayer v. Rothschild*, 59 *How. Pr.*, 510; *Chapin v. Foster*, 101 *N. Y.*, 1. In *Catlin v. Adirondack*, 22 *Hun*, 493, it was held that such stipulation should not be required where a suit has already been brought and is on the calendar awaiting trial. See *Guillaume v. Rowe*, 94 *N. Y.*, 268, aff'g 63 *How. Pr.*, 175, for an instance

of a stipulation held void because obtained under duress by the statement that defendant "would have to stay in jail a long time" if he did not sign it.

¹ *N. Y. Code Civ. Pro.*, § 2187, and compare 568. This in substance (supplying the allegation of a copy annexed, and of a filing of the papers), is the affidavit on which the order was granted in *Pinckney v. Hegeman*, 53 *N. Y.*, 31.

It will usually be better to give notice of the motion.

United States District Court for the district of , and thereupon such proceedings were had that on the day of , 18 , a discharge in bankruptcy was duly made and granted to deponent by Hon. , judge of said court; and that a certificate of said discharge is hereto annexed.¹

[*Or in case of a discharge from imprisonment under State law, thus:* III. That after said date this deponent duly commenced proceedings under the statute commonly known under art. 1 of tit. 1 of chap. xvii of the Code of Civil Procedure, and that all his debts and property, and other matters required by law, were duly set forth in his schedule; and after due course of law therein, and on the day of , 18 ,²—or, the county court—of the county of , duly made and granted to deponent a full discharge from—all deponent's debts and from—imprisonment, pursuant to the provisions of said statute—of which discharge a copy is hereto annexed—and that the discharge and petition, schedules and other papers on which the said discharge was granted, were, on or before the day of , 18 , duly filed and recorded in the office of the clerk of the county of , as by law required.]

IV. That thereafter, and on or about the day of , 18 , an execution against the person of the deponent was issued in the above-mentioned action to the sheriff of said county, and on or about the day of said sheriff seized the body of this deponent thereunder.

V. That thereupon this deponent exhibited to the said sheriff a certified copy of his said discharge, but said sheriff refused to recognize it, and took this deponent into custody under said execution, and he is now confined within the limits.

[VI. *If the motion is not on notice*—That no previous application—*dec., see p. 2.*]

[*Signature.*]

[*Jurat.*]

Form No. 2036.

Order discharging from execution a debtor who has been discharged from his debts.³

[*Title (court order⁴) and recitals according to the case; see Form 493, p. 4.*]

It appearing by the affidavit of the defendant Y. Z., dated

¹ See *U. S. R. S.*, § 5119.

² In N. Y. city, the Common Pleas.

³ Sustained in *Pinckney v. Hege*,
man, 53 N. Y., 31.

⁴ This must be an order of the court where the judgment was rendered under which he was arrested and imprisoned, or of the county

the day of , 18 , that on or about the day of , 18 , a judgment was obtained against him in the above cause; that since that time he has obtained a discharge [*briefly describing it*], duly granted or made by the Hon. on or about the day of , 18 , as appears by a certified copy of the said discharge annexed; and it further appearing that, on or about the day of , 18 , an execution against him was issued to the sheriff of the county of , upon said judgment, and that on the day of , 18 , the said Y. Z. was taken into custody under said execution by said sheriff, and is still so held [*or, confined within the limits*], although said discharge was presented to him; Now, on motion of Q. R., of counsel for defendant Y. Z.:

ORDERED [that the execution against the person of said Y. Z. be and the same is set aside, and all proceedings thereunder be and are enjoined;¹ and] that the said Y. Z. be discharged from the custody of the sheriff and from the limits; and that all proceedings taken by the sheriff be vacated, and the bond given by said Y. Z. and his sureties be canceled. This order to be without prejudice to the plaintiff in said action, taking all proper proceedings upon the said judgment; and the affidavit used on this motion to be filed and this order entered in the county where the venue of said action is.

Enter: [*signature of judge by initials of name and official title.*]

court of the county. See *Hayes v. Bowe*, 65 *How. Pr.*, 347. less the execution, or its issue, is impeached.

¹ This clause is not appropriate un-

ARTICLE III.

ENFORCING JUDGMENT FOR SPECIFIC RELIEF BY JUDICIAL SALE
OR OTHERWISE.

I. JUDICIAL SALE.

Forms.

- (2037.) Notice of sale of real property under a judgment.
- (2038.) Admission of service of same.
- (2039.) Affidavit on motion to stay sale.
- (2040.) Notice of motion thereon.
- (2041.) Order thereon.
- (2042.) Notice of adjournment, or countermand, &c., for service.
- (2043.) Affidavit of publication.
- (2044.) Terms of sale.
- (2045-2047.) Statements suitable to insert in foregoing Form.
- (2048.) Memorandum of sale.
- (2049.) Report of referee of sale under judgment in partition, &c., directing sale.
- (2050-2055.) Statements suitable to insert in foregoing Form.
- (2056.) Exceptions to report of referee of sale.
- (2057.) Notice of hearing of exceptions.
- (2058.) Order confirming sale.
- (2059.) Affidavit to move to open sale.

- (2060.) Notice of motion thereon.
- (2061.) Order thereon.
- (2062, 2063.) Statements suitable to insert or substitute in foregoing Form.
- (2064.) Bond required as condition of ordering resale.
- (2065.) Affidavit on the part of purchaser to move to be discharged.
- (2066.) Order discharging purchaser.
- (2067.) — denying purchaser's motion.
- (2068.) Affidavit to move to compel purchaser to complete his purchase.
- (2069.) Order for writ of assistance.

II. SPECIFIC ENFORCEMENT BY DELIVERY,
&c.

- (2070.) Order that clerk deliver a conveyance, &c., deposited in court.
- (2071.) — — sheriff convey property, &c.
- (2071a.) Motion for receiver after judgment.

I. JUDICIAL SALE.

Form No. 2037.

Notice of sale of real property under a judgment.¹

[*Title of court and action.*]

By virtue of a judgment [of foreclosure and sale—*or*, of partition and sale] granted by this court in the above-entitled action, and entered on the day of , in the office of the

¹ As to publication, see Vol. I, p. 371; *N. Y. Code Civ. Pro.*, § 1678; and *Bechstein v. Schultz*, 19 *Abb. N. C.*, 168; s. c., 45 *Hun*, 191; *Sanborn v. Potter*, 35 *Minn.*, 449. As to amending, *Valentine v. McCue*, 26 *Hun*,

456. If the property is not in a city in which a daily paper is published, post and advertise as in case of a sale of real property on execution. *N. Y. Code Civ. Pro.*, §§ 1434, 1435, and Vol. I, p. 378, n., and 380, n.

clerk of at [if modified, add: and in pursuance of
a further order made by said court on the foot of said judgment
and entered in said clerk's office on the day of , 18 ,
modifying said judgment or decree—or thus : and an order of
resale, made by said court and entered in said clerk's office on
the day of , 18], the undersigned R. F., a referee
duly appointed in this action for such purpose [if, as is
sometimes the case, executors or trustees are directed to join,
add: and we, the undersigned E. X. and T. R., trustees and
plaintiffs in said action], will sell at public auction on
the day of , 18 , at twelve o'clock noon¹ of that
day [*here name salesroom or particular place of sale, for*
instance], at the front door of the Westchester county court
house, situate in White Plains, Westchester county, New York
[*here insert full description, which will be governed by the*
judgment]. [Signature of], Referee [etc.]
[Date.]

[Name and office address of],
Plaintiff's attorney.

[*Notice of adjournment will be by adding:*] The sale of the
above-described property is hereby adjourned until _____, the
day of _____, 18_____, at the same hour and place.
[*Date, signatures, and address, as above.*]

Form No. 2038.

Admission of service of notice of sale.

[*Paste here a copy of the advertisement,
with title of court and action.*]

Due and timely service of a copy of the foregoing notice of sale in this action is admitted this day of , 18 .

[Date.] [Signature of],
Attorney for

¹ Personal property may be concisely described as thus: all the personal property, assets and effects belonging to the late firm of E. & W., or to the representatives of said firm (excepting the bills receivable), including the chattels, fixtures, machinery, horses, wagons and stock of said firm

and the good will of its business. This description was held sufficiently explicit in *Winter v. Eckert*, 93 N. Y., 367.

Error or omission even as to real estate is amendable. *Woodhull v. Little*, 102 *id.*, 165.

Form No. 2039.

Affidavit on motion to stay sale.¹[*Title of court and action.*][*Venue.*]

A. B., being duly sworn, says :

I. He is the above-named [defendant] in this action [*or state relation to the cause*].

II. That this action was brought to foreclose a certain mortgage ; that thereafter a judgment of foreclosure and sale herein was entered in the office of the clerk of county on the day of , 18 .

III. That by said judgment B. C., Esq., was appointed referee to sell the premises therein decreed to be sold, according to law and the practice of this court, and that in pursuance thereof the said referee duly advertised the said premises to be sold at public auction at the in the town [city] of , on the day of , 18 .

IV. That [*state grounds upon which a stay is desired*].
[*If order to show cause is asked, state as on p. 2.*][*Jurat.*][*Signature.*]

Form No. 2040.

Notice of motion to stay sale.

[*Move the court, or a judge—see Forms 488 and 491—for an order*] staying the sale of the premises decreed to be sold herein until the day of , 18 [*or, for days*], and for such other [*&c.*].

Form No. 2041.

Order staying sale.

[*Name of*] Court [*or if a court order*] At a special term [*&c.*,
as in Form 493, p. 4].[*Title of action.*]

On reading the annexed affidavit of A. B., and it satisfac-

¹ At least two days' notice is necessary in partition or foreclosure. As *inari v. Volkening*, 2 *Abb. N. C.*, 454; *N. Y. Gen. Rules*, No. 67, of 1888.

has been regularly published in the said newspaper twice a week for three weeks successively, commencing on the day of _____, 18 [and also on day of sale¹—viz., on the _____ days of _____ and _____ days of _____].
 [Jurat.] [Signature.]

Form No. 2044.

Terms of sale.²

[*Paste here a copy of the advertisement, with title of court and action.*]

The premises³ described in the annexed advertisement of sale will be sold under the direction of R. F. [referee], upon the following terms :

1st. Ten per cent. of the purchase-money of said premises must be paid to the said [referee], at the time and place of sale, for which his receipt will be given. [*As to mortgage, see Form 2045 (below).*]

2d. The residue of said purchase-money must be paid to the said [referee] at his office, No. _____, street, in the [city of New York], on the⁴ _____ day of _____, 18 _____, at o'clock, _____ m., when the said [referee's] deed will be ready for delivery.

3d. The said [referee] is not required to send any notice to the purchaser; and if the purchaser does not call at the time and place above specified to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, unless the said referee shall deem it proper to extend the time for the completion of said purchase.⁵

¹ This is the usage, but not required by law.

² Terms of sale should be prepared with care, not only to describe the premises, but to state also any incumbrances, restrictions or servitudes to which the premises are liable.

Properly these ought to be in the judgment which directs the sale of property. If any serious question arises between the referee and the attorneys as to what qualifications of that kind are necessary or proper, the referee may apply for the instructions of the court.

³ If a less estate than the fee is directed by the judgment to be sold, designate it accordingly here, if not so expressed in the notice.

⁴ Usually thirty days.

⁵ Under such terms a purchaser who wholly failed to complete his purchase, so that a resale became necessary, was held liable for the entire deficiency on the resale, to the payment of which the referee might apply his deposit; and not merely liable for interest on his bid, as that was the penalty provided in case he eventually completed his purchase at a later date than that specified in the terms of sale. *Chase v. Chase*, 15 *Abb. N. C.*, 91; *aff'd* without opinion at general term. Compare *Chancellor v. Gummed*, 25 *Am. L. Reg., N. S.*, 147.

4th. All taxes, assessments and water rates,¹ which at the time of sale are liens or incumbrances upon said premises [and moneys necessary to redeem the property sold from any sales for unpaid taxes, assessments or water rates, which have not then apparently become absolute²], will be allowed by the said referee out of the purchase-money, provided the purchaser shall, previous to the delivery of the deed, produce to the said referee proof of such liens [and redemptions], and duplicate receipts for the payment thereof.³

5th. The purchaser of said premises, or any portion thereof, will, at the time and place of sale, sign a memorandum of his purchase, and pay, in addition to the purchase-money, the auctioneer's⁴ fee of _____ dollars for each parcel separately sold⁵ [*and in the counties of New York and Kings, if the sale is at a public salesroom:*⁶ not exceeding two dollars salesroom fee for each parcel separately sold⁷].

6th. The biddings will be kept open after the property is struck down; and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale under the direction of said referee under these same terms of sale, without application to the court, unless the plaintiff's attorney shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale, and that for which they may be purchased on the resale, and also for any costs or expenses occurring on such resale.⁸

[*Add if desired, consent to receive purchase-money mortgage.*]

[*Date.*]

[*Signature of*], Referee.

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

2045. *Purchase-money mortgage.*] Two-thirds of the purchase-money may remain on bond and mortgage, payable in three years, with interest at 6 per cent. payable semi-annually [provided the purchaser gives the referee notice of

¹ This clause ought to follow the directions of the judgments if that directs differently as to incumbrances.

² *N. Y. Code Civ. Pro.*, § 1676.

³ As to the referee's duty, see *Hotchkiss v. Clifton Air Cure*, 2 *Abb. Ct. App. Dec.*, 406; *People ex rel. Day v. Bergen*, 63 *N. Y.*, 404; *Easton v. Pickersgill*, 55 *id.*, 310; 75 *id.*, 599; *Weseman v. Wingrove*, 85 *id.*, 353. See, also, *Bache v. Doscher*, 67 *id.*, 429; aff'g 41 *Super. Ct. (J. & S.)*, 150; *Mut. Life Ins. Co. v. Truchtnicht*, 3 *Abb. N.*

C., 135; *Koch v. Purcell*, 45 *Super. Ct. (J. & S.)*, 162.

As to void taxes, see *Simms v. Voght*, 11 *Abb. N. C.*, 48; *Re Byrnes*, 4 *Centr. Rep.*, 113.

⁴ See *Griffin v. Helmbold*, 72 *N. Y.*, 437; *Miller v. Burke*, 68 *id.*, 615; aff'g 6 *Daly*, 171.

⁵ See *Miller v. Burke* (*above*) cited.

⁶ The rule (*N. Y. Rule*, 62, and local rule of Mar. 31, 1885) requires sales to be at such a room.

⁷ *N. Y. L.*, 1879, p. 569, c. 519.

⁸ See note 5, p. 1098.

his election to give a mortgage within days after the sale]. The bond and mortgage [*may state form, as thus*: to be drawn by the counsel for the plaintiff, subject to the approval of the referee, and] to contain the usual insurance, and 30 days' interest, tax, and assessment clauses.

2046. *Title.*] The property is sold by a good title in fee simple, and will be conveyed by the usual referee's deed, free and clear of all incumbrances [except a lease of the premises to C. F., to expire , 18].

2047. *Apportionment of rents.*] The purchaser will take the rents from , 18 .

Form No. 2048.

Memorandum of sale.

I, M. N., of , have, this day of , 18 , purchased the premises described in the above annexed printed advertisement of sale [*if part, say*: designated as lot No. —or otherwise specify it¹] for the sum of dollars, and hereby promise and agree to comply with the above terms and conditions of sale.

[*Date.*]

[*Signature.*]

[*Date.*] Received from the sum of dollars, being ten per cent. on the amount bid by for property sold by me under the order in this cause.

\$.

[*Signature of*], Referee.

Form No. 2049.

Report of referee of sale under judgment, in partition, foreclosure, or other action, directing sale.

[*Title of court and action.*]

To the Court of .

In pursuance of a judgment of this court, in this action, bearing date the day of , 18 , the undersigned R. F., referee, to whom the execution thereof was confided, do report.

That I caused notice of the time and place of sale of the premises mentioned in the judgment, containing a brief description thereof, to be duly published [*if property is not in a city where there is a daily paper, add*: and posted—*here state mode, so as to show compliance with the directions of the judgment and rules of court*; or say: as appears by the

¹ As to separate parcels, see *Mott v. Mott*, 68 N. Y., 246; modifying 8 Hun, 474.

affidavits hereto annexed]. And agreeably to said notice, I did, at the time and place specified in the notice, to wit, the day of , 18 , at noon, attend at the in said city, and exposed said premises for sale by public auction to the highest bidder.

And I further report that the said premises were then and there fairly struck off and sold to M. N. for dollars, he being the highest bidder therefor, and that being the highest sum bid for the same.

[*Or where there are several parcels :*] And I further report that the several lots or parcels of land so directed to be sold as aforesaid, were put up for sale separately, and were each and every of them fairly struck off and sold to M. N., for the following sums respectively : [*here name the parcels and prices ;*] those sums being the highest sums bid for the said lots respectively, and the said M. N. being the highest bidder therefor ; which several sums amount in the aggregate to dollars. *

And I do further report that I received from the said purchaser the amounts so bid by him as above mentioned [*if conveyance has been made, add :* and that thereupon I executed, acknowledged and delivered to said purchaser the usual referee's deed for said premises].

That I have paid over and disposed of the purchase-money or proceeds of sale as follows, viz. :

I have retained in my hands the sum of dollars, being the amount of my fees and expenses on said sale.

I have paid [*here enumerate in detail the payments made, according to the judgment ; and in case of a surplus in foreclosure, add :*] and I have deposited the balance, being the sum of dollars, in the hands of the county treasurer of county, to the credit of the clerk of this court, as directed by said judgment.

[*In case of a deficiency in foreclosure, substitute for the foregoing sentence :*] And I have paid the plaintiff [through his attorney] the whole of the residue, being the sum of dollars ; and I also report that the proceeds of said sale were insufficient to pay the amount found due to the plaintiff, with interest and costs, and that the deficiency due to the plaintiff from the defendant Y. Z., and for which he is personally liable under the judgment herein, is dollars, with interest from the date of this my report.

I have taken receipts for the sum so paid, which are hereto annexed.

The schedule hereto annexed contains a statement of the sums thus received and paid out.

[I do also report that I have let the said M. N. into the possession of said premises.]

All which is respectfully submitted.

[Date.]

[Signature],

Referee.

[In partition, verify report as in Form 494, p. 5, substituting "report" for "petition."¹]

STATEMENTS SUITABLE TO INSERT IN FOREGOING FORM.

2050. *Where a widow or tenant accepts a gross sum.*² That the defendant U. V. having duly consented to receive from the proceeds of the sale a gross sum to be fixed according to the principles of law applicable to annuities, in satisfaction of her dower [or other estate] in said premises, as appears by her consent duly filed on the day of , 18 , with the clerk of this court [or, of county], I computed the value of the said [dower] interest upon the principles of law applicable to annuities, and ascertained the same to be dollars.³ And I have paid the same to her, and have taken a release from her, duly executed and acknowledged, and approved by me, of all her right, title, and interest of, in and to the said premises, and every part thereof, which release is hereto annexed.

[In partition verify report as in Form 494, p. 5, substituting "report" for "petition."⁴]

2051. *Where purchaser has not completed. As in preceding Form to the *, concluding thus :* That the terms and conditions of such sales were reduced to writing, and made known to the persons attending such sale, previous to putting up said premises, and stipulated [that the purchaser of each lot or separate parcel was to pay ten per cent. of the purchase-money down on the day of sale, and the residue when the sale should be confirmed and the deed delivered.] And that the said M. N. has signed the written conditions of sale above mentioned, together with an acknowledgment that he has purchased the premises upon those terms, and he has paid to me the amount required to be paid down [may add statement of default].

2052. *Where taxes, &c., paid by purchaser were allowed to him :* And I do further report that I have allowed to the said purchaser, out of the said purchase-money, the sum of dollars, paid by him [or, me] for taxes [and assessments—and water rates], which were liens on said mortgaged premises at the time of such sale, and for which receipts are hereto annexed; and that I have received from such purchaser the balance of the said purchase-money, namely, the sum of dollars, and that the same has been disposed of by me as follows:

1053. *Where part only of the premises were sold :* That so much of the mortgaged premises in the complaint and in said judgment described as was sufficient and necessary to raise the amount due to the plaintiffs for principal, interest and costs, together with expenses of sale, as defined and prescribed by law, and which could be sold separately without material injury to the parties interested, namely, the lots numbered to , inclusive, on the map of said premises, copies whereof are hereto annexed, were sold by me

¹ N. Y. Code Civ. Pro., § 1576.

² N. Y. Code Civ. Pro., § 1576.

³ The tables for computation given in the Supreme Court Rules of 1877

are in part erroneous. See *Abb. Trial Ev.*, p. 724.

⁴ N. Y. Code Civ. Pro., § 1576.

and under my direction at the Real Estate Exchange Salesroom, No. 59 Liberty st., in said city and county, on the days hereinafter mentioned.

That being satisfied that said premises would produce a greater price if offered in lots separately, with the option hereinafter mentioned, than they otherwise would, and being thereto requested by the parties to this action [*or*, by some of them, the others consenting], I offered said lots separately; but some of them with the option to the successful bidder of taking the next one, two, or three lots, of inferior value by reason of being more remote from the nearest street corner, at the same price per lot.

2054. *Where sale was adjourned because bids were unsatisfactory :* That thereupon, being of opinion that adequate prices could not then be obtained for the residue of the property, and being requested thereto by the parties to the action, or some of them, the others consenting, I adjourned said sale.

2055. *Where bids were assigned :* That said L. and F. assigned their said bid to E. S. H., and the said G. R. R. assigned his said bid to H. M. F.

Form No. 2056.

Exceptions to referee's report of sale.¹

[*Title of court and action.*]

Please take notice, that the defendant Y. Z. hereby excepts to the report of sale filed herein by R. F., Esq., the referee appointed by this court to sell the premises described in the complaint in the above entitled action, in the following particulars :

1. In that he has [*state objections, and so on*].

[*Date.*]

[*Address to attorneys for each other party interested.*]

[*Signature and office address of attorney for excepting party.*]

Form No. 2057.

Notice of hearing of exceptions to report of referee of sale in foreclosure, partition, &c.²

[*Title of court and action.*]

Please take notice, that the exceptions filed on the part of

¹ The remedy for the relief of a party against a sale sought on facts appearing in the report and other parts of the record is not by motion to set aside the sale, but by exception and opposition to its confirmation.

The remedy for relief on any grounds not appearing in the papers, is to move on the affidavits establishing those grounds.

After confirmation of sale, a motion cannot be made before another justice so as to renew the contention

on any of the points founded on the objections in the papers, but leave must be had for that purpose. Such a motion may, however, be made on the grounds not appearing in the papers, though excuse for delay may in some cases be necessary.

² The plaintiff's notice will be of a motion to overrule the exceptions and confirm the report and the sale therein mentioned. As to curing defects by confirmation, see *Woodhull v. Little*, 102 N. Y., 165; *Eaton*

Y. Z., on the day of , 18 , to the report of sale made by R. F., the referee appointed to sell under the judgment in this action, will be brought on for argument on the affidavits and other papers, copies of which are herewith served upon you, and on the judgment-roll on file in this action, and on the report of sale as made by said R. F., on file herein, at a special term of this court appointed to be held [at chambers] at the county court house in the [city of New York], on the day of , 18 , at the opening of the court on that day, or as soon thereafter as counsel can be heard, and the undersigned will then and there move that the confirmation of said report be denied, and that the said sale be set aside, or that the defendants have such further or such other relief as shall be just and proper [*if irregularity is relied on specify it.*].

[*Date, signature and addresses as on p. 1.*]

Form No. 2058.

Order confirming sale.¹

At a special term [dec., see
Form 493, p. 4].

[*Title of court and action.*]

Upon the judgment herein entered on the day of , 18 , and the report of sale of R. F., Esq., referee, made in this action, dated the day of , 18 , and filed in the office of the clerk of this court, on the day of , 18 [*and designate other papers relied on*], and upon proof that due notice of filing of said report has been given to the respective parties entitled thereto, and that no exceptions to said report have been filed, although the time for so doing has expired [*or, and on reading the exceptions filed on the part of* , on the day of , 18], and on motion of A. T., plaintiff's attorney:

v. White, 18 *Wisc.*, 517; *Voorhees v. United States Bank*, 10 *Pet.*, 449; *Milwaukee, &c., R. R. Co. v. Soutter*, 5 *Wall.*, 660; *Dawson v. Litsey*, 10 *Bush (Ky.)*, 408.

¹ If the terms of a judgment in foreclosure give the purchaser a right to possession on production of the referee's deed, and a certified copy of order of confirmation of report of sale, confirmation of report is essen-

tial to vest title in the purchaser. *Peck v. Knickerbocker Ice Co.*, 18 *Hun*, 183; *s. p.*, *Williamson v. Berry*, 8 *How. U. S.*, 495, 565, 566.

Confirmation must be absolute, not conditional. *Fitch v. Minshall*, 15 *Nebr.*, 328; *s. c.*, 18 *Northw. Rep.*, 80.

As to exceptions to the report, see *Martine v. Lowenstein*, 68 *N. Y.*, 456; *s. c.*, 6 *Hun*, 225.

IT IS ORDERED AND ADJUDGED, that [said exceptions be overruled and] the report of said R. F., referee, be and the same hereby is in all respects confirmed.

[*If judgment for deficiency depends on the confirmation, add:*] AND IT IS FURTHER ORDERED AND ADJUDGED, that the plaintiff recover of the defendant Y. Z. the sum of dollars deficiency, with interest thereon, from the day of , 18 , and that the clerk of this court docket judgment therefor against said defendant and in favor of the plaintiff.

Form No. 2059.

Affidavit to move to open sale.¹

[*Title of court and action.*]

[*Venue.*]

T. Z., being duly sworn, says:

I. He is the attorney for the defendant Y. Z. in this action.

II. That this action was brought to foreclose a certain mortgage upon the property of the defendant, and that the issues herein duly came to trial, and a judgment in favor of the said plaintiff was entered herein decreeing a sale of the said premises under the direction of R. F., Esq., referee, appointed for that purpose.

III. That the said referee [duly] advertised the said premises to be sold at public auction to the highest bidder, at the , on the day of , 18 , at 12 o'clock, noon.

IV. That said sale was at said time and place had, and the premises above mentioned were then and there struck down to M. N., but that [*state grounds upon which relief is sought, as inadequate price, fraud, mistake, &c., or irregularity; and if the latter, specify each irregularity*].

V. [That this deponent was present at said sale, and stated the reasons aforesaid to said referee, and requested him to adjourn said sale for a reasonable time, which the referee refused to do—or *state any grounds showing freedom from laches.*]

[*Jurat.*]

[*Signature.*]

¹ Fisher v. Hersey, 78 N. Y., 387.

Form No. 2060.

Notice of motion (or order to show cause) to open sale.

[*Move the court (see Forms 488 and 491):*] that the sale made under the judgment in this action, of the premises therein described [and all subsequent proceedings] be vacated and set aside [*if resale is to be had, add: and a resale had under said judgment—if irregularity is relied on, specify it*], and for such other [*&c.*].

Form No. 2061.

Order on opening sale.

[*Title (court order); see Form 493, p. 4.*]

ORDERED, that the sale heretofore made under the judgment herein of the premises therein described [and all proceedings founded on said sale], be and the same hereby is [*or, are*] vacated and set aside [and a resale of the said premises is hereby ordered according to law and the practice of this court, under the direction of R. F., the referee heretofore appointed], upon the condition that the defendant [within days] do fully indemnify M. N., the purchaser at the former sale, for all his costs and damages [*may add: including expenses of examining the title of said property*], and that he pay said M. N. \$10, the costs of this motion.

STATEMENTS SUITABLE TO INSERT OR SUBSTITUTE IN FOREGOING FORM.

2062. *Another Form:*¹] That the sale be set aside on condition that the defendant pay to M. N., the purchaser, upon demand, his costs and expenses attending the purchase, which are hereby fixed and allowed at dollars, together with dollars costs of attending this motion.

And it is further ORDERED, that if the said condition be complied with, the plaintiff be at liberty to cause the mortgaged premises to be again exposed for sale by the same referee, and according to the directions in the judgment in this action, and that the costs and expenses of the former notice and sale, on the part of the plaintiff, to be ascertained and declared by said referee in his report of such second sale, be included in the costs of this action, and be chargeable, with the other costs of this action, upon the mort-

¹ This Form is adapted from *Williamson v. Dale*, 3 *Johns. Ch.*, 290. In a case where the purchaser has paid the purchase-money, and the land has been conveyed or mortgaged, the order should be framed to protect the purchasers and subsequent mortgagees, and insure the applica-

tion of the proceeds to the payment of the moneys advanced by them; and to that end the purchase-money upon such sales should be held, and not distributed, until the further order of the court, and with leave to apply for further directions. *Gould v. Gager*, 18 *Abb. Pr.*, 32, 40.

gaged premises; and that a copy of this order be forthwith served on the attorney for the plaintiff, and also on the purchaser or his counsel.

2063. *Another Form ; for indemnifying purchaser :* And it is further ordered that if there shall not be sufficient moneys in the hands of said referee to pay said several sums, that then the parties, plaintiff and defendant, in this action, liable therefor, do pay to said J. L. [*or, his attorney*] the difference between the amount in the hands of said referee, properly applicable to the payment of the aforesaid sums, and the amounts hereinbefore directed to be paid by said referee to said J. L.

Form No. 2064.

Bond required as condition of ordering resale.¹

[*Penal clause as usual; see Form 25, Vol. I, p. 69.*]

Whereas, at a special term of the Supreme Court of the State of New York, held at the city hall, in the city of New York, on the day of , 18 , an order was duly entered in the above-entitled cause, setting aside the sale of the premises heretofore had under the judgment in said cause, and described in the complaint in this action; and ordering a resale of the same, upon the defendant filing a bond with sureties, to be approved by a judge, that at least the sum of dollars, and the expenses of a resale, shall be bid by a *bona fide* bidder at said resale: Now, the condition of this obligation is such that if, on said resale, there shall be a *bona fide* bid of dollars, and in addition thereto of a sum sufficient to pay the expense of said resale, and such bidder shall then and there, if the property is struck down to him, complete his bid as required by the terms of said resale, then this obligation to be void; otherwise to be and remain in full force and virtue.

In presence of

[*Witness.*]

[*Signatures and seals.*]

[*Acknowledgment or proof see Form 495.*]

Form No. 2065.

Affidavit on the part of purchaser to move to be discharged.

[*Title of court and action.*]

M. N., being duly sworn, says: That on or about the day of , 18 , the property described in the judgment in the above-entitled action was struck down to me at public

¹ Sustained by *Murdock v. Emple*, 9 *Abb Pr.*, 283, 285, note.

auction for the price of dollars at the sale held by R. F., Esq., the referee appointed by the judgment herein, and that thereupon I paid to said referee dollars, being ten per cent. on the amount bid by me, and otherwise complied with the terms of sale. I then employed M. T., counselor at law, to examine the title to said property. After he had concluded such examination he reported to me that in his opinion the referee's deed in pursuance of the judgment in said action would not pass to me a good title, and one free from reasonable doubt, to said property. On the day of , 18 , I caused the objections, of which a copy is annexed, made by my said attorney to the title to said property, to be served upon the referee, and on the grounds thereon set forth I declined to pay the balance of the purchase-money, although I was then able and prepared to pay the same if the title to the said property had been good, and I thereupon asked the repayment of the ten per cent. and auctioneer's and exchange fees paid by me, with interest, and that I be reimbursed the charges and expenses incurred by me in the examination of the title, which said referee refused.

[State any facts necessary to substantiate objections, and to show expenses, &c., incurred.¹]

[If order to show cause is asked, state as on p. 2.]

[Jurat.]

[Signature.]

Form No. 2066.

Order discharging the purchaser.

*[Title (court order) and recitals; see Form 491, p. 4; or as in Form 2058 to the *, continuing:]* ORDERED, that [said exceptions be sustained and said motion to confirm the sale be denied—or, ORDERED, that the motion of said purchaser to be discharged be granted, and that] M. N., the purchaser, be discharged from his said purchase.

And it is further ORDERED, that R. F., Esq., the referee in this action [or, the sheriff of said county], repay to said M. N. his said deposit.

And it is further ORDERED, that the plaintiff pay to said M.

¹ See *Rice v. Barrett*, 99 N. Y., 403; *Fleming v. Burnham*, 100 *id.*, 1, and cases cited.

It was intimated in *Totten v. Stuyvesant*, 3 *Edw.*, 500, that to discharge a purchaser for defect or omission of

notice of *lis pendens* it should be shown that there has been some change of interest meanwhile. But this was before the present *Lis Pendens* Statutes. See Chapter VIII.

N. on demand [or, within days after service of this order], [interest thereon from the time when the purchase was to have been completed, together with] his expenses of examining the title, which are hereby fixed and allowed at the sum of dollars, together with dollars cost of this motion.¹

Form No. 2067.

Order denying purchaser's motion to be discharged.

[*Title (court order) and recitals according to circumstances; see Form 493, p. 4.*]

ORDERED, that this motion be and it hereby is in all respects denied, with ten dollars costs of this motion to the plaintiffs.

And it is further ordered that the stay granted herein by the said order to show cause be, and the same hereby is vacated, and that the said purchaser complete his purchase and pay the balance of his purchase-money and the costs of this motion to the referee in this matter within ten days from service upon his attorneys herein of notice of entry of this order.

[*May state condition, as thus:*] This order is made on condition, however, that the plaintiff, before the expiration of said ten days, record the deed alleged to be in his possession from G. H. P. to B. P. F., and cause to be removed the fence of J. C. G. inclosing a portion of the premises in question at the south end thereof.²

Enter: [*signature of judge by initials of name and title.*]

Form No. 2068.

Affidavit to move to compel purchaser to complete his purchase.

[*Title of court and action.*]

[*Venue.*]

A. T., being sworn, says:

I. That he is [the attorney for] the plaintiff in this action.

¹ The purchaser, on being discharged on account of defects in the title, is entitled to receive a return of his deposit, with interest from the time the sale was to be completed, and the expenses of investigating the title, and the costs of his motion to be discharged. *Rogers v. McLean*, 31 *Barb.*, 304; s. c., 10 *Abb. Pr.*, 306. In another case, it was directed that such costs and expenses, on being ascertained, should be charged upon the

petitioner's interest in the land, and that the purchaser have execution therefor. *Matter of Cavanagh*, 14 *Abb. Pr.*, 261, note.

² In *Coates v. Fairchild*, 14 *Weekly Dig.*, 189, the direction to record the deed was held sufficient in that respect, and the direction to remove the encroachment, although under the circumstances of the case not required for the purchaser's protection, was proper.

III. That said purchaser declines to complete his purchase
[indicate ground, and allege facts showing it to be unfounded].
[Jurat.] [Signature.]

[Order to compel purchaser to complete; adapt from previous Forms.]

Order for writ of assistance.

Enter: [*signature of judge by initials of name and title.*]

II. SPECIFIC ENFORCEMENT BY DELIVERY, &c.

Form No. 2070.

Order that clerk deliver a conveyance or other thing deposited in court.

[*Title (court order) and recitals; see Form 493, p. 4.*]

ORDERED, that the clerk of this court [*or, of the county of*] deliver to the [plaintiff] A. B., or his attorney, upon the entry of this order, a certain deed executed by the [defendant] Y. Z. to said plaintiff for the conveyance of property on street in the city of , which deed bears date the day of , 18 , and was deposited in the office of said clerk on the day of , 18 .

Enter: [*signature of judge by initials of name and title.*]

Form No. 2071.

Order that sheriff convey property which a party has failed to convey under judgment.¹

[*Title (court order); see Form 493, p. 4.*]

On reading the judgment entered herein on the day of , in the office of the clerk of this court [*or, of the county of*], which contains, among other things, an adjudication and direction that [*quoting direction to convey*], and on reading and filing the affidavit of M. N., verified the day of [and the certificate of the sheriff of the county of , dated the day of , 18 , by which it appears to the satisfaction of the court that a certified copy of said judgment was, on the day of , 18 , duly personally served on said Y. Z., with due notice of its entry and due demand thereupon made that he comply with said direction, and that on the day of a deed of conveyance in proper form for execution by him under and in pursuance of said judgment was by said A. B. duly presented to him and his execution thereof pursuant to said judgment demanded, a copy of which deed is hereto annexed, and that he has wholly refused to make or execute such a conveyance, and has disobeyed said direction, and on reading proof of due notice of this motion given to said Y. Z. personally, and after hearing

¹ *N. Y. Code Civ. Pro.*, § 718; *s. p.*, *Langdon v. Sherwood*, 124 *U. S.*, 74.

A. T., of counsel for plaintiff, and T. Z., of counsel [or no one appearing] for defendant in opposition, and due deliberation being had; Now, on motion of A. T., attorney for said plaintiff:

It is ORDERED, that S. H., the sheriff of the county of _____, be and he hereby is directed in the name of said Y. Z. to execute and in his stead to acknowledge and deliver to said A. B. the deed of which said copy is hereto annexed, and that said deed shall stand and be a good, sufficient and complete conveyance of the premises in said judgment directed to be conveyed by said Y. Z., and all its terms, conditions, covenants and provisions, of whatsoever nature, shall bind said Y. Z. and all claiming under or through him as effectually as if the same had been executed by him.

[This order is without prejudice to any proceedings that have been or may be taken against said Y. Z. to punish his said disobedience as a contempt.]

Enter: [signature of judge by initials of name and title.]

Form No. 2071a.

Motion for receiver after judgment.¹

[*May apply on affidavit, on notice, which, if the defendant's attorney on record, or some other attorney, has not acted for him in the cause, since judgment, should be personally served, or served as the court may, by order to show cause, direct. Apply to the court. Adapt order of appointment with directions and powers, from Forms in Chapter VIII.*]

¹ The court have inherent power to appoint a receiver; and may appoint one after final judgment to carry it into effect (*Wright v. Vernon*, 3 *Drew*, 112; *Schreiber v. Carey*, 9 *Reporter*, 526, and cases cited; *N. Y. Code Civ.*

Pro., § 713), even though not prayed for in the complaint. *Merrill v. Elam*, 2 *Tenn.* (*Cooper*), 513; *Connelly v. Dickson*, 76 *Ind.*, 440; *abst. s. c.*, 6 *Weekly Cin. Law Bul.*, 747; *High on Recs.*, 2 ed., 38.

ARTICLE IV.

ENFORCING JUDGMENT FOR COSTS AGAINST A THIRD PERSON INTERESTED.

FORMS.

(2072.) Order that a third person pay the costs of an action.

(2073.) — — an attorney for non-resident pay costs, &c.

Form No. 2072.

Order that a third person pay the costs of an action.¹

[Title (court order) and recitals as in other cases, but reciting personal service on, or appearance of, the third person.]

ORDERED, 1. That said M. N., as a person beneficially interested in the recovery in this action, pay to T. Z., attorney for the defendant Y. Z., within [five] days after the service of a copy of this order on his attorney, O. P., the costs recovered by said defendant Y. Z. against the plaintiff in this action, amounting to the sum of dollars, with interest thereon from , 18 , to the date of said payment, for which judgment was entered in this action on the day of , 18 , in favor of the said defendant against the said plaintiff, together with \$10, costs of this motion.

[2. That if said M. N. fails to pay said sums, with the interest aforesaid, within said [five] days, that the proper process issue out of this court to enforce this order.²]

Enter: *[signature of judge by initials of name and title.]*

Form No. 2073.

Order that an attorney for non-resident pay part costs, and the assignee of the demand pay the balance.³

At a special term [*&c.*, as in Form 493, p. 4].

[Title of action.]

On reading and filing the affidavit of Y. Z., verified the day of , 18 , showing to the satisfaction of the

¹ Sustained in *Merceron v. Fowler*, 46 *Super. Ct. (J. & S.)*, 351; *N. Y. Code Civ. Pro.*, § 3247; *s. p.*, *Slauson v. Watkins*, 95 *N. Y.*, 369.

² See *Morrison v. Lester*, 15 *Hun*, 538.

³ This Form is adapted from *Waring v. Barrett*, 2 *Cow.*, 460; *s. p.*, *N. Y. Code Civ. Pro.*, § 3278.

court that the plaintiff is, and at the commencement of this action¹ was, a non-resident of the State of _____, and that this suit was prosecuted for the benefit of M. N., the assignee of the note on which the action was founded; and after hearing A. T. of counsel for the plaintiff, and T. Z. of counsel for defendant; Now, on motion of T. Z., attorney for defendant:

ORDERED, that said A. T. pay to the defendant his costs accrued in this cause to an amount not exceeding the sum of one hundred dollars; and that the said M. N. pay to the defendant the balance of said costs, and ten dollars the costs of this motion.

Enter: [*signature of judge by initials of name and title.*]

¹ An affidavit that plaintiffs are non-residents is insufficient. *Moir v. Brown*, 9 *How. Pr.*, 270; *Long v. Hall*, 3 *Sandf.*, 729; *Alexander v. Carpenter*, 3 *Den.*, 266.

liability for costs can be properly adjudicated upon is by motion for an order requiring him to pay the costs. *In re Levy*, 2 *Civ. Pro. R. (Browne)*, 108.

The only way which an attorney's

INDEX OF SUBJECTS AND FORMS.

[To avoid swelling the Index unnecessarily, the list of forms given at the head of each chapter or division of a chapter are not reprinted here in full, but the reader is referred to them instead, wherever this has seemed likely to save time in search.

Thus, under "*Affidavit*," the reader is first referred to p. 20 of vol. i, where he will find a list of common forms applicable to affidavits in general, which list is not reprinted at length in the index. Following this reference he will find in the index an alphabetic list of all the affidavits for particular purposes which are scattered through the volume. So under "*Injunction*" the reader is first referred to those pages in vol. ii where he will find the extended contents of the explanations and forms for Injunctions in general, and motions relative thereto. To this is added, in the index, an enumeration of the forms in other parts of the book which bear on this subject, such as the injunction often inserted in an order appointing a receiver (contained in the article on Receivers); the dissolution of an injunction by final judgment (contained in the chapter on Trial and Judgment).]

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CODE SECTION INDEX.

INDEX OF THE SECTIONS OF THE NEW YORK CODE OF CIVIL PROCEDURE, FOR WHICH FORMS IN THIS COLLECTION ARE SPECIALLY ADAPTED.

[This work is adapted for use throughout the country, and the index of subjects beginning at p. 1115 of vol. ii will give the practitioner a ready clue to all the various remedies now administered in civil actions in courts of record, whether under the Codes of Procedure in various States, or even under common-law or Chancery systems.

As an additional convenience for the New York practitioner, who often seeks for an appropriate Form in connection with the New York Code of Civil Procedure, this index is added, so that under the number of the respective sections here arranged in numerical order, he may at once find a reference to such of the Forms as are appropriate to each section. But the New York practitioner should not forget that a very large part of procedure and a very considerable proportion of the Forms are matters of actual practice, concerning which little or nothing is to be found in the codes, and if he would look at all the remedies available, he should consult also the Index of Subjects. Thus, for instance, it is a mistake to suppose that sections 803-809 of the New York Code of Civil Procedure exhaust the subject of Discovery. Under those section numbers in this index the practitioner will find a reference to the Forms appropriate in proceedings under those sections; but if he consults title Discovery in the Subject Index, at p. 1180 of v. ii, he will find how he may discover the address of his adversary, the assets of a defendant for whom a receiver has been or is to be appointed, the accounts relative to attached property, &c., &c., proceedings not prescribed by any provision of the code.]

ABBREVIATIONS.

F.—form. v.—volume. i or ii—number of volume. Arabic numerals indicate the page.

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